CREEL GARCÍA-CUÉLLAR AIZA Y ENRÍQUEZ

Mexico City, April 9, 2021

New Merger Notification Guidelines

On April 8, 2021, the Federal Economic Competition Commission ("COFECE"), issued new Merger Notification Guidelines (the "New Guidelines").

As with the previous guidelines, the purpose of the New Guidelines is to facilitate the merger notification procedure before COFECE, as well as to provide greater certainty to economic agents as to how COFECE analyzes concentrations.

The New Guidelines, among its most relevant changes, added the following:

1. *Collaboration agreements between competitors (joint ventures)*. Given that in some cases agreements between competitors may have elements that can be characterized as *concentration*, for the first time COFECE issues parameters[1] to determine whether a collaboration agreement between economic agents (e.g., joint venture) is susceptible to be analyzed as a concentration, which would have to be notified if the relevant monetary thresholds are reached. Thus, collaboration agreements could fall within the scope of concentrations considering:

   (i) That the term (duration) is permanent or long term;

   (ii) If they involve the creation of a new entity with functional and operational autonomy and/or if the entities involved lose certain degree of independence;

   (iii) That the scope of the collaboration agreement should not reduce the competitive pressure between the parties in other markets or activities outside the collaboration agreement; and,

   (iv) If competition between the players disappears completely in a market, it is considered an indicator of a concentration.

   As a reference, these New Guidelines include a list of the most common types of collaboration agreements between economic agents depending on their purpose and includes elements to determine whether they are a concentration or not, and when it is the appropriate time to notify them before COFECE.[2]

   Furthermore, it states that the projected contributions in a collaboration agreement can be used for the analysis of monetary thresholds.

2. *Treatment of previous transactions that were not notified.* The New Guidelines include a section explaining the consequences and a summary of the procedure to be followed for those transactions that should have been notified to COFECE before their execution.

3. *Clarifications regarding threshold calculations.* Regarding threshold calculations to determine whether or not to notify a concentration before COFECE, the New Guidelines include clarifications such as:

   (i) What should be considered to calculate the value of a concentration. For example, it is clarified that: (i) for purposes of the analysis of the obligation to notify, any tax concept should be

considered; or (ii) in the case of capital reductions, the thresholds assessment would only be relevant if such reduction involves the acquisition of control by any shareholder, over the target;

(ii) In the case of series of transactions that could reach any of the thresholds, it is recommended to follow a conservative approach and notify the transaction "*before any of the thresholds is met*"; and

(iii) It is clarified that there is no series of transactions or succession of acts when there are several acquisitions over time, but there is no identity of sellers and targets.

(iv) To determine the *accumulation* of assets or shares in Mexico (as set forth in thresholds II and III of Article 86 of the Law) COFECE will consider the joint accumulation of all entities signing the relevant transaction document, regardless of whether they belong to different corporate groups, under certain exceptions (i.e., that entities involved belong to different corporate groups and the transaction is not a result of a joint or coordinated negotiation among the buyers).

4. *Companies in a failing firm situation.* For economic agents with a precarious economic situation (*failing firm*), the New Guidelines recommend:

(i) To include documentation demonstrating the imminent risk of exit from the market and that there are no other plausible solutions;

(ii) To demonstrate that the acquirer can mitigate the problem, that reasonable efforts were made to find other acquirers and/or that there are no alternative acquires; and

(iii) Submit financial information demonstrating that the financial situation is permanent, as well as submit financial projections or reports from external auditors, presentations to investors, among others.

5. *Notifying Parties and related information.* Regarding the notifying parties, as well as the information required from each of them for a notification of concentr ation, the New Guidelines include, among others, the following clarifications:

(i) It is clarified that, in those cases in which there are several acquirers, it is not necessary for the minority acquirers to appear provided that (a) individually they do not meet the thresholds; and (b) the transaction does not arise from a joint negotiation or a coordinated acquisition between acquirers;

(ii) Clarifies that, in the case of economic interest groups, the Commission may require any member to join (appear) in the notification; and

(iii) It is established that it will not be necessary for an investment fund to provide information about its limited partners, provided that the limited partner holds less than 20% of the fund and does not have the right or capacity to participate, interfere or influence, directly or indirectly, in decisions related to the business plan, annual budget, appointment or removal of the fund manager or the fund's investments or, in general, in the fund's operating activities.

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1 These include duration, independence and scope.
2 For example, prior to the incorporation of the new economic agent or before the agreement takes effect, depending on the case.

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