

## **GUIDANCE ON PRE-NOTIFICATIONS OF CONCENTRATIONS**

### **I. Introduction**

1. The notification of a merger or concentration<sup>1</sup> before the Competition Agency (*Fiscalía Nacional Económica* or “**FNE**”, for its initials in Spanish) can give rise to legitimate substantial and procedural doubts.
2. The FNE allows for and promotes that, prior to notifying a merger or concentration, the undertakings that are contemplating such merger or concentration (“**Parties**”), may contact the Mergers Division (“**Division**”) in order to put forth any queries prior to the notification (“**Pre-Notification**”).
3. The purpose of the contact between the FNE and the Parties during the Pre-Notification is to enable a more timely and complete notification, in order to avoid errors and/or omissions that could cause a lack of completeness of the form and/or affect the course of the investigation to be executed by the Division. Likewise, the purpose of Pre-Notification is to analyse any circumstances under which notifying a transaction would not be required, because the transaction would not be legally considered a concentration pursuant to article 47 of DL 211 or for the purpose of reviewing the criteria to calculate merger control thresholds set out in article 48 of DL 211, among others.
4. Indeed, via Pre-Notification, the FNE aims to establish a voluntary, informal, cooperative and confidential stage, pursuant to the terms of Title IV of DL 211, the objective of which is to resolve any specific questions or doubts, substantial and/or procedural, that may be constructively addressed between the FNE and the Parties.
5. Through Pre-Notification, the FNE ultimately seeks to establish a stage that will enable the merger control system in our country to be as expedient and effective as possible.
6. The purpose of this document is to provide clarity about the way in which Pre-Notification will take place. More specifically, this document seeks to set out guidelines for the Parties as to how to participate during this stage and what they can expect from it, as well as to outline the means through which the Division will manage Pre-Notification and provide answers to the Parties’ queries (“**Guidance**”).

#### **I.1 General matters pertaining to Pre-Notification**

7. Pre-Notification is voluntary and is initiated exclusively by the Parties; it is the Parties’ decision to raise before the Division any queries in connection with the notification of a concentration prior to the relevant filing. The filing of any such queries in Pre-Notification does not prevent the Parties from subsequently filing the relevant notification, as per the terms set forth in the law, at any time deemed pertinent.
8. Pre-Notification is informal, because it is not subject to any specific formalities besides the guidelines set out in this Guidance. For this reason, and based on the experience acquired by the FNE during the time the merger control system has been in place, it

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<sup>1</sup> Pursuant to Title IV of Decree with Force of Law No. 1 of year 2004, issued by the Ministry of Economy, Development and Tourism, which establishes the consolidated, coordinated and systematized text of Law Decree No. 211 of year 1973 and its subsequent amendments (“**DL 211**”).

would be advisable, during Pre-Notification stage, to involve the Parties' legal and/or business representatives, in addition to their legal and/or economic advisors, so as to clarify in a more expedient way the specific doubts or questions, in light of their more thorough understanding of the relevant markets which could be affected.

9. However, if during a Pre-Notification a party appears on behalf of a third party, filing queries or claims which could entail a written statement under this Guidance<sup>2</sup>, the proper accreditations or legal capacity to act as a representative shall be duly attested, according to article 22 of Administrative Procedure Law (Law No. 19,880).
10. Pre-Notification is a collaborative stage, aimed at any queries to be filed in the most efficient manner and for said queries to be resolved within the shortest possible period of time, depending on their complexity.
11. Pre-Notification shall be confidential, pursuant to the terms of DL 211. Its existence, the scope of the relevant transaction, and the queries submitted in the context thereof shall not be disclosed by the FNE and its officials – except if the Parties grant their explicit consent – until the time of the notification, if any such notification is ultimately filed<sup>3</sup>.
12. Pre-Notification envisages an officer in charge of the Pre-Notification, who is an official belonging to this Division, who shall be entrusted to answer – whether by him/herself or jointly with other officials of the Division, as the case may be – the queries filed prior to the notification of a merger or concentration (“**Pre-Notification Officer**”). The FNE will duly disclose the Pre-Notification Officer's contact information on its website<sup>4</sup>.
13. However, regarding certain queries – particularly, but not exclusively, whenever a draft notification form is submitted for the FNE's preliminary review<sup>5</sup>– the Head of the Mergers Division of the FNE will appoint a team (“**Pre-Notification Team**”), composed of one or more attorneys and/or economists of the Division, who will be directly in charge of solving any submitted queries. To the extent possible, the Pre-Notification Team shall be staffed by the same individuals who will analyse the concentration or merger, once the same has been notified, if such notification ultimately takes place.
14. With the exception of the Division's statements issued concerning the legal qualification of a transaction<sup>6</sup>, any opinions issued by the FNE during the Pre-Notification stage will be informational and issued to provide guidance. Notwithstanding the fact that the FNE will take into consideration the opinions presented to the Parties in the statements or resolutions that it must issue under Title IV of DL 211, any such opinions will not irrevocably compromise any of its future decisions.

## I.2 Objective of Pre-Notification

15. The purpose of Pre-Notification stage is to resolve any specific questions or doubts

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<sup>2</sup> Pursuant to paragraph 28 of this Guidance.

<sup>3</sup> At which time the confidentiality will be governed by the general rules applicable to all concentrations notified to the Division, pursuant to Title IV of DL 211, to article 39 letter a) of the same, or to any other applicable rule.

<sup>4</sup> <<https://www.fne.gob.cl/fusiones/pre-notificacion/>>.

<sup>5</sup> Pursuant to section II.2 of this Guidance.

<sup>6</sup> Pursuant to paragraph 28 of this Guidance.

that the Parties may have regarding certain substantial or procedural matters pertaining to a potential notification of a specific merger or concentration. Consequently, this stage is not meant for the FNE to provide solutions to queries relating to theoretical or general questions or doubts, which are not related to a merger or concentration that is actually and specifically contemplated.

16. For example, and without limitation, the Pre-Notification has been established in order to discuss and/or analyse the following issues:
- i. Whether or not the transaction can be legally qualified as a concentration, pursuant to article 47 of DL 211.
  - ii. The Parties' real and serious intention to enter into a concentration.
  - iii. The means through which the concentration will be consummated, in connection with article 47 of DL 211.
  - iv. The timing for the consummation of a concentration.
  - v. The existence or inexistence of interrelated and/or successive transactions.
  - vi. Geographical link of the concentration with Chile.
  - vii. Criteria to add sales, for the purposes of calculating the thresholds, as per article 48 of DL 211.
  - viii. Existence or inexistence of product or geographical overlaps.
  - ix. Difficulties in the definition of relevant markets.
  - x. Scope and type of information that must be submitted under the Regulation on the Notification of Concentrations ("**Regulation**")<sup>7</sup>.
  - xi. Admissibility of the simplified notification mechanism.
  - xii. Admissibility of any information waiver or relief.
  - xiii. Voluntary submission of information.
  - xiv. Any other matter that could hinder the Parties' submission of a notification or any act aimed at preventing potential errors or omissions by the Parties within the context of a notification.
17. Additionally, during this stage, the Parties are entitled to be heard and to put forward before the FNE certain substantial matters related to a specific concentration which will be notified. Among these matters are potential competition concerns that, preliminarily, in the Parties' judgment, could be attached to the contemplated merger or concentration; the potential offering of mitigation measures for any concerns that, preliminarily, in the Parties' judgment, could be associated to the contemplated concentration; or the eventual filing of the failing firm defence by the Parties. Considering the preliminary nature of this stage, the foregoing will not necessarily involve any feedback by the FNE.

## **II. Types of Pre-Notification**

18. The Parties must approach the FNE reasonably in advance prior to the date foreseen for the respective notification, considering the complexity of the query and the magnitude of the contemplated concentration. Specifically, any document submitted before the Division must be filed sufficiently in advance before any meetings or other contacts held in this connection, so as to allow the FNE to properly analyse the relevant

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<sup>7</sup> Approved via Supreme Decree No. 33 of the Ministry of Economy, Development and Tourism, issued on March 1, 2017, published in the Official Gazette on June 1, 2017, or whichever other regulation amends or replaces the same.

information in respect of which guidance has been requested.

19. The queries filed prior to the notification can have various degrees of complexity and/or may require different types of guidance. For this reason, it is possible to distinguish two categories of Pre-Notifications, depending on the nature of the query: (i) Pre-Notification pertaining to simple questions; and (ii) Pre-Notification pertaining to complex questions and draft notification forms.

## II.1 Pre-Notification pertaining to simple questions

20. Simple questions are any queries which can be easily resolved and can be answered within a short period of time, whether because they refer to eminently formal aspects of the notification, or because the relevant criterion has already been defined in the forms or guidelines issued by the FNE, such as doubts regarding the validity of a representation, formalities which must be fulfilled by certain documents submitted jointly with the notification, or the method for calculating the thresholds set out in article 48 of DL 211, among others.
21. Simple questions shall be formulated and answered remotely, via telephone, or via videoconference. For such purposes, the Parties must contact the Pre-Notification Officer, who may appear with another attorney and/or economist, if deemed pertinent, and schedule a conference with the Pre-Notification Officer, via e-mail, to the address **pre-notificacion@fne.gob.cl**, specifying the subject matter of the query, the legal entity or individual on whose behalf the query is being submitted, and briefly describing the contemplated transaction and its structure. The FNE will strive to provide the relevant answers to simple questions during the same phone conference or videoconference, except if due to the matter of the query, a further review or revision by the Head of the Mergers Division is required, in which case the answer will be supplied within a short timeframe, which cannot exceed five business days.
22. If the FNE is of the opinion that the filed query is not a simple question, because by its nature further background information or additional time are required to resolve the same, this circumstance shall be duly informed to the Parties and the question shall be processed in the manner detailed below.

## II.2 Pre-Notification pertaining to complex questions and draft notification forms

23. **Complex questions.** Complex questions are defined as any questions which, in order to be answered, require a more detailed analysis of the characteristics of the concentration that the Parties intend to notify. For example, and without limitation, complex questions are any queries relating to whether or not the contemplated transaction can be legally qualified as a concentration, whether the ordinary or the simplified notification form applies, whether or not overlaps exist in the product or geographic relevant markets, and whether or not the background information that the Parties intend to submit abide by the requirements set out in a specific section of the Regulation, among others.
24. **Requirements of the request.** The question must be submitted in writing before the Pre-Notification Officer, via e-mail, to the address **pre-notificacion@fne.gob.cl**. With regard to any complex questions that do not attach a draft notification form, the Parties must include the following information:

- i. A summary of the contemplated merger or concentration;
  - ii. The identification or specification of the Parties;
  - iii. The Parties' economic activity; and
  - iv. The specific query for which an answer is being requested. For example, and without limitation, the Parties can mention any opinions held by the Parties themselves, along with the legal and/or economic rationale thereof.
25. **Draft notification form.** Likewise, the Parties are entitled to submit a draft notification form, along with any relevant exhibits. In the same notice, the Parties must indicate the specific matters of the draft notification form that they are submitting to the FNE's preliminary review, specifically detailing the Regulation's requirements which give rise to the Parties' doubts.
26. **Processing and deadlines.** Once the query has been received in accordance to the aforesaid terms, the FNE will label it with an internal Pre-notification docket number, and a meeting, videoconference or telephone conference will be scheduled with the Parties within a maximum term of five administrative business days, in order to discuss the queries contained in the request. If a draft notification form is submitted for the purposes of clarifying specific doubts, the timeframe shall range between five and ten business days. Exceptionally, the aforementioned deadlines may be extended to a maximum of 15 business days, should it be necessary for conducting an adequate analysis of the query, in light of its extension and/or complexity. This circumstance will be duly notified to the Parties by the Pre-Notification Team, once the information has been received.
27. **Further proceedings and information.** The FNE shall answer the complex questions and any other queries regarding the specified section(s) of the draft notification form with the background information submitted by the Parties. In any event, and if deemed necessary to resolve a certain query, the FNE may advise the Parties to submit additional information, but the Parties may voluntarily decide whether or not to supply the same.
28. **Answer by the FNE and statement.** The FNE shall present to the Parties – in one or more meetings – the answer deemed most adequate for the submitted queries, provided that the FNE considers that it has obtained all the information that is necessary, truthful and complete to issue such an answer. Regarding the Parties' queries pertaining to whether or not the transaction can be legally defined as a concentration under article 47 DL 211, the Parties may request the FNE to issue a written statement, the scope of which shall be limited exclusively to the described transaction and to the documents submitted by the Parties and to those analysed by the FNE in Pre-Notification<sup>8</sup>.
29. **Abandonment.** The Pre-Notification procedure shall be deemed as abandoned if the Parties fail to submit the information requested to them by the Pre-Notification Team in order to resolve their query, or if they fail to execute any actions during a term of 30 business days, an outcome of which the Parties shall be duly warned about by the Pre-Notification Officer. If the Parties intend to continue with the Pre-Notification procedure after the aforesaid term has

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<sup>8</sup> Consequently, any such statement will not encompass any potential substantial amendments to the transaction, under the terms of the FNE's Competition Guidelines, dated June 2017, section IX.A, § 116 and 117.

expired, they must fulfil the formalities set forth in the Guidance, as if they were filing an entirely new Pre-Notification.

### **III. Information waiver or relief requests**

30. Pre-Notification queries may be accompanied by waiver requests –or drafts thereof– filed in accordance with the provisions of the Regulation. If the Parties claim that the information is not necessary, relevant or pertinent for the analysis of the transaction, the request must necessarily attach a draft notification form.
31. The FNE will seek to answer the waiver request that has been filed within the shortest possible timeframe and, generally, will do so within a term of five business days. If the waiver request is filed jointly with a draft notification form, the timeframes or deadlines set out section II.2. above shall apply.
32. In any event, the submission of an information waiver or relief request shall not impede the parties from notifying the merger or concentration at any time, following such request. If the transaction is notified while the information waiver request is still pending reply, the FNE shall resolve the same simultaneously when issuing the resolution ordering the initiation of an investigation or, in lieu thereof, when issuing the resolution that declares that the notification is incomplete, pursuant to article 50 of DL 211.