



# Horizontal Merger Guidelines

**[Free translation into English]  
[Only Spanish version is authentic]**

**Santiago, May 2021**

## PRESENTATION

Pursuant to article 47 of Decree with Force of Law No. 1/2004, of the Ministry of Economy, Development and Tourism, which establishes the consolidated, coordinated and systematized text of Law Decree No. 211 of 1973, as amended ("**DL 211**"), concentrations are transactions where, as a result of an event, act, or contract, or combination thereof, two or more undertakings that were not part of the same corporate group and which were previously independent of each other, cease to be independent in any area of their operations.

The Chilean Competition Agency (*Fiscalía Nacional Económica* or "**FNE**", for its initials in Spanish) deems that a horizontal concentration exists between two undertakings that are current or potential competitors in a given relevant market. A vertical concentration is deemed as a transaction involving undertakings that operate at different levels of production or distribution chains of a product or service, generally having a supplier-customer relationship. Conglomerate concentrations are conceived as being neither horizontal nor vertical in nature.

These Horizontal Merger Guidelines ("**Guidelines**") represent an effort to publicize the analytical framework with which the FNE will assess whether a horizontal concentration is capable of substantially lessen competition, in the terms established in Title IV of DL 211, presenting the criteria, type of evidence and analytical techniques commonly applied in the prospective examination that is conducted for this purpose.

The purpose of this document is to provide as much certainty and predictability as possible on the conceptual framework that the FNE will use to analyse the substance and competitive impact of a horizontal concentration, narrowing the discretion that Title IV of DL 211 may confer upon the authority.

However, since this document is intended to provide guidance for the analysis of all horizontal concentrations, it should be noted that these Guidelines only provide general considerations, and therefore the criteria, types of evidence and analytical techniques presented herein cannot be invoked or interpreted as the only conceptual framework available for the FNE. By its very nature, this examination requires that the FNE must have flexibility to assess the particularities of each horizontal concentration and its respective markets, updating its analytical tools if and as needed.

These Guidelines include, in various sections and where applicable, references to decisions issued by the FNE and judgments of the Chilean Competition Court (*Honorable Tribunal de Defensa de la Libre Competencia* or "**TDLC**", for its initials in Spanish). Such references should be understood as practical examples of the principles used by the FNE or the TDLC, and are included only for illustrative purposes. Such decisions are not

necessarily replicable to all future scenarios, as they have been issued regarding the particular circumstances of each case. Finally, it should be noted that the references cited herein are a non-exhaustive list, given the impossibility of referring to every single decision that addresses a given topic.

By virtue of an express legal mandate, the purpose of the investigations deployed by the FNE under Title IV of DL 211 is to conduct a prospective assessment of whether or not a concentration is capable of substantially lessening competition. Consequently, the purpose of this framework is not to analyse the lawfulness or unlawfulness of any conduct that may have been deployed and/or exist in markets where the merger parties operate. Specifically, the purpose of merger control is neither to correct potential failures found in the markets affected by the concentration, nor to improve their competitive structures, since there are other legal and/or regulatory means to achieve these objectives.

Likewise, the institutional design of this framework does not grant the FNE any legal powers to decide on matters other than the promotion and defence of competition in the markets affected by the concentration.

In addition, these Guidelines offer guidance for the analysis of dynamic competition and innovation, technological platforms and digital markets. In recent years, innovations and technologies related to the digitalization, use and access to information have gained vital importance in the development of many industries, and the so-called “digital markets” have emerged and/or deepened. These markets have their own distinctive characteristics, and they are especially driven by dynamic competition. These Guidelines represent an effort to publish the general criteria to be used by the FNE to evaluate horizontal concentrations involving digital markets, illustrating the specific elements that differ from the traditional analysis applied to transactions in other markets.

This document continues the path already outlined by the Horizontal Merger Guidelines of October 2006 and their October 2012 revision, which replaced the original version. The amendments made to DL 211 by Law No. 20,945 of 2016, which introduced its Title IV about "Merger Control", as well as the advances in the economic theory applicable to the analysis of such transactions, the jurisprudence of our courts and the experience accumulated by the FNE since the previous Guidelines and during these three years of mandatory merger control, make it appropriate to release this new version.

Sincerely,

**Ricardo Riesco Eyzaguirre**  
National Economic Prosecutor

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## I. ANALYTICAL FRAMEWORK

1. The FNE deems competition as a process of rivalry between undertakings where they strive to capture consumer preference<sup>1</sup>. Such rivalry creates incentives for undertakings to reduce their prices, increase their output, improve quality and/or introduce new products or services<sup>2</sup>.

2. Thus, some concentrations ("**Transaction**" or "**Transactions**") may be pro-competitive, allowing the merger parties to increase their efficiencies by taking advantage of synergies and costs savings. This may result in benefits for consumers, when such efficiencies are effectively passed on to them. Other Transactions may also increase the incentives of the merger parties to compete with its rivals when, as a result of the concentration, the concentrated entity can impose greater competitive discipline upon incumbent market players.

3. Other Transactions can be neutral or have negligible impacts on the market, because the rivalry between competitors will subsist regardless of the Transaction due to the existence of sufficient competitive pressure.

4. Finally, certain Transactions may substantially lessen competition in markets, reducing the incentives of the merger entity to compete, to the detriment of consumers. This may materialize either through an increase in prices, a decrease in the quantity or quality of the products involved<sup>3</sup>, or by affecting other competitive variables that are relevant to compete in the corresponding market.

5. In its assessment, the FNE will seek to determine whether or not a Transaction has the ability to substantially lessen competition in a given market. More specifically, a Transaction will be found to have such ability if it is concluded that, if materialized, the concentration would grant, strengthen or increase, or could grant, strengthen or increase, the ability of the merger entity to, by itself or jointly with other competitors, significantly lessen

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<sup>1</sup> Henceforth, the term 'consumer' will be used broadly, including both purchasers of products that are then used as intermediate inputs, as well as end consumers.

<sup>2</sup> Henceforth, the term "products" will include both "products and services". The distinction will only be made when required by context.

<sup>3</sup> Henceforth, the term "price" will include "other competitive variables". The distinction will only be made when appropriate.

competitive conditions in the relevant market, as compared to the situation that existed without the Transaction<sup>4-5</sup>.

6. Indeed, and as a general rule, the analysis of a Transaction will seek to compare expected competitive outcome if the Transaction is concluded, with those that would be expected in the absence of the Transaction. The latter is the *counterfactual* scenario. The prevailing competitive situation prior to the conclusion of a Transaction is usually a good indicator of that market's competitive situation. Thus, in most cases, the competitive conditions existing at the time of the Transaction will be the most appropriate benchmark for assessing its effects.

7. However, in certain circumstances, the FNE will take into account the changes that would be reasonably foreseeable if the Transaction does not take place. In particular, the possible entry or exit of undertakings, the parties' investment plans before deciding to concentrate (in terms of expansion, innovation or others), the merging parties' possibility of survival in the market, imminent regulatory changes or other Transactions occurring in parallel to the one under analysis by the FNE, and which directly or indirectly influence the relevant market, among other factors.

8. The analysis to be conducted by the FNE to determine whether a Transaction has the ability to substantially lessen competition will consider the background information made available to the FNE via its investigation. To the extent possible and depending on each particular Transaction, the FNE will supplement its qualitative analysis with quantitative tools, avoiding reliance on a single source or instrument. As a general rule, the FNE will consider the quantitative predictions as indicative of the existence of incentives to behave in a certain way within the market, and of the likelihood that they may be substantially modified, examining their consistency with other qualitative information gathered during the investigation process.

9. Depending on each particular case, the FNE's analysis may also consider other undertakings that are within the merging parties' sphere of ownership and/or influence

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<sup>4</sup> See case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", p.142; case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", p.80; case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", pp.149-150; case Docket No. FNE F90-2017 "*Notificación de Operación de Concentración Ideal S.A – Nutrabien S.A.*", pp.72-74; case Docket No. FNE F116-18 "*Adquisición de CDF por Turner International Latin America, Inc.*", pp.56-57; and case Docket No. FNE F101-2017 "*Concentración entre Banco Santander – Chile y Sociedad de Recaudación y Pagos de Servicios Limitada*", p.76.

<sup>5</sup> A similar analysis will be made with respect to Transactions that have already been concluded, in accordance with article 48, paragraph 9 of DL 211. In this type of Transactions, the analysis will not only focus on already consummated effects, but also on the potential for future effects. A concluded Transaction may be anticompetitive even if such effects have not yet been observed, because, for example, the resulting entity may be aware of the possibility of a subsequent review of the Transaction and moderate its conduct, or because certain effects may take time to materialize.

in the respective market, in order to determine, as precisely as possible, the potential abilities and incentives of the parties if the Transaction is concluded<sup>6</sup>.

## II. RELEVANT MARKET

10. "Relevant market" means the market for a product or group of products, in a geographic area where such products are produced, bought or sold, and within a temporal dimension that makes it is probable to exercise market power in respect thereof.

11. The relevant market contains the most likely alternatives with which consumers of the merging parties could substitute their products. The definition is useful as a frame of reference or benchmark for competitive analysis, and serves as a basis for the determination of the parties' market shares and concentration indicators, among others.

12. However, a precise definition of the relevant market or markets is not always necessary when assessing Transactions. The FNE will only define them for the purposes of providing an instrumental frame of reference for the assessment of the potential competitive effects related to a Transaction, which will normally occur when it is necessary to conduct an in-depth analysis of the market and the effects of the Transaction in that market<sup>7</sup>. The ultimate goal in the assessment of a Transaction is to determine whether its effects could substantially lessen competition, and not to define relevant markets as an end in itself.

13. As a first approach to the analysis, the FNE will usually analyse the most conservative scenario, meaning a relevant market definition in which the parties' activities effectively or potentially overlap, concentrating a greater market share. If the concerns in this scenario are ruled out, it will generally not be necessary to devise a more precise definition of the relevant market.

14. In particular, when the markets affected by the Transaction include differentiated products, the FNE may conduct an analysis of closeness of competition, as a supplement to the relevant market definition. In other cases, only an analysis of closeness of competition will be required, and it may not be necessary to specify the relevant market<sup>8</sup>.

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<sup>6</sup> Thus, the analysis of the FNE may consider not only the activities developed by the parties to the respective Transaction, but also those of the undertakings belonging to their respective corporate groups, as the case may be. See, Competition Guidelines of June 2017 issued by the Antitrust Agency, p.11 and Supreme Decree N°33 of the Ministry of Economy, Development and Tourism, which Approves the Regulation dated March 1, 2017, on the Notification of a Concentration, published in the Chilean Official Gazette on June 1, 2017, article 2, numeral 3, literal a).

<sup>7</sup> Generally speaking, this occurs after an in-depth examination of the Transaction, after its investigation has been completed ("Phase II"). Article 54 c) of DL 211, and the Guidelines on Remedies of June 2017, published by the Antitrust Agency, p. 7. See case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", pp.31-45, and case Docket No. FNE F135-2018 "*Adquisición de las acciones de Grupo Empresas Navieras, SAAM Puertos y Ransa Comercial en Terminal Puerto Arica por Inversiones Neltume e Inversiones y Construcciones Belfi S.A.*", pp.17-20.

<sup>8</sup> The reasons for which the FNE may choose to conduct an analysis on closeness of competition are presented below, in Chapter III.C.1.ii) of these Guidelines.

## A. RELEVANT PRODUCT MARKET

15. The FNE deems that a group of products will integrate a relevant product market to the extent that consumers consider them as substitutes, with sufficient closeness due to their characteristics, price and/or use. In some cases, and as indicated below, the FNE may consider not only demand-side substitution but also supply-side substitution.

16. To assess “demand-side substitution” and define relevant product markets, the FNE will generally use the hypothetical monopolist test as a conceptual tool. This test seeks to determine which is the set of products or services that, if offered by a hypothetical monopolist, could profitably apply a small but significant and non-transitory increase in price<sup>9</sup>.

17. Ultimately, products will be included or excluded from the relevant product market definition depending on whether their competition has the effect of sufficiently affecting or restricting the parties' pricing strategy in the short-term, thereby determining whether or not consumers would be willing to purchase readily available substitutes in response to such a price increase.

18. In defining relevant markets, the FNE will generally use the hypothetical monopolist test, determining which products should be part of the candidate market based on the qualitative and quantitative evidence available. The information to be considered takes into account the particularities of the segment and products involved, and may include without limitation:

- i. Relevant market definitions and plausible alternatives included in the Transaction's filing;
- ii. Characteristics and function or use of the products that could integrate the same relevant market<sup>10</sup>;

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<sup>9</sup> In practice, the test is applied by taking a product or set of products ('candidate market') and analysing whether it would be profitable for a hypothetical monopolist to impose a price increase. It always assumes a small, but significant and non-transitory increase in price (SSNIP). A reference value of 5% is generally used, although the specific value may depend on the particular characteristics of the products in question. If, in the face of such a price increase, it is expected that a sufficient number of buyers would respond by substituting their purchase for a product other than those considered in the market definition, it will be understood that the price increase would not be profitable for the hypothetical monopolist and, therefore, it would be necessary to incorporate the substitute products into the candidate market. Then, the test is applied again for a hypothetical monopolist offering this expanded set of products and so on, until a group of products is found for which the simultaneous -small, but significant and non-transitory- increase in all their prices would be profitable for the hypothetical monopolist, since there is not a sufficient number of buyers who would switch to another product in the face of such a price increase. Thus, such a group of products will constitute the relevant product market.

<sup>10</sup> Evidence that the products satisfy completely different needs, could ultimately discard demand-side substitution. However, the fact that two goods satisfy the same need does not necessarily mean that they are both part of the same relevant market. See, case Docket No. FNE F184-2019 “*Adquisición de Financiere Dry Mix Solutions S.A.S. por Sika AG*”, p.5.



- iii. Information (whether prospective<sup>11</sup> or based on prior experience<sup>12</sup>) relating to the behaviour of buyers and competitors in cases of alterations of supply (for example, variations in prices, quality or stock-outs) or demand conditions;
- iv. Switching costs and times faced by consumers;
- v. Pricing levels and correlations between prices<sup>13-14</sup>;
- vi. Crossed elasticities, diversion ratios, and other measures of closeness of competition;
- vii. Internal or external documents provided by the parties or third parties, such as strategy or marketing studies, that could provide information with respect to the alternative products that the parties to a Transaction or consumers or competitors could consider as close competitors<sup>15</sup>;
- viii. Opinions of consumers and current or potential competitors<sup>16</sup>;
- ix. Opinions of trade associations; and/or
- x. National and comparative case law that may be of relevance to the Transaction under analysis.

19. Additionally, in some particular cases, “supply-side substitution” may be considered to define the scope of a given relevant product (or geographic) market. Supply-side substitution consists of the reaction of product suppliers within the same relevant market or in close or related markets, either through the introduction of new products and/or by

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<sup>11</sup> Such as questionnaires or surveys. In this regard, see paragraph 50 i. of these Guidelines. For more information, see case Docket No. FNE F178-2019 “*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*”, p.36; y case Docket No. FNE F217-2019 “*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*”, Exhibit II Survey for final consumers of Cornershop and Uber Eats.

<sup>12</sup> In general, information relating to unexpected changes in demand and supply produces more conclusive results, since most of them have not been previously internalized by buyers and competitors, and are therefore unaffected by any prior competitive variables. For more information, please see case File FNE F109-2017 “*Operación de Concentración entre Aza Participaciones SpA, Matco Cables SpA y otros.*”, pp.16-18.

<sup>13</sup> For example, significant differences in price levels could suggest that the products are not close enough. See case Docket No. FNE F43-2015 “*Enajenación de Foods Cía. de Alimentos.*”, pp.14-15.

<sup>14</sup> Price correlations are mainly used to rule out the inclusion of a product in the relevant market. Thus, for example, two products whose prices behave similarly over time do not necessarily integrate the same relevant market. However, two products whose prices behave differently could suggest that they set their prices independently of each other. See FNE Report for Docket No. NC N° 385-10 “*Consulta de Soprole Inversiones S.A. y Nestlé Chile S.A. sobre Operación de concentración*”, pp. 8 y 183; and case Docket No. FNE F109-17 “*Operación de Concentración entre Aza Participaciones SPA, Matco Cables SPA y otros*”, p.18.

<sup>15</sup> See, case Docket No. FNE F163-2018 “*Adquisición de control sobre activos de Aresta, Delco y Fastcom por parte de Telepizza*”, p.9; case Docket No. FNE F207-2019 “*Adquisición de control en Avon por parte de Natura Cosméticos*”, pp.9-11; case Docket No. FNE F217-2019 “*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*”, pp.39-40; case Docket No. FNE F218-2019 “*Fusión ente Outotec OYJ y Metso Oyj*”, p.23; y case Docket No. FNE F220-2019 “*Adquisición de control en GrandVision NV (Rotter & Krauss) por parte de EssilorLuxottica S.A.*” Concerns Report, p.139.

<sup>16</sup> When analyzing the opinions of market players, the Antitrust Agency will take into consideration that such players may potentially have strategic interests in a Transaction. Therefore, the opinions of customers are generally given more relevance than the opinions of competitors of the concentrating parties, since, in Transactions that substantially lessen competition, the former would be harmed by a price increase, whereas the latter could potentially benefit from such increase.

repositioning existing products, in response to a (small, but significant and non-transitory) price increase and/or to the deterioration of other relevant competitive variables<sup>17</sup>.

20. Supply-side substitution will be evaluated if the undertakings considered as potential suppliers have the ability to enter the product category, making the product available to consumers in a very short period of time and at a very low cost<sup>18-19</sup>.

21. For the purposes of analysing supply-side substitution, the FNE may consider the following information, without limitation:

- i. Evidence that supply-side substitution is technically and economically feasible<sup>20</sup>, and that there is enough existing capacity.
- ii. Required costs and times, whether to redirect production towards other goods, or for commercialization to the end consumer; and/or
- iii. Evidence that, in the past, suppliers have redirected their production and/or marketing in response to changes in prices or other relevant competitive variables.

## **B. RELEVANT GEOGRAPHIC MARKET**

22. The FNE deems that the relevant market is delimited by the smallest geographic area within which it would be possible for a hypothetical monopolist to exercise market power with respect to the product or group of products that integrate it. In addition, it is deemed that in this area the conditions of competition are sufficiently homogeneous, making possible to distinguish one area from another.

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<sup>17</sup> Notwithstanding the foregoing, and even if supply-side substitution is not achieved, the FNE may analyze the reaction of product suppliers to price changes during subsequent stages of its assessment.

<sup>18</sup> In extreme cases, there may be high levels of supply-side substitution, such as when it is possible to alternate between products without costs and in the short-term. See case Docket No. FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I Report of the FNE with respect to the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., p.10.

<sup>19</sup> This may occur, for example, in bidding markets, where the products being bid for are not necessarily demand-side substitutes, notwithstanding the fact that there are a number of plausible bidders for a number of products. In such a case, competitive discipline would be determined by the consumer's willingness to switch suppliers, rather than the consumer's willingness to switch products. See, case Docket No. FNE F110-2017 "*Consortio entre Besalco Concesiones S.A. y Empresa Constructora Belfi S.A. para la licitación de la concesión "Mejoramiento Ruta Nahuelbuta"*", pp.4-5 and case Docket No. FNE F162-2018 "*Asociación entre BASF SE y Solenis International, LLC*", p.14.

<sup>20</sup> See, case Docket No. FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I Report of the Antitrust Agency with respect to the Investigation of a Transaction between Cementos Polpaico S.A. y Cementos Bicentenario S.A., p.8.

23. The analytical tools that will be used by the FNE to define the geographic market are analogous to those used to define the relevant product market<sup>21-22</sup>.

24. In practice, in order to approximate a given geographic market, the FNE may use so-called "catchment areas"<sup>23</sup>, which are geographic zones delimited by a radius that concentrates a certain percentage of product sales<sup>24</sup> or a predefined percentage of consumers<sup>25-26</sup>, and which is correlated to the distance that consumers are willing to travel to obtain the product, or the distances that undertakings are willing to assume to distribute their products.

25. The FNE may consider, *inter alia*, the following information to evaluate the relevant geographic market.

- i. Relevant market definitions and its plausible alternatives, contained in the Transaction's filing;
- ii. Information about the physical characteristics of the products, such as their perishability and the technical feasibility of transportation over long distances<sup>27</sup>;
- iii. Transport costs and times for the products<sup>28</sup>;
- iv. Need for suppliers to be located close to their respective consumers<sup>29</sup>;

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<sup>21</sup> Therefore, the hypothetical monopolist test will be applied by considering what would happen if the monopolist of the relevant product, in a particular geographical area, were to impose a small but significant and non-transitory price increase. If, as a result, a sufficient number of consumers would switch to another area in a manner such that the price increase is no longer profitable, it will be necessary to repeat the exercise by increasing the geographical area considered by including that area.

<sup>22</sup> This includes both demand-side and supply-side substitution.

<sup>23</sup> Also known as catchment areas.

<sup>24</sup> This percentage may depend on the particularities of the markets studied. However, a percentage of 80% is generally used, verifying the sensitivity of the analysis results through the use of other percentages. See, for example case Docket No. F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Report of the Antitrust Agency with respect to the Investigation of a Transaction between Cementos Polpaico S.A. y Cementos Bicentenario S.A. pp.14-15; case Docket No. FNE F1-2013 "*Adquisición de Colmena Golden Cross por Fondo Privado / Larrain Vial*", pp.5-6; and case Docket No. FNE F108-2017 "*Fusión entre Linde Aktiengesellschaft y Praxair Inc.*", p.61.

<sup>25</sup> See, case Docket No. FNE F157-2018 "*Adquisición de Casino de Juegos Pacífico S.A., Casino Gran Los Ángeles S.A. y San Antonio Hoteles II SpA por parte de Enjoy S.A. y Enjoy Gestión Limitada.*", pp.9-13.

<sup>26</sup> Similarly, the Elzinga-Hogarty test, in both its original and revised versions, has been used to define geographic markets in the analysis of Transactions involving health service providers. In this regard, see case Docket No. FNE F247-2020 "*Adquisición de control en Red de Clínicas Regionales S.A. por parte de Asociación Chilena de Seguridad*", pp.9-10 and Exhibit 1, and case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", pp.45-55.

<sup>27</sup> See, case Docket No. FNE F211-2019 "*Fusión entre Inversiones Quillayes SpA y Surlat Corporación S.A.*", p.8.

<sup>28</sup> See, case Docket No. FNE F108-2017 "*Fusión entre Linde Aktiengesellschaft y Praxair Inc.*", p.59.

<sup>29</sup> See FNE Report for case Docket No. NC 385-10 "*Consulta de Soprole Inversiones S.A. y Nestlé Chile S.A. sobre Operación de concentración*", p.80.

- v. The origin or provenance of consumers<sup>30</sup>, or catchment areas of certain points of sale<sup>31</sup> and/or production plants<sup>32</sup> of the parties and their competitors;
- vi. Price levels<sup>33</sup> and correlations between them<sup>34</sup>, between different geographic areas;
- vii. Changes or diversion of products from one geographic area to another, faced with variations of the conditions of supply or demand;
- viii. Historical evidence relating to the role of product imports<sup>35</sup>;
- ix. Internal documents, such as strategy or marketing studies, which may shed light on catchment areas and size of the market; and
- x. Opinions of consumers and competitors; and/or national and comparative jurisprudence that may be illustrative for the Transaction under analysis.

### C. OTHER CHARACTERISTICS OF THE MARKET

26. When defining the relevant market applicable to a Transaction, and without prejudice to the use of the hypothetical monopolist test as a conceptual tool, the FNE will additionally take the following factors into consideration, depending on the specific Transaction and the particular characteristics of the market, in a non-exhaustive manner:

- i. Consumers or sales channel dimension: If producers may charge different prices to different groups of consumers or through different sales channels, it may be necessary to define different relevant markets according to the different groups or channels<sup>36</sup>. For example, if there are substantially different requirements between large and small consumers, or if conditions between different sales channels are substantially different, and only a subset of the suppliers would be able to service the demand of each consumer group or sales channel.
- ii. Temporal dimension: The FNE may consider a temporal dimension of a relevant market when there is evidence of fluctuating demand over short or extended periods of time, or if the goods are durable or rapidly perishable.

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<sup>30</sup> See case Docket No. FNE F247-2020 "Adquisición de control en Red de Clínicas Regionales S.A. por parte de Asociación Chilena de Seguridad", pp.9-10 y Anexo 1, and case Docket No. FNE F178-2019 "Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.", pp.45-55.

<sup>31</sup> See case Docket No. FNE F216-2019 "Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.", pp.17-22.

<sup>32</sup> See case Docket No. FNE F71-2016 "Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.", pp.13-15.

<sup>33</sup> See case Docket No. FNE F223-2019 "Adquisición de control en activos de la marca First por parte de Inversiones Mitta SpA", p.5.

<sup>34</sup> See FNE Report for case Docket No. NC 385-10 "Consulta de Soprole Inversiones S.A. y Nestlé Chile S.A. sobre Operación de concentración", pp.81-88.

<sup>35</sup> See case Docket No. FNE F108-2017 "Fusión entre Linde Aktiengesellschaft y Praxair Inc.", pp.27, 84 and 87.

<sup>36</sup> See, case Docket No.FNE F163-2018 "Adquisición de control sobre activos de Aresta, Delco y Fastcom por parte de Telepizza", p.8 and case Docket No. FNE F211-2019 "Fusión entre Inversiones Quillayes SpA y Surlat Corporación S.A.", pp.15-16.

- iii. Two-sided markets: When there are markets that connect different, unrelated groups of consumers, as in the case of digital or other platforms<sup>37</sup>, it may be necessary to consider the relationships between these groups when defining the respective relevant market(s)<sup>38</sup>.
- iv. Secondary markets or aftermarkets: Secondary products are those that are only acquired after obtaining another related primary product<sup>39-40</sup>. Thus, depending on the compatibility between secondary and primary products, the FNE may find both products to be part of the same market, as separate markets, or as several markets, grouping secondary products into different markets based on the compatibility with the respective primary product.
- v. Self-supply: The FNE may include the internal production of the undertakings within the same market, that is, production intended for the self-consumption of the undertaking or any entity that is part of its business group<sup>41</sup>. This shall be done only if it is profitable for the respective undertaking to make such production available to third parties, when facing a significant increase in prices.

### III. COMPETITIVE ANALYSIS

#### A. MARKET SHARE

27. As noted in section II, the FNE will generally identify the market(s) involved in the Transaction, either based on a definition of the relevant market and its plausible alternatives, or the most conservative definition, when it is not necessary to adopt a strict definition<sup>42</sup>. In any case, the main players will be identified, as well as the industry or segment in which they operate.

28. The FNE will determine market shares based on the yearly turnover of the market players. Alternatively, the unit of measurement used by the FNE to calculate market shares

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<sup>37</sup> See, case Docket No. FNE F199-2019 “Asociación entre Inmobiliaria Puente Limitada y Compañía de Seguros Confuturo S.A.”, p.4 and Judgment No. 41 dated September 27, 2012 of the H. TDLC in case Docket No. NC N° 404-12 “Consulta de la Fiscalía Nacional Económica relativa a la adquisición por parte de Radiodifusión SpA de concesiones de radiodifusión de Comunicaciones Horizonte Ltda.”, recital 10.1.

<sup>38</sup> The specific dynamics of the digital platforms will be analyzed in section III.C.5.

<sup>39</sup> See case Docket No. FNE F226-19 “Adquisición de control en Bergé Automoción, S.L.U por parte de Mitsubishi Corporation.”, pp.17-18.

<sup>40</sup> See, case Docket No. FNE F89-2017 “Notificación de Operación de Concentración entre HP Inc. y Samsung Electronics Co., Ltd”, p.6; case Docket No. FNE F200-2019 “Adquisición de control de Grupo Coseche por parte de Inversiones GAC S.A.”, pp.8-12; and case Docket No. FNE F218-2019 “Fusión ente Outotec OYJ y Metso Oyj”, p.33.

<sup>41</sup> See, case Docket No. FNE F71-2016 “Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.”, Exhibit I Report of the Antitrust Agency with respect to the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., p.4, where the sales of cement included related-party sales within the incumbent player’s business group.

<sup>42</sup> See paragraphs 12-13.

may be the one generally used in the respective industry, or given the peculiarities of each market, the one that best reflects the competitive weight of each player<sup>43</sup>.

29. The period of time over which to measure market shares may vary and be indicative of the relative importance of each competitor in the market, as may occur in markets with large transactions and that occur infrequently over time<sup>44</sup>.

30. Normally, the FNE will consider the market shares of each undertaking at the time of analysis of the Transaction. However, the shares may be calculated considering changes that may be reasonably expected in the near future. For these purposes, the FNE may consider potential exits or entries of players in the market, as well as potential contractions or imminent expansions<sup>45</sup>.

31. When the characteristics of the market so require, the FNE may analyse historical market shares, as well as their evolution over time<sup>46</sup>. The latter will be especially relevant in markets with volatile market shares, such as innovation-driven markets.

## B. CONCENTRATION INDEXES

32. In general, the FNE will use market concentration calculations as a starting point in its analysis, mainly to identify Transactions that preliminarily do not pose concerns to competition<sup>47</sup>. As a general rule, the FNE will not assume that a given measure of concentration is the sole predictor of a market's competitive performance.

33. In its analysis, the FNE will generally look at the levels of concentration in a market, and the changes experienced in such levels as a result of the Transaction under analysis.

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<sup>43</sup> Thus, it is also possible to use sales in terms of physical units, installed and/or existing ability of each player, reserves in the case of natural resources, or other variables, based on how they are usually measured by market players. See, case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", pp.39 et seq.

<sup>44</sup> See, case Docket No. FNE F218-2019 "*Fusión de Outotec Oyj con Metso Oyj*", p.17.

<sup>45</sup> See, case Docket No. F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I Report of the Antitrust Agency with respect to the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., pp.18-19.

<sup>46</sup> See, case Docket No, FNE F155-2018 "*Adquisición de 21CF por parte de Disney*", pp. 27-29.

<sup>47</sup> In this regard, as noted in paragraph 12 above, the FNE often considers the definition of a plausible relevant market where concentration is maximized. If, in that scenario, concentration ratios rule out the need for further analysis, it will not be necessary to strictly define the relevant market.



The Herfindhal Hirschman Index ("**HHI**")<sup>48-49</sup> will be used preferentially for this purpose, but not exclusively<sup>50</sup>.

34. Thus, all other things being equal, the higher the market share obtained by a merger party, and the higher the market concentration indexes and their expected variations as a result of the Transaction, then the greater the likelihood of anticompetitive effects in the market. In such cases, it will be important for the FNE to conduct an in-depth competition analysis of the relevant market to determine the effects of the Transaction.

35. Thus, the FNE understands that, generally speaking, Transactions that affect markets whose concentration indexes do not exceed certain concentration thresholds have little potential to substantially lessen competition. Consequently, in general, the FNE will rule out further analysis if, after the Transaction, the market concentration index is:

- i. Less than HHI 1500;
- ii. More than HHI 1500 and less than HHI 2500 (indicative of a moderately concentrated market), with a projected HHI variation (or  $\Delta HHI$ <sup>51</sup>) of less than 200; and
- iii. More than HHI 2500 (indicative of a highly concentrated market), with a projected HHI variation (or  $\Delta HHI$ ) of less than 100.

36. On the contrary, the FNE will analyse in greater detail the competitive effects of Transactions in markets that equal or exceed the abovementioned concentration thresholds, or those that, without exceeding such thresholds, present certain special, non-exhaustive, circumstances that merit a more in-depth evaluation of the market, such as:

- i. When one of the parties involved in the Transaction is a potential competitor, or a recent entrant, with a small market share that does not necessarily reflect the share it could reasonably achieve in the near future;

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<sup>48</sup> The HHI is calculated by adding the squares of the market shares of the various players in percentage terms.

<sup>49</sup> The traditional HHI is designed for the case of completed mergers or acquisitions. For cases of partial acquisitions and/or joint ventures, the FNE normally uses modified HHIs. See, for out of court settlement Docket No. AE-12-2015 P "*Acuerdo extrajudicial entre Fiscalía Nacional Económica y Electrolux Chile S.A.*", p.3; case Docket No. FNE F219-2019 "*Adquisición de control en Eletrans S.A. y otros por parte de Chilquinta Energía S.A., y adquisición de control en Chilquinta S.A. por parte de State Grid International Development Limited*", p.16; and case Docket No. FNE F247-2020 "*Adquisición de control en Red de Clínicas Regionales S.A. por parte de Asociación Chilena de Seguridad*", p.12.

<sup>50</sup> For example, for the analysis of coordinated effects or a series of local geographic markets, the Antitrust Agency can use the number of significant competitors as a yardstick. See, case Docket FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I Report of the Antitrust Agency with respect to the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., p.30.

<sup>51</sup> The  $\Delta HHI$  is the variation of the Herfindhal Hirschman Index resulting from the Transaction.

- ii. When one of merger parties is an important innovator or a particularly vigorous and independent competitor (a maverick undertaking<sup>52</sup>) in a sense that is not reflected in its market shares;
- iii. When the merger parties are close competitors;
- iv. When there are relevant relationships between the players in the respective market, either structural (e.g. minority shareholdings) or contractual (e.g. cooperation, collaboration or supply agreements, financing agreements, etc.), which may reduce their independence and/or competitive autonomy;
- v. When the market reflects a structure tending towards coordination, or when there have been indications of coordination in the recent past;
- vi. When there are relevant objections from consumers in relation to the effects of the Transaction, or concerns relating to the competitive dynamics of the respective market or industry;
- vii. When the existence of concerns for competition has been found by the corresponding authority in similar Transactions in Chile, or at a comparative level; and/or
- viii. When there is evidence or any other indication of possible competitive concerns in relation to the Transaction.

37. When the concerns for competition resulting from the Transaction cannot be disregarded in a preliminary phase, the FNE will supplement and deepen its analysis with the qualitative and quantitative tools that are presented in the following sections.

### **C. EFFECTS ON COMPETITION**

38. The central exercise in the assessment of a Transaction consists of comparing the current competitive scenario that would be expected if the Transaction were concluded, with the *counterfactual* scenario.

39. Thus, it is feasible to expect a substantial lessen of competition when a Transaction, if concluded, could grant, reinforce or increase the ability of the merger entity to significantly deteriorate the competitive conditions of the respective market in comparison with the counterfactual scenario, either by itself (unilateral concern) or together with others (coordinated concern). In other words, a Transaction will raise competition concerns when it may generate the ability and incentives for the merger entity, acting either unilaterally or in coordination with its competitors, to increase its prices or affect other competitive variables to the detriment of consumers.

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<sup>52</sup> Maverick undertakings are atypical players in a market, usually small firms, that tend to act independently and without necessarily following the trend of the other players or the leading economic agent(s), which makes them vigorous competitors that usually exert effective competitive pressure in the market or segment where they operate.



## 1. UNILATERAL EFFECTS

40. The most obvious way in which a Transaction could raise adverse competitive effects is by eliminating competition among the merger parties, allowing the entity resulting from the Transaction to exercise market power unilaterally.

41. A concentrated entity could, under certain circumstances, acquire a level of market power that would give it the ability and incentive to unilaterally and negatively affect competition variables, such as raising its prices, decreasing output, or reducing the levels of innovation<sup>53</sup>, quality or variety offered to its consumers, among others<sup>54</sup>.

42. The FNE may consider different approaches for the evaluation of unilateral effects that may be generated by the consummation of a Transaction, depending on merger parties, the products offered by them, and the particular characteristics of each market<sup>55</sup>.

### i) Homogeneous / Differentiated Products

43. One classification used to delimit the analysis of unilateral effects consists of characterizing the products according to their degree of differentiation.

44. In markets where products are 'homogeneous', buyers are largely indifferent as to which undertaking produces the product they purchase<sup>56</sup>. In such markets, other competitors can usually affect prices by changing the quantity of products they offer in the market. In these cases, the configuration of the unilateral effects and their magnitude will depend on the incentives and ability of the merged entity to reduce its output, if its competitors are unable to fully and timely compensate for this reduction increasing their production.

45. In markets where products are "differentiated" - for example, in terms of quality, geographic location, brand perception, after-sales services, among other characteristics - some products are closer substitutes and compete more intensely with each other than others<sup>57</sup>. Under these circumstances, unilateral effects are more likely to occur when the products offered by the concentrating undertakings are relatively close substitutes. In this

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<sup>53</sup> Some particularities of the analysis of markets in which dynamic competition and innovation play an important role will be detailed in section III.C.4 below.

<sup>54</sup> Another type of unilateral effects that may be analysed by the FNE are exclusionary effects. Indeed, the FNE analyses whether the Transaction gives the resulting entity the ability and incentives to engage in exclusionary practices with respect to its competitors, determining whether, by virtue of such practices, the latter may be excluded from the respective market, concluding that, but for the Transaction, they would have continued offering their products, or would have entered the relevant market.

<sup>55</sup> These approaches are not necessarily mutually exclusive. For example, the FNE may analyse the market as one of differentiated goods and in one where the form of competition is by bidding, both at the same time.

<sup>56</sup> See, case Docket No. FNE F109-17 "*Operación de Concentración entre Aza Participaciones SPA, Matco Cables SPA y otros*", p.26.

<sup>57</sup> See, case Docket No. FNE F85-2017 "*Notificación de la Operación de concentración entre Essilor International y Luxottica Group*", p.19.

case, the FNE will generally seek to assess whether it would be profitable for the merged entity to raise prices unilaterally.

46. The distinction between homogeneous and differentiated products is not always clear<sup>58</sup>. Products perceived *a priori* as homogeneous could present significant degrees of differentiation that justify a differentiated product analysis<sup>59</sup>. For this reason, the FNE will analyse the nature of the market on a case by case basis, and will then select the most appropriate qualitative and quantitative tools to conduct its assessment.

47. In the case of homogeneous goods, the information that could be considered by the FNE to evaluate possible unilateral effects derived from the Transaction, includes, but is not limited to:

- i. Market shares and concentration indexes;
- ii. The available installed capacity or the existence of competitor stock and, in the case of imported products, the ease of importing the goods;
- iii. The form of commercialization and the terms included in the sales contracts, such as the average tenure of contracts, the possibility of renegotiating prices or quantities during the term of the contract, which could give indications of the ability of the entity resulting from the Transaction to reduce its production or raise prices to its consumers;
- iv. The elasticity of demand; margins associated with the sold units and margins of unsold units; and/or
- v. Other factors that affect the ability and incentives of competitors to respond in the event of a reduction in production or increase in prices of the concentrated entity.

## ii) Closeness of competition

48. In addition to the factors mentioned above for homogeneous goods, when dealing with differentiated products, the FNE may evaluate the closeness of competition between the products offered by the parties to the Transaction, with a view to determine whether the new entity would have incentives to raise its prices, especially considering the potential recapture of sales among the concentrating parties<sup>60</sup>.

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<sup>58</sup> Almost all goods and services have features that differentiate them from others in the same class, such as related services, accessories, geographic location, reliability, and others.

<sup>59</sup> See case Docket No. FNE F71-2016, "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I Report of the Antitrust Agency with respect to the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., pp.11-12; and case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", p.25.

<sup>60</sup> This is explained by the fact that, by raising their prices, undertakings face two countervailing effects: on the one hand, they obtain higher profits from the units they continue to sell, but, on the other hand, they see a reduction in the quantities sold, since some consumers will decide to consume substitute products or even not to purchase the product. Thus, if as a consequence of a Transaction, such undertaking acquires control or merges with a competitor, a portion of those sales that would have been previously lost as a result of a price increase could be recaptured by the entity as a result of the Transaction, driving an upward pressure on prices. This effect will be greater the higher the value of the sales recaptured by the concentrated undertaking, which will depend positively on the closeness of competition between the parties to the Transaction, and the margins

49. Closeness of competition between two or more products can be determined both qualitatively and quantitatively. The qualitative elements used to determine the degree of closeness of competition of products offered by merger parties may include the following:

- i. Analysis of consumer behaviour and their patterns of use or consumption<sup>61</sup>;
- ii. Characteristics of the products that account for similarities of use<sup>62</sup>; and/or
- iii. Analysis of the behaviour of the undertakings of the respective industry, such as the existence of systematic monitoring of a rival or the circumstance of considering the strategic decisions of a competitor in an undertaking's own competitive behaviour<sup>63</sup>.

50. The above can be obtained from various sources, such as consumer surveys or questionnaires<sup>64</sup>, marketing studies, internal documents of the parties and/or third parties, and opinions of competitors, consumers and/or industry experts<sup>65-66</sup>, among others.

51. Depending on the characteristics of the Transaction under analysis and the availability of information, the FNE will attempt to quantify the degree of closeness of competition by calculating 'diversion ratios'<sup>67</sup>. Some non-exhaustive sources of information that may be used by the FNE for the purpose of estimating diversion ratios are the following:

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obtained from the recaptured sales. In this regard, see Judgment No. 43 dated December 12, 2012 of the H. TDLC in case Docket No. NC N°397-11 "*Consulta de SMU S.A. sobre los efectos en la libre competencia de la fusión de las sociedades SMU S.A. y Supermercados del Sur S.A.*", recital 11.4. See case Docket No. FNE F36-2014 "*Operación de Concentración entre Promotora Camino a Canaán S.A. y Nuestros Parques*", pp.11-13 and case Docket No. FNE F51-2015 "*Adquisición de TNT Express N.V. por parte de FedEx Corporation*", p.28.

<sup>61</sup> See case Docket No. FNE F51-2015 "*Adquisición de TNT Express N.V por parte de FedEx Corporation*", pp.28-31; case Docket No. FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", Exhibit II Survey made to the final consumers of Cornershop and Uber Eats, and case Docket No. FNE F211-2019 "*Fusión entre Inversiones Quillayes SpA y Surlat Corporación S.A.*", pp.7-8.

<sup>62</sup> See case Docket No. FNE F51-2015 "*Adquisición de TNT Express N.V. por parte de FedEx Corporation*", pp.33-36.

<sup>63</sup> See case Docket No. FNE F155-2018 "*Adquisición de 21CF por parte de Disney*", p.22.

<sup>64</sup> The FNE may use surveys, either commissioned by itself or by third parties. See case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", p.4; case Docket No. FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", *Anexo II Encuesta a consumidores finales de Cornershop y Uber Eats*; case Docket No. F36-2014 "*Operación de Concentración entre Promotora Camino a Canaán S.A y Nuestros Parques*", pp.14-18; and case Docket No. FNE F233-20 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", p.51.

<sup>65</sup> The FNE may send questionnaires to illustrate the competitive closeness between the parties. These questionnaires generally seek to confirm evidence obtained from other sources. See case Docket No. FNE F218-2019 "*Fusión de Outotec Oyj con Metso Oyj*", p.18; case Docket No. FNE F85-2017 "*Notificación de la Operación de Concentración entre Essilor International y Luxottica Group*", p.15; and case Docket No. FNE F233-20 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", p.51.

<sup>66</sup> See *supra* footnote 16.

<sup>67</sup> The diversion ratio from Company A to Company B is the percentage of Company A's lost sales that are diverted to Company B when Company A raises its price. For example, Company A raises the price of its products, and as a result, its sales decrease by 1000. If 400 of these units are captured by Company B, then the diversion ratio from A to B is equal to  $400/1000=0.4$ .

- i. Consumer surveys or questionnaires<sup>68</sup>;
- ii. Natural experiments<sup>69</sup>;
- iii. Econometric estimates<sup>70</sup>;
- iv. Historical switching patterns<sup>71</sup>; and/or
- v. Market shares<sup>72</sup>.

52. When the FNE has sufficient background information to calculate diversion ratios and, in addition, has reliable information on the margins of the merging parties<sup>73</sup>, it will be able to quantify the increase in upward price incentives stemming from the consummation of the Transaction through different indexes that take as a basis such diversion ratio<sup>74</sup>. By way of illustration, the indicators frequently used by the FNE are as follows<sup>75</sup>:

- i. *Upward Pricing Pressure* ("**UPP**"), which seeks to verify whether there is an incentive to raise prices in the presence of efficiencies<sup>76</sup>.

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<sup>68</sup> See case Docket No. FNE F36-2014 "*Operación de Concentración entre Promotora Camino a Canaán S.A. y Nuestros Parques*", pp.14 *et seq.*, and case Docket No. FNE F220-2019, "*Adquisición de control en GrandVision NV (Rotter & Krauss) por parte de EssilorLuxottica S.A.*"; and case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", p.51.

<sup>69</sup> The FNE may analyse unexpected past events or natural experiments that may be appropriate to appreciate the competitive effects of a Transaction. Thus, depending on the circumstances, it may be relevant to inquire into the impact of recent transactions, market entries, expansions, contractions, exits (definitive or temporary), imposition of restrictions, legal or regulatory changes, and/or stock failures within the relevant market or within other similar markets. Price comparisons in markets similar to the one under study, among which their competitive structure varies, may also provide useful evidence. See case Docket No. FNE F65-2016 "*Operación de concentración por traspaso de estación de servicio a Copec*", p. 14.

<sup>70</sup> For example, own and cross-elasticities of demand. Where the data permit the estimation of demand elasticities, the FNE may complement this analysis with a merger simulation as indicated in paragraph 52 above.

<sup>71</sup> That is, how consumers have switched in the past. See case Docket No. FNE F150-2018 "*Operación de concentración entre Caja de Compensación de Asignación Familiar Los Héroes y Caja de Compensación de Asignación Familiar Gabriela Mistral*", pp.10-11.

<sup>72</sup> When the relevant market has already been defined and there are no other best estimates available, market shares may be used to approximate the diversion ratios, for which purpose the percentage of sales that is diverted outside the relevant market in the event of an increase in the price of the good or service for which the existence of upward price pressure is being assessed should also be taken into consideration. However, if the qualitative elements of the analysis show that the parties' products are closer (or more distant) than the other alternatives, it is understood that such diversion ratios may be underestimated (overestimated). See case Docket No. FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", *Anexo I Informe de la Fiscalía Nacional Económica respecto a Investigación de Operación entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*, pp.31-32.

<sup>73</sup> Although theoretically it is preferable to use the incremental margin, in practice, the incremental margin is difficult to estimate accurately, so the FNE will approximate it by using the variable or contribution margin.

<sup>74</sup> The impact of non-price variables tends to be difficult to quantify, so its prospective analysis is more often based on qualitative evidence. However, if possible, the FNE may use upward pressure indices or other quantitative tools. See case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", pp.59-71.

<sup>75</sup> Depending on the particularities of each case, the FNE may use one or more of these indexes. Additionally, it may use modified versions to capture certain particularities of the market or may use new versions to be developed in the future.

<sup>76</sup> See case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", pp.29-31.

- ii. *Gross Upward Pricing Pressure Index ("GUPPI")*, similar to UPP, but generally does not consider efficiencies and is expressed in percentages. All else constant, the higher the GUPPI, the greater the incentive to raise prices<sup>77</sup>.
- iii. *Illustrative Price Rise ("IPR")*, which seeks to quantify, under certain assumptions, the post-merger price increase<sup>78</sup>.
- iv. *Compensating Marginal Cost Reduction ("CMCR")*, which seeks to measure the level of efficiencies that could counterbalance the incentive to raise prices<sup>79</sup>.

53. Another method that may be used by the FNE, in the light of the particularities of the Transaction and the availability of information, is the estimation of econometric models that simulate the unilateral effects of the Transaction. Such models may include, among others, scale models of the relationship between price (or other competition variables<sup>80</sup>) and market structure<sup>81</sup> (the so-called 'price-structure relationship') or a merger simulation, which compares the equilibrium price between the scenario before and after the Transaction in order to quantify the magnitude of the increase in prices.

### iii) Merger parties competing in tender and trade negotiation markets

54. 'Tender and trade negotiation markets' are those in which prices are determined primarily through bidding processes between buyers and sellers that take place in public and private spheres<sup>82</sup>. In such processes, buyers generally negotiate with more than one supplier and make them compete with each other. Within such markets, negotiations that are highly structured are usually called tenders, while others follow more informal negotiation processes, which differ from case to case.

55. A Transaction in this kind of markets may give the merged entity the ability and incentive to raise its prices, since the loss of a competitor in the market may result in less intense competition -especially if the parties were close competitors- as the buyer loses the possibility to make them compete with each other.

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<sup>77</sup> See case Docket No. FNE F36-2014 "*Operación de Concentración entre Promotora Camino a Canaán S.A. y Nuestros Parques*", pp.20-22 and case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automóviles N.V. y Peugeot S.A.*", pp.65-67.

<sup>78</sup> See case Docket No. FNE F43-2015 "*Enajenación de Foods Cía. de Alimentos*", pp.22-24 and case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", pp.78-82.

<sup>79</sup> See case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", pp.77-79 and case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automóviles N.V. y Peugeot S.A.*", pp.67-68.

<sup>80</sup> See case Docket No. FNE F56-15 "*Notificación de Operación de Concentración entre Banco Santander-Chile, Banco de Chile y Banco Bilbao Vizcaya Argentaria, Chile.*", p.19.

<sup>81</sup> See case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", pp.31-35.

<sup>82</sup> With regard to the public sphere, see *Estudio de Mercado sobre Compras Públicas (EM05-2019)*, División Estudios de Mercado FNE, Santiago, November 2020.

56. In order to estimate the effects associated with a concentration that affects this type of markets, whether in respect of homogeneous or differentiated goods, the FNE will consider -in addition to the methodologies already explained- the following non-exhaustive elements<sup>83</sup>:

- i. The fact that the parties generally participate in the same tenders or negotiations;
- ii. The fact that the parties are considered close alternatives by buyers<sup>84</sup>; and/or
- iii. Estimates that determine the eventual effect of the presence of the other party in the bidding on the awarded price.

**iv) Acquisition of a potential competitor or recent entrant**

57. If a Transaction involves, on one hand, an undertaking active in a market and, on the other hand, a potential competitor or recent entrant with growth potential ('recent entrant'), such Transaction could substantially lessen competition if, in the absence of the Transaction, the potential competitor would have entered the market or the recent entrant would have expanded its operations, thus significantly increasing the levels of competitive pressure that could be reasonably foreseen in the near future<sup>85</sup>.

58. To assess the competitive pressure that could be exerted by a potential competitor or a recent entrant in the market, the FNE will first consider the likelihood that the undertaking would have become an effective competitor. The FNE will weigh the antecedents that demonstrate that such undertaking would have entered the market or expanded its operations in the absence of the Transaction. If the foregoing is proved, the FNE will analyse the competitive behaviour that the relevant undertaking would have had with its entry or expansion<sup>86</sup>. Then, the FNE will consider whether the loss of competitive pressure that the Transaction would produce could be sufficiently outweighed by the repositioning or rearrangement of other players that would be able to exert a competitive pressure comparable to the one that the undertaking would have exerted in the market<sup>87</sup>.

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<sup>83</sup> With regard to market shares, see *supra*, section III.2, in particular, paragraph 28.

<sup>84</sup> In bidding markets, this translates into the ranking of the bids submitted by the parties – closeness in the ranking (especially when one is awarded and the other comes in second) could be considered as an element of closeness of competition.

<sup>85</sup> See Resolution No. 37 dated September 21, 2011 issued by the TDLC in case Docket No. NC N° 388-11 "*Consulta de Conadecus sobre Operación de concentración entre LAN Airlines S.A. y TAM Linhas Aéreas S.A.*", recital 111.

<sup>86</sup> In particular, the possible positioning in the market, the degree of proximity to the products of the other party and third parties, the projected scale, among other factors, will be analyzed.

<sup>87</sup> See case Docket No. FNE F246-2020 "*Asociación entre Archer-Daniels-Midland Company y NBM US Holdings, Inc.*", p.7 and case Docket No. FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", section 4.2.1.



## v) Transactions between buyers

59. The FNE considers that Transactions involving buyers of the same input can increase market power from a demand-side perspective in the same way that a concentration among bidders can increase market power from a supply-side perspective.

60. The conceptual framework to be used by the FNE to assess whether or not a Transaction between buyers could be capable of substantially lessen competition is analogous to the one used to assess a concentration between bidders<sup>88</sup>.

## 2. COORDINATED EFFECTS

61. The structural changes involved in a Transaction may affect the incentives for undertakings to compete on the merits; it may be more profitable for them to coordinate than to compete on the market.

62. In particular, a Transaction could lessen competition in one or more markets if it allows, facilitates or makes more effective the coordinated behaviour of the entity resulting from the Transaction with one or more of its competitors<sup>89</sup>.

63. Such coordination may be the result of an agreement or concerted practice, or simply consist of parallel conduct that does not respond to a prior understanding between the undertakings. This implies that the coordinated effects, within the prospective analysis of merger control, include conducts that will not necessarily be considered anticompetitive under competition law, in other scenarios.

64. Coordination may take different forms and arise from one or several variables of competition in the market. Thus, for example, undertakings can coordinate their prices, share the market on the basis of geographic areas or the characteristics of their customers, or reduce the competitiveness of their offers, among other mechanisms.

65. A Transaction may increase the likelihood that market participants will match each other's behaviour, thus generating coordinated effects. In order for such coordination to be plausible, it is not necessary that all the actors in such market adjust their behaviour among themselves, notwithstanding the fact that those who coordinated are collectively capable of exercising some degree of market power. Thus, and especially when there are some competitors linked to each other by structural links, such as cross-shareholdings or joint

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<sup>88</sup> In this regard: Report by the FNE in case Docket No. NC N° 385-10 "*Consulta de Soprole Inversiones S.A. y Nestlé Chile S.A. sobre Operación de concentración.*", p.206 and case Docket No. FNE F211-2019, "*Fusión entre Inversiones Quillayes SpA y Surlat Corporación S.A.*", pp.12-14.

<sup>89</sup> Or between the resulting entity and the constituent parties, in the case of a joint venture, as defined in the section III.C.3 below.

ventures<sup>90</sup>, vertical relationships or contractual links such as collaboration agreements, the FNE may then focus its analysis on the possible coordination effects between these undertakings<sup>91</sup>.

66. Additionally, historical evidence of coordination in the market involved in the Transaction, or in markets similar or comparable to this one, may indicate the need for a more in-depth analysis of the likelihood of the Transaction to create, increase or reinforce the conditions leading to coordination in the markets.

67. To analyse coordinated effects, the FNE will assess how the Transaction generates, reinforces or increases the likelihood of concurrence of one or more of the following conditions: a) the ability to meet the terms of coordination; b) the internal sustainability of coordination; and c) the external sustainability of coordination.

68. If the above conditions were to occur simultaneously, the Transaction could give rise to coordinated effects.

#### **a) Ability to meet the terms of coordination**

69. For coordination to exist, it is necessary that the undertakings involved may reach a common understanding about the objective of such coordination<sup>92</sup>. As indicated, such understanding may be the result of an explicit or implicit understanding, but it may also consist simply of parallel conduct that does not respond to a prior understanding between the undertakings involved<sup>93</sup>.

70. Some factors that the FNE will analyse to assess whether the undertakings are capable of meeting the terms of coordination may include, but are not limited to, the following factors:

- i. High market concentration and, in particular, a low number of participants;
- ii. The degree of product differentiation;
- iii. The similarity of characteristics among the undertakings in the market<sup>94</sup>;
- iv. The number and type of products and/or variables on the basis of which the operators compete;

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<sup>90</sup> In this regard, see section III.C.3 and Competition Guidelines dated June 2011 issued by the FNE, p.22.

<sup>91</sup> See case Docket No. FNE F109-2017 "*Operación de Concentración entre Aza Participaciones SpA, Matco Cables SpA y otros.*", pp.25-27 and case Docket No. FNE F243-2020 "*Asociación entre CMA CGM, COSCO Shipping Lines, COSCO Shipping Ports, SIPG, Hapag-Lloyd, PSA, Hutchinson Ports, OOCL y Qingdao Port Lines*", pp.8,12-13.

<sup>92</sup> For example, an agreement to fix prices or allocate customers.

<sup>93</sup> This implies that coordinated effects in Transactions include conduct that would not necessarily be reprehensible under competition law in other scenarios. See Resolution No. 43 dated December 12, 2012 by the TDLC in case Docket NC No. 397-11 "*Consulta de SMU S.A. sobre los efectos en la libre competencia de la fusión de las sociedades SMU S.A. y Supermercados del Sur S.A.*", recital 12.2.

<sup>94</sup> Among other factors, the FNE analyzes the symmetry of the market shares and cost structures of the undertakings that are active in the respective relevant market.



- v. The stability of demand;
- vi. The frequency and timeliness of information exchange (e.g., existence of trade associations, price monitoring platforms, public announcements of commercial strategies, etc.); and/or
- vii. The existence of structural linkages with each other.

71. When analysing the extent to which a market is prone to coordination, the FNE usually identifies variables from which the likelihood of a coordinated action could arise, stabilize or increase, such as the price of one or more products or the geographic distribution of the market or consumers, agreements on the outcome of tenders, among other variables.

72. In less complex and more stable competitive environments, it may be easier for undertakings participating in the market to reach a common understanding on the terms of coordination. This would be more challenging in more complex environments, for example, where there are differentiated products. However, even in such circumstances, a common understanding could be reached, for example, by simplifying the parameters of competition or through market partitioning.

#### **b) Internal sustainability of coordination**

73. For coordination to be internally sustainable, it is necessary that the benefits of coordination make it sufficiently profitable for the participants, and that there is a mechanism to monitor and punish possible deviations from the understanding.

74. If coordination is not sufficiently profitable<sup>95</sup>, or if the punishment for deviating from it is not sufficiently credible and/or severe, undertakings might prefer not to comply with the understanding and deviate, so this would not be sustainable<sup>96</sup>.

75. For coordination to be sustainable over time, it must be possible to monitor the behaviour of the undertakings that are part of it, in order to detect -and punish- eventual deviations. A facilitating element of coordination is the existence of a certain degree of transparency with respect to the variable that could be the object of coordination, or at least the existence of indirect monitoring mechanisms<sup>97</sup>. In cases where this level of transparency is very low, it becomes more difficult to project sustainable coordination, even more so in the absence of an explicit understanding.

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<sup>95</sup> With respect to the cost-effectiveness of the agreement, the FNE may also analyse the factors listed in paragraph 66 *supra*.

<sup>96</sup> Punishment may consist of different mechanisms, although it will generally consist of returning to intense competition with respect to the defaulter. When there are repeated interactions in one or more markets, accounting for a significant percentage of the revenues of the undertakings seeking to coordinate, or when there are structural links between them - such as the existence of joint ventures - there are more credible instances of punishment. In the latter case, a possible punishment for deviations from coordinated behaviour is a reduction of investments in the joint venture, or alternatively, ignoring the interests of the deviating undertaking in the decision-making process regarding the management of the joint venture.

<sup>97</sup> For example, information on quantities or price ranges instead of exact prices.

76. The FNE will evaluate the level of transparency with respect to relevant competitive parameters, identifying possible information flows between competitors in the market, analysing what and how much undertakings can infer about the behaviour of their competitors from the information available to them and how the Transaction may create, reinforce or increase such transparency<sup>98</sup>. The FNE will also evaluate the impact of the Transaction on the likelihood of relevant competitive parameters being monitored between the merged entity and its competitors<sup>99</sup>.

77. Another element that the FNE may consider to assess whether the Transaction creates, reinforces or increases the internal sustainability of coordination is the speed of and immediacy between the deviation that is detected and the punishment<sup>100</sup>, as well as the cost of the punishment both for the undertaking being punished<sup>101</sup> and for the rest of those engaged in coordination.

78. There may be several reasons why a Transaction may reduce the asymmetry in the incentives of the parties to engage in eventual coordination, thus facilitating coordination in the market. For example, the acquisition of a maverick or of an undertaking that usually exerts important competitive pressure in the market by a competitor with greater incentives to engage in coordination could preliminarily raise coordinated effects<sup>102</sup>.

### **c) External sustainability of coordination**

79. Even when the Transaction creates, reinforces or increases the possibility of agreeing on and monitoring the terms of coordination, and there are credible and effective punishment mechanisms in case of eventual deviations, coordination could be difficult to sustain if competitors that are not coordinating, or if third parties not engaging in

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<sup>98</sup> For example, when coordination is feasible with respect to the price variable, the FNE analyses to what extent each undertaking knows the prices of its rivals or can infer them from the information in its possession. In digital markets, the existence of big data (as defined below in section III.C.5) may facilitate coordination. With regard to block chain technology and access to information, see case Docket No. FNE F243-2020 “*Asociación entre CMA CGM, COSCO Shipping Lines, COSCO Shipping Ports, SIPG, Hapag-Lloyd, PSA, Hutchinson Ports, OOCL y Qingdao Port Lines*”, pp.13-15. On the other hand, if coordination is feasible through consumer allocation, the FNE may analyse, among other factors, the extent to which undertakings can know from which competitor each consumer is procuring its supply and the costs involved in obtaining such information.

<sup>99</sup> A similar analysis can be made with respect to the monitoring possibilities between undertakings participating in a joint venture or collaboration agreement.

<sup>100</sup> In this regard, in a market where sales are occasional, the incentives for diversion are increased, since the effects of punishment would not occur immediately. Also, certain contractual clauses, such as most-favoured-customer clauses, may increase the expected cost of diversion by guaranteeing a response from competitors.

<sup>101</sup> The existence of multi-market contacts between undertakings can make the coordinated equilibrium more stable.

<sup>102</sup> As would be, for example, an undertaking with a low-cost business model. See case Docket No. FNE F216-2019 “*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*”, p. 50.

coordination, can exercise an important disciplining role, thus affecting the expected gains derived from coordination<sup>103</sup>.

80. In particular, the above could occur when competition "outside" the coordinated group accounts for a significant proportion of the market, through the entry of new competitors into the market, or through certain actions from consumers that may act as destabilizing factors of coordination<sup>104</sup>. This could occur when they concentrate a relevant share of purchases with one supplier, or when it is common to sign long-term supply contracts with any potentially-coordinated competitors<sup>105</sup>.

### 3. JOINT VENTURES

81. When the Transaction under analysis consists of the creation of a new undertaking independent and distinct from the undertakings that are associated, which performs its functions on a permanent or full function basis (joint venture or "JV")<sup>106</sup>, the FNE will place emphasis on the assessment of the possible coordinated effects that may arise, regardless of the market in which the JV operates and without prejudice to the analysis of non-horizontal effects that may be apply.

82. This is because joint ventures create or strengthen structural links between the parents<sup>107</sup>. This could allow the parties to the JV to increase the ability to coordinate their competitive behaviour among themselves, both in the market where the JV will be operated and outside it, especially if their activities are conducted in the same market or in markets related to those in which said parties conduct their activities<sup>108</sup>.

83. In the event that any of the parties participates in the same market of the joint venture or it is the joint venture the entity concentrating the activities of the parties in the same market, the FNE will also analyse potential unilateral effects that may derive from the creation of the new entity through the Transaction. In this regard, the FNE will consider: (i) how the incentives of each of the parties to the JV are altered in respect of their own competitive parameters, taking into consideration that any consumer switching would be at least partially recaptured by their participation in the JV<sup>109</sup>; and (ii) the existence or lack of

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<sup>103</sup> The entry conditions are discussed in detail in Section III.D.

<sup>104</sup> As maverick undertakings. However, the entry of competitors that compete marginally with those engaging in coordination is unlikely to destabilize said coordination.

<sup>105</sup> Countervailing buyer power is discussed in detail in Section III.E.2.

<sup>106</sup> See the FNE's June 2011 Competition Guidelines which details the characteristics of a joint venture that qualifies as a Transaction.

<sup>107</sup> As detailed above in Section III.C.2.

<sup>108</sup> Coordination effects in markets other than that of the JV are known as spill-over effects. See case Docket No. FNE F199-2019 "Asociación entre Inmobiliaria Puente Limitada y Compañía de Seguros Confuturo S.A.", pp.7-12 and case Docket No. FNE F243-2020 "Asociación entre CMA CGM, COSCO Shipping Lines, COSCO Shipping Ports, SIPG, Hapag-Lloyd, PSA, Hutchinson Ports, OOCL y Qingdao Port Lines", pp.12-18.

<sup>109</sup> In general, the evaluation of this theory of harm follows the idea discussed in paragraphs 40 *et seq.*, with the difference that in the case of the analysis of JVs, the profits recovered do not account for 100% of the profits obtained by the JV as a result of consumers switching from the parties thereto, but would be proportional

power of each of the parties to the Transaction to influence the competitive behaviour of the joint venture, as well as the extent of such power.

84. The FNE will take a closer look at a joint venture where either party may be a potential competitor of the other or of the new entity<sup>110</sup>.

#### 4. DYNAMIC AND INNOVATION MARKETS

85. The competitive process involves rivalry among the players operating in a market, generally involving short-term competition parameters such as price or quantity. However, this process also involves - to a greater or lesser extent and depending on the specific market - competition on the basis of the improvement of existing products, the creation of new products, the establishment of new ways of meeting consumers' needs, or other types of rivalry involving innovative activities. Competition that takes place on the basis of these parameters is called 'dynamic competition'.

86. Notwithstanding the inherent difficulties in predicting the impact on dynamic competition that could stem from a Transaction, the FNE will use the same traditional conceptual framework used to evaluate static effects on competition, thus analysing how the Transaction would alter the incentives of undertakings operating in a market with respect to the determination of the different competition parameters.

87. However, in those markets where innovation is relevant to compete, the existing competitive conditions do not necessarily constitute a good counterfactual to evaluate the possible effects of a Transaction, since the structure of the markets is still developing and may evolve, in the short or medium term, towards scenarios different from those observed when examining the competitive impact of the Transaction.

88. This could occur, for example, when in an affected market there are processes of 'disruptive innovation'<sup>111</sup>, scenarios in which an important part of the competition is 'for-the-market' and not 'in-the-market'<sup>112</sup>. In other words, this is a competitive process where undertakings strive to create an innovation that is then preferred by consumers and has the ability to displace other competitors<sup>113</sup>.

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to said parties' share of equity interest in the JV. See case Docket No. FNE F101-2017 "*Operación de Concentración entre Banco Santander-Chile y Sociedad de Recaudación y Pagos de Servicios Limitada.*", pp.30-37.

<sup>110</sup> In this regard: case Docket No. FNE F246-2020 "*Asociación entre Archer-Daniels-Midland Company y NBM US Holdings, Inc.*", p.7.

<sup>111</sup> Scenarios in which an innovative product becomes the industry standard, displacing previous versions.

<sup>112</sup> Competition for the market occurs when products have characteristics that lead undertakings to compete to supply an entire market or segment, rather than to gain or increase their market share. An extreme case would be that of a product that is not yet on the market, so there is no competition in the market, but where there could be competition for its creation (competition for the market).

<sup>113</sup> On the economic theory underpinning the disruptive innovation notion, see case Docket FNE No. F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", pp.8-9.

89. In dynamic markets, therefore, a Transaction between an undertaking with a relevant market position and a recent entrant, or with an undertaking with a low market share, which has produced a relevant innovation and which has expanded its operations and significantly increased the level of competition that could be expected in the future, could be capable of substantially lessen competition<sup>114</sup>.

90. Current competitive conditions may also be an inappropriate counterfactual for evaluating Transactions in those cases where the Transaction affects markets where 'incremental innovation' processes are observed<sup>115</sup>. In these cases, the parties to a Transaction could compete to improve their services in the markets in which they participate, or develop some new product to gain a 'first-mover advantage'<sup>116</sup>. The concerns of such Transaction, with respect to innovation activities, may not depend on the previous market structure, but rather on the reduction of incentives to innovate arising from the elimination of a competitive threat.

91. Consequently, in markets where competitive conditions are prominently dynamic in nature, whether characterized by disruptive or incremental innovations, the market structure observed during the pre-transaction period may not be a good counterfactual. A preferable approach will be to assess the competitive position of other market players to develop innovations and the closeness of competition of the parties to the Transaction with respect to the development of potentially competing innovations.

92. The FNE considers that a Transaction could reduce the incentives to innovate of the merger parties particularly when they have innovation projects of a similar nature and in advanced stages<sup>117</sup>. In such cases, the FNE will assess the likelihood that, as a result of the Transaction, one of the projects will be eliminated, thus affecting the speed of market entry and/or the variety available to consumers in the near future<sup>118</sup>. Such incentives could also be diminished when in an innovation-intensive market, in which there may be different lines of research and development, the Transaction is concluded and the merged entity decides

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<sup>114</sup> The analysis of the acquisition of a potential competitor is discussed in more detail in section III.C.1.iv) *supra*.

<sup>115</sup> Instances in which the launch of an innovation in the market is not capable of completely displacing other competitors.

<sup>116</sup> A first-mover advantage is the competitive advantage that a supplier gains by being the first to market a product or service. Being the first to market can provide competitive advantages in that it allows the undertaking to anticipate the possible strategic actions of rivals and take them into consideration when making its commercial decisions. It can also enable an undertaking to generate brand loyalty before other competitors, to exploit learning curves or to take advantage of better economies of scale and/or network effects.

<sup>117</sup> To quantify the status of the parties' innovation projects, the FNE will conduct a case-by-case analysis considering the seriousness of the plans, implementation projections, prototyping, timelines or implementation of pilot plans, investments in innovation, the existence of a budget linked to innovation, and other factors.

<sup>118</sup> This argument also applies to those innovations that have been recently launched to the market, and that have not yet reached a relevant scale of operation, but that in the counterfactual scenario of the Transaction would have exerted a significant competitive pressure.

to eliminate, downgrade or postpone those projects that could cannibalize the profits of a current or future product of said entity<sup>119</sup>.

93. On the contrary, a Transaction could increase the incentives to innovate if the merger entity is able to better appropriate the value generated by the Transaction, based on the structural change stemming from the concentration<sup>120-121</sup>.

94. The FNE will analyse the effect of the Transaction on the incentives to innovate of the merger parties according to the abovementioned parameters. In light of the particular case, the structure and guidelines of the analysis of a conventional Transaction could be followed when attempting to assess the level of closeness of competition on the basis of innovation of the merger parties<sup>122</sup>.

95. In its analysis, the FNE may consider the number and identity of the players active in the market and of potential competitors, evaluating in both cases their performance in terms of innovation and the degree of competitive pressure they may exert over the parties that are merging. In this regard, a relevant element to consider is whether the innovation processes observed in the respective markets are of a disruptive or progressive nature, as well as the existence or absence of intellectual property rights and their effect on the undertakings' ability and incentive to innovate<sup>123</sup>.

## 5. DIGITAL PLATFORMS AND DIGITAL MARKETS

96. This section will focus on the analysis of the distinctive characteristics of these markets and the elements that differ from the traditional analysis of traditional markets.

97. There are various types of 'digital platforms'<sup>124</sup>. The following is a non-exhaustive list based on the scope or segment in which they participate<sup>125</sup>: i) digital information

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<sup>119</sup> Cannibalization occurs if one party's potential efforts capture a substantial part of the other party's revenues.

<sup>120</sup> For example, as a result of the elimination of opportunism or free riding, the internalization of positive externalities, known as spill-over effects.

<sup>121</sup> Additionally, a Transaction may increase the ability and/or incentives to innovate when there are synergies between research and development teams that entail reductions in innovation costs, or when it allows access to financing for research and development investments that could not be obtained in the absence of the Transaction. This efficiency depends on the existence of obstacles to obtain funds in the external capital market. For further information, see case Docket No. FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", p.102.

<sup>122</sup> For example, players with higher innovation intensity -in terms of investments or investment plans- and with similar innovation paths could cause greater anti-competitive effects.

<sup>123</sup> Because intellectual property rights could determine certain aspects of competition in innovation, such as the ability to innovate on existing products or the incentives to innovate.

<sup>124</sup> Digital platforms are a particular case of platforms that are characterized by an intensive use of data and technologies. Emphasis is placed on this type of platforms because they are expected to become increasingly important over time. The analysis in this section may also be applicable to non-digital platforms.

<sup>125</sup> These groups are not intended to encompass the totality of possible uses that digital platforms may serve.



platforms<sup>126</sup>; ii) digital communication platforms<sup>127</sup>; iii) digital platforms for intermediation of goods and/or services<sup>128</sup>; iv) digital platforms for supply chain and logistics<sup>129</sup>; v) digital platforms that facilitate the recruitment of human capital (task platforms); and vi) digital platforms that facilitate payment systems and other financial services (fintech).

98. There are different areas in which digital platforms are involved; a distinction can be made between those the purpose of which is to facilitate transactions ('transactional platforms') -such as service intermediation or fintech platforms- and those which purpose is not the intermediation of transactions, but the facilitation of other types of interactions ('non-transactional platforms'), such as digital information platforms or digital communication platforms.

99. Additionally, digital platforms are characterized by the presence and relevance of 'network effects'. Network effects can be both positive and negative, and entail that the value of the platform for each user depends (positively or negatively) on the number of other users from the same group or side using it ('direct network effect'), or on the number of users from other groups or sides using it ('indirect network effect')<sup>130</sup>.

### 5.1. Definition of the relevant market

100. In digital platform markets, the FNE's definition of the relevant market will consider the interaction between different groups of users, since the presence of indirect network effects implies that the value that one side of users obtains from using the platform may depend on the number of consumers of another side. Thus, the prices charged to each set of consumers take into account the effects on the other groups of platform users. However, the application of the hypothetical monopolist test generates certain difficulties when applied *mutatis mutandi* to digital platforms<sup>131</sup>.

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<sup>126</sup> Those that allow their users to obtain information, such as Internet search engines, mapping and geographic location services, informative websites linked to newspapers, radio or television, encyclopaedias, etc.

<sup>127</sup> Those that facilitate the transfer of content and opinions between people, such as social networks, websites that allow sharing music files, videos, or participating in games over the Internet, etc.

<sup>128</sup> Those that enable e-commerce or facilitate the supply of services, such as the purchase and delivery of products from supermarkets or restaurants, or the sharing of vehicles for transportation in urban areas. (*ride-sharing*). See case Docket No. FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", p.11.

<sup>129</sup> Those that serve a specific logistic process, through the reception and delivery of information, together with the execution of transactions and optimization of administrative processes. See case Docket No. FNE F243-2020 "*Asociación entre CMA CGM, COSCO Shipping Lines, COSCO Shipping Ports, SIPG, Hapag-Lloyd, PSA, Hutchinson Ports, OOCL y Qingdao Port Lines*", pp.6-7.

<sup>130</sup> For example, in the case of a digital communication platform, it is possible that the users' valuation of the platform depends on the number of users who want to use it to communicate. This would be an example of a positive direct network effect. In the case of a digital platform for intermediation of goods and/or services that makes it possible, for example, to share vehicles, the valuation of the platform by users requiring transportation services could depend on the number of drivers using the platform to offer their services. This would be an example of a positive indirect network effect.

<sup>131</sup> Firstly, since there may not necessarily be a single price for both sets of consumers to which a small but significant and non-transitory price increase (SSNIP) may be applied, and the effect of such a price increase

101. Considering that digital platforms operate in multi-sided markets, the competitive analysis may be conducted considering a single definition of relevant market that incorporates all groups of platform users. Alternatively, a relevant market may be defined for each side, but considering the relationships between the different markets the platform serves. The FNE will evaluate the convenience of adopting one or the other approach depending on the particular characteristics of the Transaction under analysis, especially considering whether the platforms are transactional or not<sup>132</sup>.

## 5.2. Competitive analysis

102. Consistent with the examination of traditional transactions, rather than reaching a precise definition of the relevant market, for the analysis of Transactions in digital markets, the FNE will focus on determining their possible effects on competition<sup>133</sup>.

103. In its assessment, the FNE will use the qualitative and quantitative tools that are reasonably available and will take into consideration the possible effects of the Transaction on all sides of the market, even if any of them face a zero price. The FNE will also evaluate the competitive pressure that non-digital products could exert on digital markets and vice versa<sup>134</sup>.

104. The FNE will carefully analyse the possible effects of the Transaction taking into consideration not only its horizontal dimension, but also vertical and/or conglomerate

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on the demand of one set of consumers may be amplified by the effects of the price change on another set of users. Secondly, by taking into consideration that competitive constraints on the parties' products may not come exclusively from other platforms, but also from other types of undertakings that only serve one set of consumers. The analysis will also take into account that in these markets there may be products offered at 'zero price'. An undertaking offers its products at zero price when consumers do not pay a monetary price for these products. This is the case, for example, with digital communication platforms that monetize their business mainly through advertising, providing services free of charge, from a pecuniary perspective, to one side of the platform in order to attract a greater number of advertisers or data seekers. See case Docket FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", p.11. For the application of the hypothetical monopolist test, see footnote 9.

<sup>132</sup> Generally, the FNE will find it preferable to adopt an approach of defining multiple markets for each user group using the platforms in the case of non-transactional platforms, as this would better capture the different substitutes for each side of the platform. In these cases, it is possible that there are substitutes for platforms with different business models that do not serve exactly the same user groups or that are not platforms and provide services that could compete with them. Conversely, in digital markets where transactional platforms compete, the FNE will consider the option of adopting an approach of defining a single market that groups together the different sides, since the product offered depends on the simultaneous use of different sides of a platform, probably in fixed proportions, in which case it would not be possible to offer the service to a group of users if the other groups of users are not available simultaneously.

<sup>133</sup> See paragraphs 11-12 of these Guidelines.

<sup>134</sup> For example, see Report by the FNE in case Docket No. NC N° 421-14 "*Consulta de la Fiscalía Nacional Económica sobre acuerdo para el desarrollo de una plataforma de distribución de contenidos digitales "Over The Top"*", pp.38-39. and case Docket No. FNE F161-2018 "*Adquisición de control sobre Delivery Technologies SpA por parte de Walmart*", pp.15-16.



aspects<sup>135</sup>. With regard to horizontal aspects, the FNE will analyse in greater detail the competitive effects in the markets in which the following non-exhaustive elements concur:

- i. When an undertaking can eliminate potential competitors or recent entrants that could challenge its competitive position in the market<sup>136</sup>;
- ii. When the Transaction may raise competition concerns of undermining parameters other than price, such as terms of use of the platforms (e.g. privacy policies) and the merging parties' incentives to innovate;
- iii. When possible monetization strategies of non-transactional platforms may be triggered, even if such strategies are not being exploited at the time the Transaction is completed<sup>137</sup>; or
- iv. When as a consequence of the combination of certain datasets of the merging parties (e.g., databases of their consumers and their preferences), it is easier to raise barriers to entry or expansion resulting in the weakening of competition if doing so would give them a competitive advantage difficult to replicate by other actors<sup>138</sup>.

#### **i) Network effects and tipping**

105. In digital platform markets, a theory of harm considered is the one in which, as a consequence of the Transaction, it can be reasonably expected that the merged entity would acquire such a significance that, due to positive network effects, it can hardly be challenged by its rivals in the market. Such concern shall be balanced against possible efficiencies arising from the respective Transaction.

106. By the same token, the presence of economies of scale in the provision of services offered by digital platforms is also frequent. For the relevant level of sales given the size of the market, there are generally decreasing average marketing costs with respect to the units sold. This is because in these markets fixed costs are usually high, while the costs of serving an additional consumer are usually low. Thus, an increase in sales will generally entail decreasing average costs.

107. The confluence of positive network effects and economies of scale generates leads, in certain cases, to market 'tipping', which means that once a certain scale of operation is exceeded, the markets tend to concentrate and eventually become dominated by a single or dominant player.

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<sup>135</sup> These effects are beyond the scope of these Guidelines.

<sup>136</sup> Some of these operations are known as "killer acquisitions".

<sup>137</sup> In these cases, it is reasonable to assume that the parties to the Transaction will eventually exploit possible monetization strategies (through advertisers, for example), so the FNE will analyze the potential competition between the parties in monetization activities that are reasonably foreseeable.

<sup>138</sup> See case Docket No. FNE F217-2019 "*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*", p.80.

108. In some cases, the predisposition to market foreclosure or the proximity to a tipping point may be caused by a Transaction or by certain practices that limit the possibilities for users to switch platforms<sup>139</sup>. In other cases, tipping may not be related to the Transaction but to a previous market trend, which naturally converged towards the formation of a single or dominant player. In all these cases, the FNE will analyse the likelihood of any challenge to the position of the leading digital platform in the market through disruptive innovations that could be created by new players and, additionally, whether or not this likelihood is altered if the Transaction is consummated.

109. On the other hand, among the characteristics that generally favour the existence and potential growth of various players in a digital platform market are the following:

- i. Capability restrictions in the supply of products;
- ii. The possibilities of differentiation by digital platforms;
- iii. Compatibility between different digital platforms<sup>140</sup>; and
- iv. Low switching costs for consumers.

110. In this regard, the FNE will consider whether there is 'multi-homing' – i.e. where users frequently use multiple platforms simultaneously that provide the same service- or there is 'single-homing', that is, use of a platform takes place to the exclusion of others.

111. In general, if there is a relevant number of users that frequently use multiple platforms, indirect network effects will not necessarily lead to high concentration levels, since different platforms could share the common base of multi-homing users<sup>141</sup>. However, the existence of this element will not necessarily be considered as a counterweight to the concerns arising from a Transaction in digital markets. This is because the existence of multi-homing could also increase the closeness of competition between the parties to a merger.

## **ii) Use of data**

112. In the case of digital platforms, it is relevant for the competitive analysis that the information obtained through the services they provide is usually a relevant input both in the market where it is obtained, which allows improving the services offered, as potentially in other markets.

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<sup>139</sup> Changes in the ability, incentives or exclusionary effects of such practices could be effects of a Transaction that should be analyzed.

<sup>140</sup> This is, for example, the possibility of interconnecting content and applications from different platforms with each other.

<sup>141</sup> See case Docket No. FNE F217-2019 “*Adquisición de control en Cornershop por parte de Uber Technologies, Inc.*”, p.64.

113. In its analysis, the FNE may additionally assess the existence of what has been called 'big data'<sup>142</sup> and weigh the importance of this input in the ability of undertakings to compete in the market<sup>143</sup>. In cases where the data is traded in the market, the analysis will basically follow the guidelines used to analyse markets with differentiated products<sup>144</sup>.

114. There may also be horizontal effects in the strategic use of data<sup>145</sup>. For example, the FNE may analyse whether access to better data gives the merged entity a scale that, due to network effects, it can hardly be challenged by its rivals. Such concern will be counterbalanced by possible efficiencies derived from having better data.

115. In addition, the possibility of interoperating and/or jointly using databases by digital platforms that merge, in the context of a specific case, could hinder the entry or expansion of competitors to/in the market, if it generates a significant competitive advantage that is not replicable by competitors<sup>146</sup>.

116. If the Transaction enables the attainment of market power, and thus allows for the collection of an even higher amount of information via the establishment of more invasive privacy policies, a feedback effect could occur, whereby the digital platform that gains a given advantage could tend to progressively strengthen its position in the market<sup>147</sup>.

#### **D. ENTRY CONDITIONS<sup>148</sup>**

117. An undertaking's possibilities of entering a market, or of expanding via the rearrangement or repositioning of its products, as well as the conditions the undertaking faces when entering or expanding, shall be evaluated whenever, within the context of the Transaction under review, it is necessary to evaluate how certain dynamic elements of

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<sup>142</sup> For the purposes of competition law, big data is defined as the accumulation of large volumes of information that can be analysed computationally to reveal patterns, trends and various aspects of the behaviour of consumers and/or competitors or other market players.

<sup>143</sup> Such as incentives to innovate and/or improve products. In this regard, data exclusivity, the amount of data needed to enter the market, the source of the data advantage and its dynamic implications will be analysed in particular.

<sup>144</sup> Thus, in order to determine whether horizontal effects exist, the closeness of competition of the parties will be analysed with respect to the information they trade in the market (e.g., whether it is used by the same consumers and whether it has similar uses). The effects of information in other markets, in terms of conglomerate or vertical effects, are beyond the scope of these Guidelines.

<sup>145</sup> Notwithstanding the fact that the most common theories of harm regarding the strategic use of data are of a vertical nature (exclusionary effects or market foreclosure). See case Docket No. FNE F217-2019 "Adquisición de control en Cornershop por parte de Uber Technologies, Inc.", pp.78-83.

<sup>146</sup> The Antitrust Agency shall analyse the nature of the additional data to which the entity resulting from the Transaction would have access, assessing whether the same is a relevant input for the provision of the products supplied by the platform, and whether competitors – current or potential – could have access to inputs of a similar quality.

<sup>147</sup> See, case Docket No. FNE F217-2019 "Adquisición de control en Cornershop por parte de Uber Technologies, Inc.", p.79.

<sup>148</sup> As explained, the analysis of horizontal Transactions carried out by the FNE is not lineal and, consequently, in some cases, the conditions of entry into the market will be assessed as a characteristic of the industry, prior to the antitrust analysis of the Transaction.

competition – prospective reactions from current and/or potential competitors of the parties engaging in the concentration – could influence the competition scenario once the Transaction has been consummated<sup>149</sup>.

118. The assessment of entry conditions shall be conducted particularly when the FNE needs to carry out a more thorough analysis of the effects of the Transaction in the market, pursuant to section III of these Guidelines<sup>150</sup>. Specifically, if due to the analysis of the entry conditions of a given market, the FNE deems that the entry of new competitors is copulatively unlikely, timely and sufficient, this could generate sufficient competitive pressure to mitigate, or otherwise limit the competition concerns derived from a Transaction.

119. For the purpose of evaluating the likelihood, timeliness and sufficiency of entry, the FNE will especially weigh the historical evidence of market entries, in light of the market conditions that have existed at the time of each one of such entries<sup>151</sup>. Furthermore, any entry plans by undertakings that, based on their features, could be plausible candidates to enter the market, will also be considered<sup>152</sup>, along with potential expansion plans by the competitors of the merging entities or other undertakings that operate in adjacent or neighbouring markets of the resulting entity, evaluating the possibilities of its products' rearrangement or repositioning<sup>153</sup>.

120. The FNE could also assess, as indications of unfavourable entry conditions, the difficulties faced by various undertakings when entering the market<sup>154</sup> and the absence of entry in the event of a non-transitory increase in the market power of the current competitors or in the event of a significant growth of the market's size.

121. The analysis of entry conditions shall be carried out by assessing the likelihood, timeliness and sufficiency of entry.

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<sup>149</sup> Hereinafter, this section of the Guidelines will address entry conditions including expansion conditions, except when otherwise expressly stated.

<sup>150</sup> In the event that the Antitrust Agency's analysis concludes that the Transaction only has a low potential of substantially lessen competition, it may omit analysing the entry conditions of a specific market.

<sup>151</sup> See, case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", p.108.

<sup>152</sup> Whether due to holding assets necessary to participate in the industry or in adjacent or complementary markets, or due to possessing characteristics revealing the existence of sufficient incentives to enter the respective relevant market.

<sup>153</sup> See, Decision 166, rendered on November 27, 2018, by the Chilean Competition Tribunal, in case Docket No. RRE N°1-18 "*Recurso de Revisión Especial de Ideal S.A. y otro en contra de la Resolución de la FNE de 10 de mayo de 2018*", recitals 107 *et seq.*

<sup>154</sup> See, case Docket No. FNE F109-2017 "*Operación de Concentración entre Aza Participaciones SpA, Matco Cables SpA y otros.*", p.28 and case Docket No. FNE F178-2019 "*Adquisición de control de Clínica Iquique S.A. por parte de Redinterclínica S.A.*", p.107.

## 1. LIKELIHOOD OF ENTRY

122. The likelihood that a new undertaking will enter a new market will depend on the incentives for such entry to occur. The entry decision will generally be based on an assessment of the profitability that is expected from such entry, taking into account the costs in which the entrant will have to incur. Said costs include not only financial and accounting costs, but also the opportunity costs and financial risks that the entry process would entail.

123. Even when it is profitable to enter a market, difficulties or impediments for such entry can still exist. For this reason, the FNE will analyse the existence of any factors which could constitute entry barriers, insofar as they can affect the likelihood of entry of new entrants<sup>155</sup>.

## 2. TIMELINESS OF ENTRY

124. The FNE will analyse the degree of expediency and continuity associated to the entry, in order to determine whether the entry could generate sufficient competitive discipline so as to dissuade or bar the exercise of market power by the entity resulting from the Transaction.

125. For the above purposes, the FNE will assess the time that is necessary for the construction, implementation, or reactivation, as the case may be, of the specific assets that are needed to operate, and for the optimization of their use, along with the production timeframes for the products, and for reaching the necessary scale. In this regard, an assessment will be conducted to determine whether the same allow for the development, access, or reinforcement, as the case may be, of a distribution network and/or for the acquisition of a critical mass of consumers.

126. In addition, the FNE will also review the frequency with which transactions occur in the analysed market, along with the nature and remaining duration of the contracts between providers and consumers, since they can act as protection in the event of prospective price increases by the entity that results from the Transaction<sup>156</sup>.

127. Even though the maximum period of time within which the entry must occur to be deemed timely shall depend on the characteristics and dynamics of the specific market, the FNE is of the opinion that, the higher the frequency of transactions, and the shorter the remaining duration of the respective contracts, the tolerable timeframes for an entry to be considered timely shall be shorter. In general terms, the FNE does not consider timely any entry occurring within a term exceeding two years.

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<sup>155</sup> As detailed in section III.D.3 below.

<sup>156</sup> For instance, in markets where no formal contracts exist, a price increase can materialize within a very short period of time, while in markets where long-term contracts are in place, in general, no such price increases can be consummated until the existing contracts have expired.

### 3. SUFFICIENCY OF ENTRY

128. Besides likely and timely, the entry of an undertaking into a market must have a scope and extension that is sufficient in order to limit or mitigate the potential anticompetitive effects associated to the Transaction.

129. For a market entry to be deemed sufficient, the entrant must reach a scale of such magnitude so as to provoke an effective competitive pressure to the entity that results from the Transaction. The FNE will weigh any factors that affect the likelihood of a timely entry by a new competitor with a sufficient scale, such as the existence of scale economies or of economies of scope and of potential network effects, among others.

130. In markets of differentiated goods, whenever feasible, the FNE shall take into consideration the degree of closeness of competition of the products that will be marketed by the entrant competitor, in respect of those commercialized by the entity that results from the Transaction. This review is conducted because the sufficiency of the entry is not only related to the magnitude achieved by the entrant, but also to the level of closeness of competition *vis-à-vis* the resulting entity<sup>157</sup>.

131. Any evidence of a small-scale entry, or of entries in niche segments<sup>158</sup>, would not, initially, constitute sufficient entry into a market, because generally such entries are not suitable for instilling a competitive discipline that is apt to deter or prevent the anticompetitive effects of the Transaction<sup>159</sup>.

### 4. ENTRY BARRIERS

132. The FNE defines an 'entry barrier' as any factor or characteristic of the market that prevents or hinders the likely, timely and/or sufficient entry into a given market. In general terms, entry barriers can be deemed as a cost that must be incurred by an entrant, which the current competitors have already amortized and do not currently have to bear, or which they did not have to incur to enter the market in which they participate.

133. The FNE will review as entry barriers any features of the market that provide an advantage to the undertakings that participate therein, when compared to their potential competitors or of other firms in adjacent or neighbouring markets, preventing or delaying their entry, or making said entry costlier. In general, entry barriers allow for the exercise of market power by the undertakings that participate in the market, during a given period of time, by protecting them from external competitive discipline.

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<sup>157</sup> See, *supra* section III.C.1.ii) and case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", p.81.

<sup>158</sup> See, case Docket FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I, FNE Report regarding the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., pp.61-62.

<sup>159</sup> In the same sense, isolated cases of imports are also not considered as sufficient entries that are apt to provide an effective competitive restriction.

134. The FNE will analyse whether any entry barriers exist that absolutely prevent the entry into a market, and whether other barriers exist limiting or encumbering entry, by increasing the costs and effects associated to such entry.

135. Additionally, the FNE will analyse if the Transaction could create, increase or strengthen any entry barriers, considering the simultaneous influence exercised by all barriers that, jointly considered, could prevent or limit entries into the market, based on both qualitative and quantitative elements<sup>160</sup>.

136. The main entry barriers that will be considered by the FNE in its analyses of the effects of a Transaction – without the following list being exhaustive – are the following:

**i) Legal barriers**

137. ‘Legal barriers’ are any obstacles to entry the justification or source of which is a regulatory tool whose effect is to prevent the entry of new competitors, or to generate a cost advantage for the market’s established undertakings. This type of barriers can consist of legal provisions, sector-specific regulations<sup>161</sup>, intellectual property rights, administrative licenses or permits for the exercise of specific activities, among others<sup>162</sup>.

**ii) Structural barriers**

138. ‘Structural barriers’ correspond to natural barriers that an entrant must face when entering a market.

139. In this connection, the FNE will especially analyse the presence of ‘sunk costs’<sup>163</sup>. They could refer to commissioning costs (such as for the collection of market information, development and testing of product designs, installation of equipment, and establishment of distribution systems), investments in specific assets, investments in advertising and

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<sup>160</sup> For example: historical evidence and market data, such as those mentioned in section III.A. In some cases, any given factor, reviewed individually, may not be sufficient to hinder or prevent the entry of new competitors into the market.

<sup>161</sup> See, case Docket No. FNE F80-2017 “*Notificación Operación de Concentración Dow Chemical y DuPont*”, p.17.

<sup>162</sup> See, Judgment No. 56, issued on August 13, 2019 by the Chilean Competition Tribunal, in case Docket No. NC N°452-19 “*Consulta de Iberoamericana Radio Chile S.A. y otros sobre participación en concursos públicos para la renovación de concesiones de radiodifusión sonora*”, pp.24-25.

<sup>163</sup> Sunk costs are any costs that the undertaking cannot recover within a reasonable timeframe, after exiting the market.



marketing, branding<sup>164</sup>, after-sales servicing<sup>165</sup>, research and development costs, and innovation and technology costs<sup>166</sup>, among others.

140. Scale economies can also operate as an entry barrier. If a market has significant scale economies on the supply side, which have already been exploited by the undertakings which operate in the market, this could act as a deterrent for the entry of new firms<sup>167</sup>. In digital markets, the presence of scale economies, coupled with the existence of network effects<sup>168</sup> in two-sided markets<sup>169</sup>, can also impede market entry.

141. The existence of assets that are difficult to replicate in the market, whether tangible or intangible, can also be tantamount to entry barriers. Tangible assets may consist, *inter alia*, of the access to facilities or raw materials that are essential or necessary for the development of the business activity, that prevent potential entrants from successfully challenging the undertakings that are active in the market<sup>170</sup>. Intangible assets may consist, among others, of brand power<sup>171</sup> and its level of fidelity by consumers, as well as the relations that exist with suppliers and/or distributors.

142. Furthermore, the FNE will analyse the existence of other factors that could affect the likelihood, timeliness and sufficiency of the entry into a market, such as, among others, market maturity<sup>172</sup>, costs of change<sup>173</sup>, degree of demand certainty, and excess installed capacity of the industry.

### iii) Strategic barriers

143. 'Strategic barriers' are defined as any actions or credible threats that can be executed by undertakings in a given market, which are apt to hinder or limit entry into the same.

144. In its analysis, the FNE will weigh various business factors or practices that, generally speaking, can cause a decline in the entry of potential competitors, such as

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<sup>164</sup> See, case Docket No. FNE F233-20 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*", pp.84-87.

<sup>165</sup> See, out-of-court settlement under Docket No. AE-11-2015 P "*Acuerdo extrajudicial entre la Fiscalía Nacional Económica, Contitech Chile S.A. y Veyance Technologies Chile Ltda.*", p.13.

<sup>166</sup> See, case Docket No. FNE F80-2017 "*Notificación Operación de Concentración Dow Chemical y DuPont*", pp.32-33.

<sup>167</sup> See, case Docket No. FNE F97-2017 "*Notificación de la Operación de Concentración entre Bayer AG y Monsanto Company*", pp.21-22.

<sup>168</sup> See, *supra* section III.C.5.

<sup>169</sup> *Ibid.*

<sup>170</sup> See, case Docket No. FNE F108-2017 "*Fusión entre Linde Aktiengesellschaft y Praxair Inc.*", p.62.

<sup>171</sup> See, case Docket No. FNE F60-2015 "*Notificación de Operación de Concentración entre NV Bekaert S.A y Ontario Teachers' Pension Plan Board*", pp.25-26.

<sup>172</sup> See, case Docket No. FNE F220-2019 "*Adquisición de control en GrandVision NV (Rotter & Krauss) por parte de EssilorLuxottica S.A.*" Report on Competition Concerns, p.112

<sup>173</sup> See, Submission of Information by the FNE in "*Consulta de VTR Comunicaciones SpA sobre alzamiento de condiciones impuestas por la Resolución N°1/2004*", Docket No. NC-459-2019, pp.88-92.



overinvestment in installed capacity or in marketing, brand proliferation, hoarding conducts (patents, shelf space, or other inputs relevant for competing), the existence of certain non-compete and/or exclusivity clauses<sup>174</sup>, specific discount programs or brand fidelity strategies<sup>175</sup>, retroactive discount systems, and the reputation of a tough competitor as a result of the application of aggressive pricing policies, among others<sup>176</sup>.

## E. COUNTERVAILING FACTORS

145. The FNE will assess all information in its possession, especially the information supplied by the merging parties, provided to prove countervailing factors to the antitrust concerns entailed by the Transaction, in order to decide whether or not said countervailing factors suffice for the purposes of ruling out that the Transaction – once consummated – would substantially lessen competition.

146. For these purposes, among other elements, the FNE will take into consideration the potential efficiencies derived from the Transaction and the prospective counterweight to the negotiating power held by the parties that could be exercised by their customers.

### 1. EFFICIENCIES

147. Transactions may allow the merger parties to achieve various efficiencies. Whenever a Transaction, once consummated, could substantially lessen competition, the efficiencies derived therefrom could act as countervailing factors to the competition concerns associated to such Transaction.

148. However, in general, the efficiencies that could derive from a Transaction will not be deemed sufficient to mitigate the concerns of a Transaction which gives rise to the creation of a monopoly.

#### 1.1 Types of Efficiencies

149. The efficiencies that arise from a Transaction can be productive or dynamic.

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<sup>174</sup> The Antitrust Agency will analyse this type of clauses, as well as those limiting the hiring of workers from the acquired undertaking, from a temporal, material and spatial or geographic perspective. See, case Docket No. FNE F251-2020 “*Adquisición de control en Grupo Uno Salud S.A por parte de Inversiones dental Salud SpA.*”, pp.5-10.

<sup>175</sup> See, Judgment No. 43, issued on December 12, 2012 by the Chilean Competition Tribunal in case Docket No. NC N°397-11 “*Consulta de SMU S.A. sobre los efectos en la libre competencia de la fusión de las sociedades SMU S.A. y Supermercados del Sur S.A.*”, recital 9.35-9.37. See, case Docket No. FNE F216-2019 “*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*”, p.56.

<sup>176</sup> See, Judgment No. 37, issued on September 21, 2011, by the Chilean Competition Tribunal in case Docket No. NC N° 388-11 “*Consulta de CONADECUS sobre Operación de concentración entre LAN Airlines S.A. y TAM Linhas Aéreas S.A.*”, recitals 103-106.

150. 'Productive efficiencies' are efficiencies that entail cost reductions. These efficiencies could constitute a counterbalance to the detected unilateral effects, if the entity that results from the Transaction decreases its marginal costs curve to such an extent so as to limit its incentives to raise prices, when compared to the counterfactual scenario.

151. Productive efficiencies can also constitute a countervailing factor to coordination concerns, in the event that it is proven that the new costs curve of the entity resulting from the Transaction makes potential diversions from coordinated actions more profitable<sup>177</sup>.

152. Productive efficiencies are mainly expressed as synergies<sup>178</sup>, scale economies<sup>179</sup>, economies of scope and economies of density<sup>180</sup>.

153. In turn, 'dynamic efficiencies' refer to complementarities between the merging entities or other changes in the ability and/or incentives on occasion of the Transaction which give rise to the development of new or improved products<sup>181</sup>. Even though the main source for the development of innovations is each market's own competition dynamics, the FNE recognizes that Transactions can generate dynamic efficiencies, which will be analysed in their own merit.

154. In markets where the loss of dynamic competition could result in a substantial lessen of competition, dynamic efficiencies, in general, will have a higher relevance, since innovation and the continuous improvement of products are elements that constitute the same. If said efficiencies are greater than the loss of innovation stemming from the overlap of similar projects by the merging entities, then dynamic efficiencies could operate as a direct counterbalance to the concerns of loss of innovation or the strategic use of data<sup>182</sup>.

155. However, in markets where the antitrust concerns associated to the Transaction are not for the most part dynamic in nature, this kind of efficiencies generally will only constitute a countervailing factor to concerns indirectly. Indeed, a Transaction may negatively affect consumers via higher prices and, in turn, favour them by creating a corporate structure that fosters dynamic efficiencies. In these cases, dynamic efficiencies

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<sup>177</sup> Nevertheless, efficiencies could also facilitate coordination if, as a result of the same, the punishment becomes more severe. The Antitrust Agency will analyse the net effect of the efficiencies on the coordination.

<sup>178</sup> A synergy is the reduction of marginal costs for the entire production or a portion thereof of the resulting entity, derived from the Transaction. For example, this could occur as a result of complementarities, network effects, among others.

<sup>179</sup> See, case Docket No. FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I, FNE Report regarding the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., pp.32-35.

<sup>180</sup> The above as regards the treatment of productive efficiencies in horizontal Transactions. Productive efficiencies in conglomerate or vertical Transactions, such as, for example, the elimination of double marginalization, exceed the scope of these Guidelines.

<sup>181</sup> Since they generally require complementarity between the undertakings involved in the concentration, this type of efficiencies is more specific to vertical or conglomerate Transactions.

<sup>182</sup> See, section II.C.5.2 *supra*.

will be assessed by the FNE within the Transaction's global analysis and both effects will be weighed qualitatively, in light of their antitrust concerns.

## 1.2 Efficiency's requirements

156. The FNE will only measure against the Transaction's concerns the efficiencies that, copulatively, are verifiable, inherent to the Transaction, and suitable to offset the increased market power obtained by the resulting entity.

157. The existence of the efficiencies derived from a Transaction, as well as the fulfilment of each and every one of the admissibility requirements, must be argued and proven by the parties involved in the concentration<sup>183</sup>. The FNE will assess whether the invoked efficiencies fulfil the relevant requirements primarily based on the information supplied by the parties.

158. The FNE's review may determine that the efficiencies are of such magnitude that the Transaction is not suitable for substantially lessen competition. Conversely, the FNE could also conclude that the Transaction is, in fact, apt for the purpose of substantially lessen competition, if the analysed information is insufficient for proving that the invoked efficiencies fulfil the aforementioned copulative requirements.

### i) The efficiencies must be verifiable

159. The invoked efficiencies must be duly proven to the FNE by the parties involved in the concentration, via persuasive evidence that is reasonably available to such parties, both pertaining to their likelihood of occurrence as well as to their magnitude. The FNE does not consider as verifiable any efficiencies that are presented in vague, merely theoretical, or speculative terms.

160. In this regard, the parties to the concentration must provide sufficient information that describes, in detail, the productive and/or dynamic efficiencies that they expect to obtain from the Transaction, indicating the likelihood of their occurrence, quantifying them, and justifying the timeframes they have projected for their effects to materialize<sup>184</sup>. Furthermore, in order for efficiencies to be verifiable, their likelihood of occurrence must be subject to replication by the FNE<sup>185</sup>.

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<sup>183</sup> See, Decision 166, rendered on November 27, 2018 by the Chilean Competition Tribunal, in Case Docket No. RRE N°1-18 "*Recurso de Revisión Especial de Ideal S.A. y otro en contra de la Resolución de la FNE de 10 de mayo de 2018*", recital 83.

<sup>184</sup> Among the information that could be useful for the purpose of proving the efficiencies are, *inter alia*, the Transaction's relevant background information (which could shed light on the economic rationality of the same and on the prospective efficiencies), financial statements, research and development reports, business and strategic plans, integration plans, studies by consultants assessing potential efficiencies, and any other equivalent evidence supplied by the parties involved in the concentration.

<sup>185</sup> Indeed, in order for efficiencies to be replicable, the parties must provide the data they have used to calculate the estimated efficiencies. The sources and assumptions that have been used must be duly justified

**ii) The efficiencies must be inherent to the Transaction**

161. The merging parties must prove that the efficiencies they invoke are inherent to the Transaction, that is to say, that they are attributable directly to the Transaction and that they cannot be achieved via other alternatives that are less restrictive of competition, such as internal growth, temporary cooperation agreements, or other methods of cooperation among competitors<sup>186</sup>.

**iii) The efficiencies must be suitable for offsetting the increased market power obtained by the resulting entity**

162. Since the efficiencies arising from a Transaction must be suitable for mitigating the competition concerns arising therefrom, this requirement consists of proving that the efficiencies are, copulatively, sufficient, timely, and transferrable to consumers.

163. In order to be considered sufficient, the efficiencies' magnitude must be apt to counterweight the incentive of the resulting entity to increase prices as a consequence of the enhanced market power achieved as a result of the Transaction<sup>187</sup>. Thus, the higher the harm to consumers as a result of the Transaction, the higher the magnitude of the proven efficiency must be. In this regard, in the event that the concerns are founded on quantitative assessment, the FNE may deem the latter as a countervailing factor with the eventual proven efficiencies<sup>188</sup>.

164. In order to be considered timely, the efficiencies must, from a temporal standpoint, match the anticompetitive effects associated to the Transaction. Consequently, as a general rule, the longer the efficiencies take to materialize, the lower the influence that the FNE will assign to said efficiencies in its review.

165. In order for efficiencies to be considered as transferrable to consumers, they must bring about lower prices for said consumers, increase the level of quality of the offered products, result in the launching of new products in the market, or improving other

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and must also be verifiable. Nevertheless, the FNE recognized that, when dealing with estimates of dynamic efficiencies, the feasibility of providing information to facilitate their exact replication could be lower.

<sup>186</sup> This does not mean that the FNE will carry out a theoretical analysis about the various existing possibilities different from the Transaction; rather, the FNE will assess the reasonable practical alternatives, in light of the specific characteristics of the parties to the concentration.

<sup>187</sup> In order to determine sufficiency, the FNE can resort to various quantitative tools in order to assess whether the duly proven efficiencies can offset the upward pressure in prices generated by the reduction in competitive intensity between the parties. For these purposes, the Antitrust Agency may use various indexes, such as GUPPI or CMCRR, as described in paragraph 51 of these Guidelines.

<sup>188</sup> See, case Docket No. FNE F71-2016 "*Operación de Concentración entre Cementos Polpaico S.A. y Cementos Bicentenario S.A.*", Exhibit I, FNE Report regarding the Investigation of the Transaction between Cementos Polpaico S.A. and Cementos Bicentenario S.A., pp.29 et. seq.

competitive variables that are relevant for competition, under the Transaction<sup>189</sup>. Cost reductions that affect competitive variables generally occur when reductions of variable or marginal costs take place. However, reductions in fixed costs could be taken into consideration within the review of efficiencies, especially in markets with dynamic competition, if the merging entities prove the manner in which said reductions could result in benefits to consumers.

166. When the proven efficiencies benefit consumers of the same markets where the antitrust concerns have arisen, the efficiencies will be considered direct countervailing factors to such concerns. The reason for this is that the merged entity, in spite of acquiring the ability to increase its prices on occasion of the Transaction, will have less incentives to do so, as a consequence of the reduction in its costs.

167. The FNE will weigh the productive efficiencies that the parties invoke and prove, which occur in the same markets in which concerns stemming from the Transaction have been identified. Additionally, any efficiencies that the parties invoke and prove regarding products other than those in respect of which the concerns are generated, can be taken into account by the FNE when reviewing the Transaction, insofar as sufficient evidence is provided of their inherence to the Transaction and that the same are intrinsically related to the markets where the merger concerns occur.

168. Moreover, the FNE shall assess whether the invoked cost reductions derive from synergies among the undertakings seeking to concentrate, or from a re-optimization of production<sup>190-191</sup>, allocating a greater significance to the first type of efficiencies than to the second type, in light of the higher probability of them being transferred to consumers<sup>192</sup>.

## 2. COUNTERVAILING BUYER POWER

169. In addition to the competitive pressure exercised by its current and/or potential competitors, the entity resulting from the Transaction could also be disciplined, following the consummation of the Transaction, by the counterweight exercised by its customers.

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<sup>189</sup> See, Judgment No. 43, dated December 12, 2012, issued by the Chilean Competition Tribunal in case Docket No. NC N°397-11 "*Consulta de SMU S.A. sobre los efectos en la libre competencia de la fusión de las sociedades SMU S.A. y Supermercados del Sur S.A.*", recital 13.7.

<sup>190</sup> Namely, matching of the costs of the less efficient undertaking with those of the most efficient, as a result of the reorganization of production, without synergies.

<sup>191</sup> See, case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", pp.60-61.

<sup>192</sup> Likewise, the FNE will not consider as efficiencies any of those stemming from an anticompetitive reduction in the quantity or product of an anticompetitive increase in purchase power. See, Judgment No. 37, dated September 21, 2011, issued by the Chilean Competition Tribunal in case Docket No. NC N° 388-11 "*Consulta de CONADECUS sobre Operación de concentración entre LAN Airlines S.A. y TAM Linhas Aéreas S.A.*", recital 265.

170. This countervailing factor consists of certain customers of the entity resulting from the Transaction being able to exercise competitive pressure upon it, and thus countervailing its ability to raise prices, with the credible threat of substitution within a reasonable period of time. The more limited the options of suppliers for the customer to replace the resulting entity, the lower the customers' negotiating powers and their magnitude as a counterbalance.

171. This countervailing factor can be analysed from the perspective of various elements, such as the size of the customers, their commercial relevance in respect of the resulting entity, or their level of sophistication<sup>193</sup>, among others. These factors will be analysed by the FNE in their merit, in light of the market conditions.

172. In order for the customers' negotiation power to be assessed as a counterbalance of the concerns attached to the Transaction, the parties must firstly prove their dependence in respect of their customers and the customers' ability and incentive to use their countervailing power<sup>194</sup>. Indeed, it will be assumed that the higher the incidence of the product marketed by the resulting entity in its total costs, the higher the incentives of the customers to use their power to countervail.

173. Secondly, the parties must prove that the customers will be able to exercise a credible and opportune threat of foregoing the entity's products in the event of a price hike, against the entity resulting from the Transaction<sup>195</sup>.

174. The credible and opportune threat can consist of the potential substitution of the resulting entity by alternative supply sources, of the probability of implementing a unilateral impairment of the conditions of the respective supply, of the potential vertical integration of the customer's operations, or of a prospective sponsorship by the customer of the entry into the market of new competitors<sup>196</sup>.

175. At any rate, even when certain customers may exist who, on occasion of their bargaining power, could be protected against a potential price increase following the consummation of the Transaction, the FNE will nonetheless inquire whether, additionally, there are any other customers who lack such negotiating power and who could be adversely affected<sup>197</sup>.

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<sup>193</sup> See, case Docket No. FNE F218-2019 "*Fusión entre Outotec OYJ y Metso Oy*", p.25.

<sup>194</sup> In this sense, the parties' dependence will be analysed taking into account the relative size of the parties in the specific market.

<sup>195</sup> In other words, that in the event that their requests are not fulfilled, they do, in fact, have the ability and the incentives to carry through with said threat, having alternative suppliers who are able to deliver their products under identical quality and quantity terms and conditions, and that the execution of the threat shows results within a reasonable timeframe, depending on the specific dynamics of the supply, the productive process and the particular market.

<sup>196</sup> With the necessary financial resources and a sufficient period of time for such vertical integration. See case Docket No. FNE F70-2016 "*Notificación de Operación de Concentración entre Komatsu America Corp. y Joy Global Inc.*", p.4.

<sup>197</sup> See case Docket No. FNE F233-2020 "*Fusión entre Fiat Chrysler Automobiles N.V. y Peugeot S.A.*" pp.107-108.



## F. FAILING FIRM DEFENCE

176. The parties involved in the concentration may invoke the failing firm defence before the FNE, in order to rule out the occurrence of any of the concerns arising from the Transaction.

177. The failing firm defence will be admissible in the event that the undertaking involved in the Transaction is in such a state of financial distress that, should the Transaction not be consummated, it could be reasonably foreseeable that the firm would immediately and irrevocably exit the market and abandon its assets, in spite of reasonable efforts having been deployed to preserve them in a manner that was less burdensome for competition than the intended merger or concentration<sup>198</sup>.

178. In order to successfully attempt the failing firm defence, the merging entities must prove that the following copulative requirements have been fulfilled:

- i. The allegedly failing firm, as a consequence of its financial struggles, will be forced to exit the market in the near future, unless it is acquired by another entity<sup>199</sup>;
- ii. The firm's critical financial scenario will make inevitable the exit from the market of the undertaking's assets, both tangible and intangible<sup>200</sup>; and
- iii. There is no alternative option that can be less harmful to competition than the Transaction, even though good faith efforts have been deployed to find alternatives<sup>201</sup>.

179. The parties to the concentration must provide the FNE with compelling background information so that the FNE can ascertain that the requirements of the failing firm defence have been properly fulfilled.

180. If the requirements are met and the failing firm defence is feasible, then the Transaction's prospective analysis of the Transaction will be amended. The above, because the FNE will consider that the deterioration of the market's competitive structure is not an effect that is inherent or attributable to the Transaction, but, rather, that such deterioration

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<sup>198</sup> This circumstance must be an event of certain occurrence, and not a mere probability. See, case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", pp.64-65.

<sup>199</sup> Among others, an element that could prove the exit from the market in the near future is the circumstance that the firm's reorganization would not be economically and/or legally feasible, or that the only way forward would be the winding-up of the undertaking, pursuant to the terms of Law No. 20,720 on Insolvency and Re-Entrepreneurship, enacted on January 9, 2014, which replaced the existing bankruptcy system for a reorganization and winding-up statute for companies and individuals, or the law that replaces the same.

<sup>200</sup> See, case Docket No. FNE F216-2019 "*Adquisición de activos de Inmobiliaria y Administradora CGL Limitada por parte de Compañía de Petróleos de Chile COPEC S.A.*", pp.66-67.

<sup>201</sup> Ibid.

would have occurred to the same or to a greater extent even without the Transaction, causing the failing firm and its assets to exit the market<sup>202</sup>.

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<sup>202</sup> The same requirements for the admissibility of the failing firm defence could apply in cases where the entity targeted in the Transaction is a unit that is a member of or belongs to an undertaking, which could be qualified – autonomously and in and of itself – as a failing firm, should the requirements be fulfilled. In such a scenario, the fulfilment of the requirements will be specifically focused in defining whether the cost allocation criteria duly reflect the unit's economic costs, and whether the losses faced by the unit, cannot be economically justified by other benefits obtained by the undertaking or its business group, such as, for instance, additional sales in related markets.