Guide for the notification of concentrations

July 2021

Cofece

Comisión Federal de Competencia Económica

CONTENT

AGREEMENT BY MEANS OF WHICH THE BOARD ISSUES THE GUIDE FOR THE NOTIFICATION OF CONCENTRATIONS

Based on articles 28, paragraphs fourteenth, twentieth, section IV, and twentieth first, of the Political Constitution of the United Mexican States; 12, section XXII, last paragraph, subsection b) and 138, section III, of the Federal Economic Competition Law (LFCE); 1, 4, section I, 5 section XIII, 6, 7, 8, of the Organic Statute of the Federal Economic Competition Commission in force (Statute); as well as the "*Agreement by means of which the Board authorizes the celebration of remote sessions by virtue of the existing contingency in health matters and certain articles of the Guidelines for the functioning of the Board are repealed*";[1] the Board of the Federal Economic Competition Commission (Cofece or Commission), in ordinary session held the twentieth fifth of February of two thousand twenty one, manifests its conformity for the issuance of the present agreement.

WHEREAS

1. Article 12 of the LFCE, section XXII, last paragraph, subsection a), states that it is an attribution of Cofece to issue directives, guides, guidelines and technical criteria, prior public consultation, in the terms of article 138 of the LFCE, in concentrations matters, whose excerpt shall be published in the Federal Official Gazette (DOF); for its part, the Statute establishes in its article 5, section XIII, the power of the Board to issue directives, guides, guidelines and technical criteria for the effective fulfillment of its attributions;
2. The ninth of October of two thousand fifteen, the Board of Cofece issued the Guide for the Notification of Concentrations with the purpose of effectively complying with the objective of Cofece and guaranteeing free competition and market access, as well as preventing, investigating and fighting monopolies, monopolistic practices, unlawful concentrations and other restrictions to the effective functioning of the markets; the twentieth of April of two thousand seventeen, the Board of Cofece issued modifications to the foregoing guide;
3. Article 138 of the LFCE, in its last paragraph, states that directives, guides, guidelines, and technical criteria referred to in that article, shall be reviewed at least every five years, in accordance with that set forth in article 12, section XXII, of the LFCE;
4. Resulting from this review, the twentieth second of October of two thousand twenty a public consultation procedure began, with the publication in the DOF of the excerpt of the draft of the present document, in compliance with article 138, section I, of the LFCE; such consultation procedure concluded the fourth of December of two thousand twenty, whereby Cofece published the eighteenth of December of the same year on its website, the report referred to in article 138, section II, of the LFCE.

Therefore, the Board of this Commission:

AGREES:

FIRST.- The Guide for the Notification of Concentrations is issued, in the following terms:

1. Issued by the Board of this Commission the twenty-sixth of March two thousand twenty, published in the Federal Official Gazette the thirty first of March two thousand twenty.

GLOSSARY

Cofece or Commission	Federal Economic Competition Commission
Constitution	Political Constitution of the United Mexican States
DOF	Federal Official Gazette
Regulatory Provisions	Regulatory Provisions of the Law
DGC	General Directorate of Concentrations
Statute	Organic Statute of the Federal Economic Competition Commission
Guide	Guide for the Notification of Concentrations
LFCE or Law	Federal Economic Competition Law
Board	Board of Commissioners of the Federal Economic Competition Commission
Judicial Power	Judicial Power of the Federation
SCJN	Supreme Court of Justice of the Nation
NAFTA	North American Free Trade Agreement
UMA	Unit of Measurement and Update

1. Introduction

The present Guide provides information and an explanation about the concepts, regulation and procedures associated with the notification of concentrations, with the purpose of aiding Economic Agents in the filling of this procedure.

This Guide does not constitute a binding document, nor does it issue technical criteria or directives in the filing of the procedure that is processed before Cofece. However, this document reproduces the operational practice currently observed by the Commission in the processing of a concentration notification, and therefore constitutes a tool that provides greater transparency and certainty to Economic Agents regarding this procedure. Indeed, the operational practice may be modified in response to the accumulated experience as these matters are processed over time. In this context, the Guide has a dynamic nature and will be subject to continuous review, in order to remain consistent, at all times, with the practice of the Commission regarding concentrations.

Lastly, the present guide contains information about the analysis of the concentrations that are conducted in relation to the economic activities found within the scope of competence of Cofece and that are notified before this authority, in accordance with articles 28, paragraph sixteenth, of the Constitution and 5 of the LFCE.

2. Concentrations

Article 61 of the LFCE defines a concentration as:

> *"**Artícle 61.** For the effects of this Law, it is understood as a concentration the merger, acquisition of control or any act by virtue of which companies, associations, shares, social shares, trusts, or assets in general are united that is carried out between competitors, suppliers, clients or any other economic agents. The Commission will not authorize or as the case may be will investigate and sanction those concentrations whose object or effect is to reduce, damage, or prevent competition and free market access with respect to goods or services that are the same, similar or substantially related."*

Below, the Guide explains this provision.

2.1. Merger

A merger is a contract by which two or more companies are combined and form a new one, or by which one of them is terminated and is absorbed by the one that remains, incorporating the latter into the former.

With a merger both assets and liabilities are transferred to the merged company or companies to be incorporated into another preexisting company called the merging company, or, to a new company. Therefore, a merger implies a form of dissolution without liquidation, by virtue of which, the company that subsists or the one resulting from the merger becomes the new holder of the rights and obligations of the merged companies.[2]

2.2. Acquisition of control

The LFCE does not contain an explicit definition of control. However, the SCJN has stated that an Economic Agent can exercise a decisive influence or control over others to act on the markets, either as a consequence of legal acts (*de jure*) or in facts or practice (*de facto*).

De jure control can occur in several forms, such as:

a. An Economic Agent, directly or indirectly, owns or holds the majority of shares or social shares of a company or a percentage of direct or indirect participation that allows it to unilaterally impose decisions in assemblies;
b. There is capacity to direct or manage another by virtue of a contract, agreement, long-term supply agreements, the granting of credits or when the commercial activities of one or several companies are predominantly carried out with another or predominantly depend on another, in such a way that it exercises a real power and a decisive or significant influence over the former;

2. See: i) Articles 222 to 226 of the General Law of Commercial Companies; ii) Judicial Weekly Publication of the Federation and its Gazette, Volume XIX, Collegiate Circuit Tribunals, Isolated Thesis I.11°.C .90 C, ninth period. Page 1624. March 2004. COMMERCIAL COMPANIES. THE ACQUISITION OF ONE OR SEVERAL CREDITS AS A CONSEQUENCE OF THE MERGER, SHALL NOT BE INTERPRETED AS A TRANSFER OF THESE; iii) Judicial Weekly Publication of the Federation and its Gazette, Volume XVII, Collegiate Circuit Tribunals, Isolated Thesis VI.2°. C. 240 C, ninth period. Page 1116. April 2003. SPECIAL POWER. THE ONE GRANTED TO SUE A COMMERCIAL COMPANY, IF IT IS MERGED INTO ANOTHER ONE, CAN BE USED TO PROSECUTE THE MERGING COMPANY; iv) Judicial Weekly Publication of the Federation and its Gazette, Volume XVI, Collegiate Circuit Tribunals, Isolated Thesis XII.2°.24 C, ninth period. Page 499. November 1997. LEGAL PERSONALITY, THE INCORPORATION OF A CREDIT INSTITUTION INTO A FINANCIAL GROUP DOES NOT CAUSE THE EXTINTION OF; and v) Judicial Weekly Publication of the Federation and its Gazette, Volume XV, Circuit College Tribunals, Isolated Thesis XVI.3°.1. C, ninth period. Page 1352. March 2002. MERGER OF COMMERCIAL COMPANIES. THE MERGED COMPANIES, UPON BEING EXTINGUISHED, LOSE THEIR LEGAL PERSONALITY.

c. There is the capacity or right to appoint the majority of the members of the board of directors or equivalent body of other;
d. There is the capacity or right to appoint high-level directors such as directors, managers, relevant managers, or principal factors of other; or
e. There are ties of kinship by consanguinity or affinity between Economic Agents which exert control over one or several legal persons.

On the other side, the analysis of de facto control must address not only the level of shareholding participation in cases where no partner has an absolute majority, but also the possibility that a minority partner can obtain majority in the assemblies due to the level of attendance; the position of the other shareholders (dispersion, as well as structural, economic, or family ties with the main shareholder); and the financial interest.

In this regard, in matters of economic competition, the Judicial Power has also resolved that the control exerted by a legal person can be real or latent:

"(...) the control can be real if it refers to the effective conduction of a controlling company towards its subsidiaries, or, latent when there is a potential possibility to conduct it through persuasive measures that can occur between the companies even when there is no centralized and hierarchized legal link, but there is a real power". [3]

Considering that there is a multiplicity of ways in which an Economic Agent can acquire control over another, in each case, the parties must analyze whether a specific operation gives one of them control, which is the capacity to decide over the entirety or part of an Economic Agent's activities.

In addition, there are other regulations in the Mexican legislation which define the concept of control. Such as, for example, the Securities Market Law, which although is not a supplementary law of the LFCE, it does provide in its article 2 a definition of control from the corporate point of view which is consistent with the practice of the Commission and constitutes a reference for Economic Agents in matters of economic competition:

"III. Control, the capacity of a person or group of people, to carry out any of the following acts:
a)Impose, directly or indirectly, decisions in the general assemblies of shareholders, of partners or equivalent bodies, or appoint or dismiss the majority of the board members, administrators or their equivalents, of a legal person.
b)Maintain the ownership of the rights that allow, directly or indirectly, to exercise the vote with respect to more than the fifty percent of the share capital of a legal person.
c)Lead, directly or indirectly, the administration, the strategy or the main policies of a legal person, either through the ownership of securities, by contract or any other way."

3. "ECONOMIC INTEREST GROUP. ITS CONCEPT AND ELEMENTS WHICH INTEGRATE IT IN MATTERS OF ECONOMIC COMPETITION". [J]; 9a. period; T.C.C.; and its Gazette; Volume XXVIII, November 2008; Page 1244. I.4o.A. J/66.

In addition, the provisions of the Regulations of the Industrial Property Law are useful, which establish:

> *"**Artícle 55.**- (...)*
> *For the effects of that provided in the preceding paragraph, shall be understood as control, the capacity to adopt the general business decisions or administrative decisions on the daily operation of the legal persons in question. It is included in this assumption the indirect control that is exercised through interposed person or successive interposed persons.*
> *It will be presumed, that the control referred to in the first paragraph exists, among other cases, in the following:*
> *I.- When a person is owner or holder of shares or social shares, with full voting rights, that represent more than 50% of the share capital of another person;*
> *II.- When a person is owner or holder of shares or social shares, with full voting rights, that represent less than 50% of the share capital of another person, if there is no other shareholder or partner of the latter that is owner or holder, at the same time, of shares or social shares, with full voting rights, that represent a proportion of the share capital equal to or greater than that represented by the shares or social shares owned or held by the former;*
> *III.- When a person has the power to direct or manage another one by virtue of a contract;*
> *IV.- When a person has the capacity or right to designate the majority of the members of the board of directors or any equivalent body of another, and*
> *V.- When a person has the capacity or the right to designate the director, manager or main factor of another."*

For the effects of the analysis in matters of control, the Commission may take into account, in addition to the aforementioned elements, the manner in which the exercise of corporate rights within a company is expected to occur, such as whether there is shared control, veto rights, matters that require unanimous decisions, among others.

2.3. Acquisition of assets and other acts of concentration

In addition to the merger and the acquisition of control, the LFCE considers the acquisition of assets as an act that implies the realization of a concentration; this is when by any act or succession of acts companies, associations, shares, social shares, trusts, or assets in general are joined. These acts could include but are not limited to donations or inheritances that involve productive assets or shares, transfer of rights, lease contracts,[4] among others.

Likewise, the definition of concentration includes acts that do not necessarily mean obtaining control through shareholding or that do not derive from an act of transfer of assets or shares, but that do have analogue effects, as is the case of some collaboration agreements between competitors, as explained in the following numeral.

4. In virtue of the lease contract the lessee is granted personal rights of use or temporary enjoyment of an asset. On their own, these contracts cannot be considered as a concentration, except on certain occasions with an extended temporality that allows structural changes to take place in the market.

2.4. Collaboration agreements between economic agents or *Joint Ventures*

Unlike the legal frameworks present in other jurisdictions, in Mexico there is no legal figure that grants exemption from the enforcement of the LFCE to collaboration agreements between competitors. Therefore, when an agreement of this type is notified as a concentration, the Commission verifies whether there is any element that allows to place the act within what is set forth in article 61 of the LFCE. For example, if the agreement involves the participation of two or more Economic Agents in an economic activity, if it provides the possibility of intervention of an Economic Agent in the strategic direction or the appointment of board members or officers of another agent and/or if it involves the de facto transfer of physical control of tangible or intangible assets (for example, trademarks) or the possibility of deciding on them, among other aspects.

In this way, in addition to contemplating mergers and acquisitions, article 61 of the LFCE provides that it shall be understood as a concentration any act by virtue of which companies, associations, shares, social shares, trusts, or assets in general are combined that is carried out among competitors, suppliers, clients or any other Economic Agents. Thus, in light of Article 61 of the LFCE, certain collaboration agreements between competitors, usually referred to as Joint Ventures may qualify as a concentration, inasmuch as they involve the combination of two or more economic agents to jointly conduct economic activities, either contractually or through some vehicle with legal personality, in the latter case through which said agents will make contributions and jointly participate in profits and losses.

These agreements can occur between Economic Agents that are not competitors and also between those that are. Collaboration agreements between current or potential competitors can be considered as concentrations and analyzed as such, except in the case of contracts, agreements, arrangements, or combinations between competing economic agents whose purpose or effect is any of those indicated in article 53 of the LFCE.[5,6] To determine whether a collaboration agreement between economic agents is susceptible to being analyzed as a concentration, it is suggested to consider the following elements as a whole:

- **Duration.** In practice, collaboration agreements that fall under the definition of concentrations are those that are designed to be permanent or long-term, that is, when they involve the integration in the long-term of the activities of the companies that participate in them. The Commission may also consider as a concentration a collaboration agreement between Economic Agents without a set duration. There may also be collaboration agreements between Economic Agents that could be considered concentrations even when they are not permanent nor have a prolonged duration, given their scope or the degree of independence generated with respect to the parties of the agreement.
- **Independence.** The creation of a new Economic Agent with functional and operational autonomy. When the constituted Economic Agent has the possibility to decide in an independent manner its strategies of marketing, prices, distribution, sales, and financial deci-

5. Below, are reproduced the provisions of article 53:
"ARTICLE 53.- Absolute monopolistic practices are considered to be unlawful, consisting of contracts, agreements, arrangements or combinations between competing Economic Agents, whose purpose or effect are any of the following:
Fix, raise, coordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets;
Establish the obligation not to produce, process, distribute, commercialize or acquire but only a restricted or limited amount of goods or the provision or transaction of a restricted or limited number, volume or frequency of services;
Divide, distribute, allocate or impose portions or segments to an actual or potential market of goods and services, through clientele, suppliers, determined or determinable times or spaces;
Establish, arrange or coordinate bids or abstentions in bids, tenders auctions or purchase calls, and
Exchange information with any of the purposes or effects referred to in the previous sections. Absolute monopolistic practices will be null and void, and consequently, will not produce any legal effect and the Economic Agents that incur in these will be subject to the sanctions established in this Law, regardless of any criminal or civil liability that, as the case may be, may arise therefrom".
6. For further reference, it is suggested to review the Guide for processing an investigation procedure for absolute monopolistic practices, available (in Spanish) at: https://www.Cofece.mx/wp-content/uploads/2017/12/guia-0062015_pma.pdf; as well as the Guide for the exchange of information between Economic Agents, available (in Spanish) at: https://www.Cofece.mx/wp-content/uploads/2018/01/guia-0072015_intercambioinf.pdf#pdf.

sions, among others, it is a sign that the corresponding agreement between competitors constitutes a concentration. The Commission will also consider those cases in which the members of the collaboration agreement lose independence in taking certain decisions, in which case they must explain the reasons for this to the Commission.

- **Scope**. When a collaboration agreement is entered between Economic Agents, the parties shall maintain the competitive pressure that is exerted in the markets outside the collaboration agreement. That is, a collaboration agreement between Economic Agents must not interfere in the assets, prices, production, or any other sensitive variable that could reduce the capacity or incentive of the participants to compete in an independent manner in markets or activities different to the matter of the collaboration agreement. Likewise, the exchange of information between Economic Agents, especially when involving competitors, must be limited to the object of the collaboration agreement.

It is also relevant to determine the degree to which the competitive rivalry between competitors is reduced by virtue of the collaboration agreement, given its scope. For example, if competition between participants disappears completely in a market where the collaboration agreement occurs, this may imply that it is a concentration. On the contrary, if the agreements between competitors mainly involve specific aspects about the price or the quantity offered, these may be absolute monopolistic practices.

Finally, although collaboration agreements between economic agents can be analyzed as a concentration, the foregoing does not exempt them from being investigated when there are indications that these constitute any practice set forth in article 53 of the LFCE.

In this regard, even when a collaboration agreement between economic agents has been analyzed and authorized by the Commission, an investigation could be initiated in those cases in which the notifiers have provided false information that prevented the Commission from properly analyzing the nature and scope of the transaction and which allows it to presume that the purpose of the agreement was different. On the other hand, when an investigation is initiated regarding a collaboration agreement between economic agents, the fact that it is notified as a concentration does not translate into the closing of the investigation.

2.4.1. Types of collaboration agreements

Collaboration agreements between Economic Agents can pursue different purposes. In this regard, below, a list of the most common collaboration agreements between economic agents is presented; these are examples of collaboration agreements that, for the purpose of determining whether or not they constitute a concentration, must be analyzed on a case by case basis considering their scope and effects:

A. **Collaboration agreements for the consolidation of activities:** they have as a characteristic that the participating Economic Agents fully integrate their activities, generally in a horizontal manner, to create a single line of business; this means they unite their activities into one or various markets. As consequence of this type of agreements, the parties cease to compete only in the markets which are object of the collaboration agreement. This type of collaboration agreements has comparable effects to those of a merger and, therefore, is considered a concentration.[7]

B. **Collaboration Agreements for network creation:** in these agreements the entirety or majority of the members of an industry participate in order to share certain assets (for example, information,[8] sources of energy, among others). These are considered because, usually, they generate network effects among the participants, since costs are reduced as more economic agents become part of the agreement. The Commission has stated that this type of collaboration agreements is considered as a concentration when they involve the union or joint use of assets or resources.[9]

C. **Collaboration Agreements to consolidate production activities:** in these agreements two or more economic agents are integrated to produce goods, either directly or through a third party, which are used as inputs. Likewise, in some cases the product can be sold to third parties. The collaboration agreements to consolidate production activities may involve the creation of productive assets or a combination of the assets that each participant owns. Since this type of collaboration agreements usually involves the union or joint use of productive assets, it is considered a concentration in accordance with article 61 of the LFCE.[10]

D. **Collaboration agreements for joint distribution and/or commercialization:** these are agreements by which the participating economic agents sell and/or distribute and/or commercialize and/or promote its products jointly. By their nature, carrying out joint distribution and/or commercialization activities generally involves the creation of new companies, as well as the combination or joint use of assets. Consequently, this type of agreements is a concentration in accordance with article 61 of the LFCE.[11] Finally, the agreements that have as a purpose to manipulate prices and quantities could not be considered as a concentration.

7. The Commission has analyzed collaboration agreements for the consolidation of activities such as concentrations, for example: (i) **CNT-006-2015** creation of a co-investment between GvH Vermögenswaltunggsgesellschaft XXXIII mbH and Springer Science + Business Media G.P. Acquisition SCA. The referred concentration was resolved by the Board of this Commission the fifth of March two thousand fifteen and the public version of the resolution is available (in Spanish) at: http://Cofece.mx/CFCResoluciones/docs/Concentraciones/V628/122/2022399.pdf ; and, (ii) **CNT-024-2019** creation of a joint company between GlaxoSmithKline plc ("GSK") and Pfizer Inc. ("Pfizer"), to which they will contribute their business of over-the-counter medications and consumer health products. This concentration was resolved by the Board of this Commission the fourth of July two thousand nineteen and the public version of this resolution is available (in Spanish) at: http://Cofece.mx/CFCResoluciones/docs/Concentraciones/V6010/10/4863928.pdf.

8. In these cases, the exchange of information between economic agents must be in accordance with the content of the Guide for the Exchange of Information between Economic Agents issued by this Commission the twelve of November of two thousand and twenty.

9. Strategic alliances between airlines are an example of collaboration between economic agents for the creation of a network. In this regard, the extinct Federal Competition Commission ("CFC") analyzed as concentrations the following strategic alliances: (i) **CNT-011-2009**, where it was analyzed the creation of Sky Team (integrated by Delta Airlines, Northwest Airlines, Air France, and KLM Royal Dutch), specifically, the referred concentration consisted of an association regarding to transatlantic flights; (ii) **CNT-064-2009** which involved the Star Alliance (conformed by Continental Airlines, United Airlines, Air Canada and Lufthansa) and in which the international association between said airlines was analyzed; and (iii) **CNT-001-2011** One World alliance (integrated by British Airways, Iberia, and American Airlines), in particular it analyzed a joint business agreement signed by the referred airlines. Additionally, the Board of this Commission through the agreement CFCE-275-2014 indicated that the alliances between national and foreign airlines should be analyzed as a concentration "[…] *if it implies the union or joint use of assets or resources in terms of the referred definition* [article 61 of the LFCE] […]". The aforementioned agreement is available at: https://www.Cofece.mx/cfcresoluciones/docs/Mercados%20Regulados/V5/12/1861454.pdf. Additionally, the public versions of the concentrations previously referred are available at the following links: https://resoluciones.Cofece.mx/CFCResoluciones/docs/Conccentraciones/V269/492/1065134.pdf#search=%20cnt-011-2009.
https://resoluciones.Cofece.mx/CFCResoluciones/docs/Concentraciones/V332/5891305083.pdf#search=%20CNT-064-2009
https://resoluciones.Cofece.mx/CFCResoluciones/docs/Concentraciones/V380/23/1443060.pdf#search=%20CNT-001-2011.

10. The Commission has analyzed collaboration agreements to consolidate production activities as concentrations, some of which have involved the joint use of assets for the manufacturing of certain products. In these cases, the Commission has indicated that the involved Economic Agents must maintain their operative independence, which implies that they should determine their marketing strategies, prices, distribution and sales independently.

11. The Commission has analyzed collaboration agreements for joint distribution and/or commercialization as concentrations. Some of the notified concentrations have involved the creation of companies which constitute a common platform for the distribution, promotion, and commercialization of certain products.

E. **Collaboration agreements to consolidate purchases (purchasing clubs):** these are collaboration agreements, generally among competitors, whose objective is to jointly acquire the necessary inputs to carry out their activities. The Commission has considered that these types of agreements are a concentration since these involve the union of economic agents, either through the constitution of a company (which would be the one responsible of carrying out the consolidation of purchases), or through the signing of a contract by virtue of which the purchases of the participants in the purchasing club will be added.[12]

F. **Research and development:** these are collaboration agreements by virtue of which the participating economic agents combine assets, technology and knowledge in order to develop new products more quickly and efficiently. They generally take place in industries where the cost of research and development is very high, for example, pharmaceuticals or agrochemicals. On occasions, the joint research and development efforts involve (i) the union of economic agents, through the constitution of a company or through the signing of a contract in which risks and profits are shared; as well as (ii) the joint use of assets; therefore, they could be considered as a concentration in terms of article 61 of the LFCE.

Finally, since the analysis of concentrations has a preventive character, it is convenient to take a conservative position in the interpretation of the thresholds established in article 86 of the LFCE.

2.5. Economic Agent and economic interest group

Article 3 of the LFCE, in its section I, defines Economic Agent as:

> *"Every natural or legal person, with or without profit, agencies and entities of the federal, state or municipal public administration, associations, business chambers, professional groups, trusts or any other form of participation in the economic activity;".*

The analysis of the effects of a concentration on the process of competition and free market access considers the belonging of Economic Agents to an economic interest group. That is, not only the activities that are developed by companies directly involved in the transaction are considered, but all those developed by persons related to the economic interest group to which they belong, as well as the links that said group may have with other agents or groups in similar or related markets.

Thus, when an Economic Agent belongs to an economic interest group, the group may be considered the relevant economic unit for the effects of the LFCE. In relation to the concept of economic interest group and that several persons can be considered as a single Economic Agent, the notifiers may consult the resolutions issued by the Judicial Power in which it is stated that, in matters of economic competition, we are before an economic interest group when a group of natural or legal persons have related commercial and financial interests, and coordinate their activities to achieve a certain common objective, being able to exert decisive influence or a real

12. The Commission has analyzed purchasing clubs as concentrations, for example: (i) **CNT-058-2016**, which consisted in the formation of a purchasing consortium through the integration of partners from service stations, in the company named *G500, S.A.P.I de C.V.* ("G500"), which would jointly participate in the acquisition and wholesale provision of refined gasolines and diesel, as well as automotive products and, in some cases, other types of products. This concentration was conditioned by the Board of this Commission the ninth of March of two thousand seventeen, the public version of the resolution is available at: https://Cofece.mx/CFCResoluciones/docs/Concentraciones/V5587/0/3806559.pdf; and (ii) **CNT-116-2016**, consisting in a concentration which involved the formation of co-investment between Volkswagen Truck & Bus and Navistar Inc. to analyze opportunities of joint acquisition. The referred concentration was authorized by the Board the twentieth six of January of two thousand seventeen, in the resolution it was expressly stated that the Notifiers "[...] *must establish the necessary measures to avoid the exchange of information that it is not related to the object of the concentration and that the present resolution shall not be interpreted as an authorization to collaborate or exchange diverse information to the JV of Acquisition* [...]". The public version of a resolution is available at https://Cofece.mx/CFCResoluciones/docs/Concentraciones/V5399/1/3692662.pdf.

or latent control over the other.[13] In the same way, to determine the existence of an economic interest group, the Commission analyzes whether an Economic Agent, directly or indirectly, coordinates the activities of the group to operate in the markets and also, whether it can exert decisive influence or control over another.[14]

3. Applicable Regulation

3.1. Compliance with the LFCE in the context of the negotiations of a concentration

When those involved in the transaction are competitors, they must refrain from exchanging information that gives or could give rise to any of the absolute monopolistic practices provided for in article 53 of the LFCE.

For more details about this topic, it is recommended to consult the Guide for the Exchange of Information between Economic Agents issued by Cofece.

3.2. Obligation to notify

Article 86 of the LFCE states that concentrations that exceed certain monetary thresholds must be authorized by the competition authority before they are executed.

Without prejudice to the procedure provided in article 5 of the LFCE, in order to determine whether a concentration should be notified before the Commission or corresponds to the broadcasting and telecommunications sector, the economic agents may take into account what was resolved by the Circuit Tribunals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications.[15]

3.2.1. The notification of concentrations as a preventive instrument

The analysis of a concentration prior to its realization aims to comply with the provisions of article 2 of the LFCE, which establishes, among other objectives, that the Law has as objective to promote, protect, and guarantee free market access and economic competition, as well as preventing monopolies, monopolistic practices, unlawful concentrations, barriers to free market access and economic competition and other restrictions to the efficient functioning of markets.[16]

For its part, article 87 of the Law specifies that the concentrations that meet the thresholds established in article 86 must be notified before any of the following events occur:

> *"I. The legal act is perfected in accordance with the applicable legislation, or, as the case may be, it fulfills the suspensive condition to which said act is subject;*
> *II. It is acquired or exerted directly or indirectly de jure or de facto control over another Economic Agent, or it are acquired de jure or de facto assets, participation in trusts, social shares, or shares from another Economic Agent;*

13. See, for example, "*ECONOMIC INTEREST GROUP, ITS CONCEPT AND ELEMENTS THAT INTEGRATE IT IN MATTER OF ECONOMIC COMPETITION*". [J]; 9a. period; T.C.C.; S.J.F. and its Gazette; Volume XXVIII, November 2008; Page, 1244, I.4o.A. J/66.
14. *Idem.*
15. See, for example, the resolutions to the administrative conflicts of competence between the Federal Economic Competition Commission and the Federal Telecommunications Institute, with file number C.C.A. 2/2015, C.C.A. 1/2017 and C.C.A. 4/2019. Additionally, the Board of this Commission has resolved various concentrations related to digital platforms, for example: (i) the one analyzed on the file CNT-161-2018, consisting of the acquisition, by *Wal-Mart International Holdings, Inc* of the totality of the representative parts of the share capital of *Deliveries Technologies, S. de R.L. de C.V.* ("Cornershop"), which public version is available at: https://www.Cofece.mx/CFCResoluciones/docs/Cocentraciones/V6008(9/4845885.pdf; and (ii) the one in file CNT-057-2020, consisting of the indirect acquisition by *Despegar.com, Corp.* ("Despegar.com") of the shares with voting rights and economic rights of *BestDay*, available at: https://resoluciones.Cofece.mx/CFCResoluciones/docs/Concentraciones/V6061/15/52799476.pdf.
16. The Supreme Court of Justice of the Nation recognized the preventive powers granted by the LFCE in matters of concentrations. For further reference, consult the resolution of the fifteen of May of two thousand, issued in the amparo in review 2617/96, promoted by Grupo Warner Lambert, S.A. de C.V.

III. Carrying out the signing of a merger agreement between the involved Economic Agents, or IV. In the case of a succession of acts, the last one is perfected, by virtue of which the amounts established in the previous article are exceeded."

With regards to the operations that have been carried out abroad, the same article 87 states that these must be notified before they have effects in national territory.

The LFCE states that the acts carried out in contravention of article 86, will not produce legal effects, without prejudice to the administrative, civil, and criminal liability of the Economic Agents and of the individuals which ordered or contributed to the execution of the concentration, as well as the notaries who had intervened therein.

Likewise, if the notification is submitted after meeting any of the assumptions provided in article 87 of the LFCE , it is considered as extemporaneous. In such case, in accordance with article 29 of the Regulatory Provisions, the notification of the executed concentration "*will be discarded as inadmissible*". Subsequently, the Commission will open a file in terms of article 133 of the Regulatory Provisions. Once handed this procedure, Cofece may authorize the operation and impose the sanctions provided in sections II and VIII of article 127 of the Law, without prejudice to the administrative, civil, and criminal liability of the Economic Agents and of the persons which ordered or contributed to the execution. On the other hand, if there are indications that this operation could meet the provisions of article 62 of the LFCE or if it is being investigated by the Investigative Authority, an agreement will be issued ordering the termination of that procedure and the file will be sent to the Investigative Authority. In this regard, we refer to section 3.2.3 of this Guide.

Article 86 of the Law provides that the acts related to a concentration may not be recorded in the corporate books, formalized in a public instrument or registered in the Public Registry of Commerce until the authorization from Cofece is obtained or the deadlines it has to issue a resolution have elapsed without having done so.

In this regard, section XIII of article 127 of the Law establishes a fine of up to the equivalent of one hundred and eighty thousand times the UMA to the public notaries who intervene in the acts related to a concentration when it has not been authorized by the Commission.

The Regulatory Provisions state in their article 16, first paragraph, that Economic Agents may agree to carry out the operation subject to the suspensive condition of obtaining the authorization from the Commission but must state that the acts related to it would not have any legal effect until the authorization is obtained from the Commission , or that the *afirmativa ficta* occurs in the sense that is understood that it has no objection to it and the respective acknowledgement is issued.

Article 89, section III, of the Law provides that the notification must contain the "*draft of the legal act in question*". Therefore, the involved Economic Agents should not wait to have definitive contracts to notify Cofece of their intention to carry out a concentration. The formal intention to carry out an operation can be manifested in documents of preliminary nature, which Cofece can use to initiate the assessment process.

In the case of some public offerings, there may not be a document in which the parties, buyer and seller, acknowledge their willingness to carry out a concentration. In these situations, the draft public offering acknowledges the intention to conduct the transaction.

3.2.2. Mandatory and voluntary notification

The Economic Agents that intend to conduct a concentration, in accordance with what is defined in article 61 of the LFCE, shall corroborate whether they are obliged to notify it before the Commission. For that matter, they must verify if the operation exceeds any of the thresholds indicated in sections I, II and III of article 86 of the Law.

Likewise, the last paragraph of article 86 of the Law states that the Economic Agents involved in a concentration which does not fall within the assumptions established in sections I, II and III, may voluntarily notify the operation. That is, if the transaction does not exceed the amounts that make the notification compulsory, the agents can voluntarily submit it before the Commission. In this case, if the Commission objects or conditions the operation, the notifiers will be obliged to the compliance and observance of the resolution.

3.2.3. Treatment of previous non-notified operations

In the case that a concentration is notifiable and those directly involved in it fail to notify it to the Commission they will be imposed with the sanction established in article 127, section VIII of the LFCE. The procedure to be followed to determine whether or not the obligation to notify a concentration was omitted when it was legally obliged to do so is established in articles 54 and 133 of the Regulatory Provisions.

In accordance with article 54 of the Regulatory Provisions, once an investigation for unlawful concentration has been initiated, the Investigative Authority will have knowledge of, as the case may be, the possible non-compliance with the obligation to notify a concentration when legally it should have been done and about the determination regarding if a notary intervened in acts related to a concentration when it had not been authorized in the terms of the LFCE. In these cases, the procedure to be followed will be an investigation in the terms provided in the Third Book, Titles I and II of the LFCE. In any other assumption, the provisions of article 133 of the Regulatory Provisions are applicable.

In terms of article 133 of the Regulatory Provisions, when the Technical Secretariat has knowledge of any indication of non-compliance with the obligation to notify a concentration, it will form a file and may dictate the necessary measures to gather information and necessary documents to determine whether or not the obligation to notify a concentration was observed. The Technical Secretary has a period of 120 working days, extendable for one occasion for justified reasons, to conduct the corresponding proceedings and once said period is expired, it will issue an agreement that concludes the stage for gathering information.

Within the 20 days following the termination agreement, it must issue an agreement in which it: i) orders the file to be archived due to the non-existence of objective elements that allow to suppose the existence of a probable omission to notify a concentration, or ii) initiates a procedure in accordance with the terms and deadlines provided in articles 118 and 119 of the Regulatory Provisions, for considering that there are objective elements on the existence of a probable omission to the obligation to notify a concentration.

Regardless of the above, the Technical Secretary may directly initiate the procedure indicated in subsection ii) of the previous paragraph when it has knowledge of objective elements about the existence of the omission to notify the concentration, therefore, when those elements are obtained, it is not necessary to exhaust the stage of gathering information in the terms described.

When resolving the procedure, the Board will determine if the corresponding omission existed and, as the case may be, will impose the applicable sanction. For the imposition of sanctions, it has been taken into consideration, particularly, whether the Economic Agent who made the Commission aware about the non-compliance, whether it cooperated with the Commission in the terms of article 183 of the Regulatory Provisions as well as the time elapsed since the non-notified operation was consummated and the said situation was informed to the Commission. Inasmuch that those elements exist and the time elapsed is less, the Commission has imposed sanctions which range from the minimum (5,000 times the UMA) to multiples of the minimum (10,000 the UMA, for example).

In addition, if it is determined that the non-notified operation does not meet what is established in article 62 of the Law, the Board may authorize it.

In any proposition of article 133 of the Regulatory Provisions, the Technical Secretary will notify the Investigative Authority to determine what is conducive and, whether it considers that there are indications that the operation could meet the provisions of article 62 of the Law or whether the operation is being investigated by the Investigative Authority, it will issue an agreement which terminates the procedure established in article 133 of the Regulatory Provisions and will send the file to the Investigative Authority to determine what is conducive.

That said, in the case that, in the processing of a file of a concentration notification, the Commission detects that those involved in a notified concentration (or some of them) previously carried out a concentration which was not notified, the Commission will require the involved Economic Agents all the necessary information so that this Commission can determine whether the previous concentration met any of the premises established in article 86 of the LFCE and was required to be notified to the Commission, and determine its effects on competition. Thus, in these cases, it is desirable that the Economic Agents present this information from the moment they present the written document by which they notify the concentration.

In the cases in which the processing of a concentration notification file detects the existence of a previously non-notified operation and said operation is substantially linked to the operation that was notified, , the Commission has determined not to resolve it until the latter is authorized in the terms indicated. For example, the Commission has considered that exists this link when the notified operation consists in the acquisition of shares in addition to those acquired in the operation which was failed to notify.

3.3. Monetary thresholds

The obligation to notify a concentration responds only to quantitative criteria established in article 86 of the LFCE. This law does not refer this obligation to issues of market shares or substantial market power. Before starting the analysis of the thresholds provided for in the LFCE, it is convenient to clarify some aspects indicated therein.

The operations that meet the thresholds established in article 86 and which have not been notified to the Commission will not produce legal effects. Likewise, Cofece may investigate said concentrations based on the LFCE, provided that no more than ten years have elapsed from their realization. In order to determine whether the operation should have been notified and carried out the referred investigation, the Economic Agents must calculate the monetary thresholds according to the following.

Amount of the operation. The value or price that the acquirer pays for the shares, social shares or assets in general object of the acquisition, located in Mexico, including money, assumption of liabilities or any type of stock exchange or any other assets can be considered as the amount of the operation. For operations that only involve assets or companies located in Mexico, normally the purchase-sale contract or the equivalent instrument allows their identification. For the calculation of the thresholds established in article 86 of the LFCE, the total agreed, as well as any tax concept, such as Value-Added Tax, must be considered.

In practice, there are operations in which it is not easy to determine the amount that corresponds to Mexico. This could be the case in stock exchanges, international operations in which there is no breakdown of the value assigned to the assets located in Mexico or operations in which there is no definitive price. In these cases, the analysis is made on a case-by case basis. For example, in the case of stock exchanges, the amount of the operation can be calculated as the value resulting from multiplying the number of shares given in exchange by its unit price.[17] In the case of operations where a direct amount is not established or there is not a stock exchange, the amount can be represented by the carrying value assigned to the merged party.

The amount of the operation refers to the amount agreed for the accumulated assets, namely, those that will actually be acquired by the buyer. To determine it, the total agreed amount must be taken into consideration, regardless of the way in which it is done -for example, assumption of debt or payment of premiums- or whether the payments are made in the future.

There are operations of consecutive nature in which the amount or amount thereof is determined by formulas which could vary over time. In this case, it is suggested that a conservative position be adopted and to notify the operation, in a previous manner, and considering the scenario that implies the highest sum or amount foreseen in the contract, considering the sum or the total amount of all the compensations.

Unit of Measurement and Update. In terms of article 15, second paragraph, of the Regulatory Provisions, in order to verify whether the operation meets any of the monetary thresholds stated in article 86 of the LFCE, the UMA of the previous day to the one on which the notification is made should be taken in account. In accordance with the "*Decree by which several provisions of the Political Constitution of the United Mexican States are declared as reformed and added, in matters of the deindexing of the minimum wage*." published in the DOF the twentieth seven of January of two thousand sixteen, the value of the UMA must be used as unit to determine the amount of payment of obligations and assumptions provided for in the federal laws.

Exchange conversion. In some cases, operations are agreed in dollars of the United States of America. In this case, the Regulatory Provisions state in the second paragraph of article 15 that it must be applied the exchange rate to settle obligations denominated in foreign-currency payable in the Mexican Republic, published by the Bank of Mexico, which is the lowest during the previous five days in which the notification is made.

Likewise, in article 15, third paragraph, of the Regulatory Provisions it is established that, regarding currencies other than dollars of the United States of America, any exchange rate indicator that reflects the value of the national currency with respect to the foreign currency in question can be used.

17. The unit price which is taken into account is the one that results in a higher amount, between the market price of the acquired assets and their carrying value. The latter normally is found on the books of the seller of the assets, since they are not yet part of the books of the acquirer at the moment of the operation.

To determine whether or not a transaction already carried out should have been notified, in accordance to what is established in article 133 of the Regulatory Provisions, in order to calculate the amount or value of the operation being analyzed, concerning operations conducted in dollars of the United States of America, the exchange rate to settle obligations denominated in foreign currency payable in the Mexican Republic published by the Bank of Mexico which results the lowest during the five days prior to the realization of the transaction will be considered.

Succession of Acts. The succession of acts is the sequence or series of legal acts or operations which allow an Economic Agent to unite companies, shares, social shares or assets of the same agent or economic interest group. In accordance with article 87, section IV, of the LFCE the obligation to notify occurs before the sum of the succeeding acts meets any of the three sections that compose article 86 of the Law. For example, it is possible that an Economic Agent makes partial acquisitions for amounts individually or in an aggregated manner below the monetary thresholds stated in article 86 of the LFCE without any obligation to notify. Said obligation arises in the moment in which the realization of a new act means meeting the monetary thresholds, considering jointly the several conducted acts. This prevents an Economic Agent from acquiring little by little participation in the share capital of another one, through acts that do not require to be notified individually, until obtaining de jure or de facto control.

On the other hand, there are occasions in which the involved Economic Agents manifest their intention to incur into successive acts, for example, when they establish options for the acquisition of participation. To determine whether there is a succession of acts subject to be notified in terms of article 86 of the Law, the Commission assesses the context of each concentration, particularly when the assumptions of article 87 of the LFCE are met, as well as the other elements indicated. It is recommended that the Economic Agents adopt a conservative position and notify this type of concentrations before the first act that meets any of the thresholds contained in article 86 of the Law is conducted.

Finally, cases in which there are several acquisitions over time but where sellers and objects are not identical, are not considered as a succession of acts, without prejudice that any of these acquisitions should be notified individually when it exceeds the thresholds established in article 86 of the LFCE.

Value of the assets. There are several ways to determine the value of the assets and that are accepted from an accounting and legal points of view. In accordance with article 15 of the Regulatory Provisions, the Economic Agents must consider the highest figure which results among the following possibilities:

a. Total value of the assets recorded in the balance sheet, that is part of the financial statements of the companies, without making exceptions among the items that comprise the assets.[18]

b. b. Commercial value of the assets, which may differ from the assigned carrying value. In this case, the Commission has considered that the commercial value of the assets is equal to the price agreed by them in the transaction.

On the other hand, sections II and III of article 86 of the LFCE contain references to different types of assets, whether assets of an acquired Economic Agent, assets of said Economic Agent in the national territory, assets accumulated through a concentration or assets in national territory of those participating in the concentration. Therefore, in order to determine the value of the assets, it is necessary to consider which assets are referred to by each threshold in question, as well as the type of assets involved in the particular case.

18. When the Law refers to assets, total assets are considered.

In the case of accumulation of assets consisting of shares, the value of these will be obtained from their acquisition value or from their carrying value of the transferor, when possible. Only in cases where this value cannot be obtained, the amount of the assets may be calculated as the proportional amount of the assets of the acquired object.

Value of the sales. The LFCE refers to annual sales as one of the aspects to be analyzed in order to determine the need to notify a concentration. If the company object of acquisition is located in national territory, the Economic Agents may consider the total net sales (that is, total sales minus, as the case may be, discounts, rebates and refunds). They may also use income as an analogous concept, which appears in the statement of income of the financial statements, when it refers to the incomes obtained by the company from the sales of goods that it produces or the services it offers.

It is possible that an acquired company is located in a different country and does not have assets in Mexico. However, it may have sales originated in national territory.[19] In these cases, the Economic Agents may analyze whether the sales in national territory are carried out directly by the company or through third parties. For example, independent distributors that may or may not have any contractual or other type of link with the acquired company. If an independent distributor is the one who imports and distributes the product in national territory and the distributor is not part of the distribution system established by the company located abroad and partaking in the operation, it is not possible to attribute these sales to the latter and, therefore, they are not taken into consideration when assessing the existence of an obligation to notify.

Some concentrations that do not exceed the thresholds provided in article 86 of the LFCE could be unlawful in terms of article 62 of that ordinance. In this regard, in accordance with the second paragraph of article 65 of the LFCE, once elapsed a year of its realization, concentrations that do not required to be notified to the Commission cannot be investigated.

19. In general terms, it is considered that sales originated in national territory are those whose billing is made in Mexico.

3.4. Meeting the thresholds

Article 86 of the LFCE states the following:

*"**Article 86.** The following concentrations must be authorized by the Commission before they are carried out:*
I. When the act or sequence of acts that originate them, notwithstanding the place of performance, are worth within national territory, directly or indirectly, an amount greater than the equivalent of eighteen million times the current general daily minimum wage in the Federal District;
II. When the act or sequence of acts that originate them, imply the accumulation of thirty-five percent or more of the assets or shares of an Economic Agent, whose annual sales originated in national territory or assets in the country are worth an amount greater than the equivalent of eighteen million times the current daily minimum wage in the Federal District, or
III. When the act or sequence of acts that originate them imply an accumulation within national territory of assets or share capital greater than the equivalent to eight million four hundred thousand times the current general daily minimum wage in the Federal District and in the concentration participate two or more Economic Agents whose annual sales originating in national territory or assets in national territory, jointly or separately, worth more than forty eight million times the current general daily minimum wage in the Federal District."

The monetary thresholds contained in article 86 of the Law must be analyzed one by one. It is sufficient that the act, succession of acts or the operation meet any of the three sections of the article for the involved Economic Agents to be obligated to notify the Cofece of their intention to carry out a concentration. If it is determined that the operation meets any section, the analysis of the other sections is no longer necessary.

Section I of the aforementioned article states that the amount of the operation in the national territory must exceed the amount of 18 million times the UMA.[20] By amount, as noted previously, the value or price agreed between the seller and the acquirer is considered, including money, assumption of liabilities or some type of share exchange or other assets to be paid for the goods which are the object of the acquisition and are located in national territory.[21]

For operations which involve assets or companies located in Mexico, the amount is normally identified through the purchase-sale contract or the equivalent instrument.[22] That is, without discarding that the amount of the transaction is represented by the sum of various payments, tacit or explicit, which may or may not be contained in these instruments.

For international operations, it is often difficult to determine the total amount of the transaction, since the involved the Economic Agents usually establish a global amount and do not make distinctions by country. In case that an amount of the transaction in national territory in terms of section I of article 86 of the LFCE is not set, an analysis in accordance of sections II and III of said article must be carried out. In the case of operations that are not notified and are subject to investigation, Cofece may estimate their amount, considering the context of each operation.

20. In accordance with the "*Decree by which several provisions of the Political Constitution of the United Mexican States, in matters of deindexing of the minimum wage are declared [sic] reformed and added*" published in the DOF the twenty seven of January of two thousand sixteen, which entered into force the twenty eight of January of the same year, which states in its Third transitory article that: "***all the mentions of the minimum wage as unit of account**, index, base, measure or reference to determine the quantity of the obligations and assumptions provided for in the federal laws [...] **will be understood referred to the Unit of Measurement and Update*** [emphasis added]". The UMA is the economic reference in pesos to determine the amount of payment of the obligations and assumptions provided for in federal and local laws and legal provisions and is determined by the National Statistics and Geography Institute (INEGI per its acronym in Spanish) .
21. The section does not exclude the possibility of acquisition of assets or social shares outside of the country, of an Economic Agent that holds assets located in national territory.
22. As it has been indicated, although the purchase-sale is the most common legal act by which this type of transactions is carried out, this does not mean that said legal act is the only one by which the regulatory assumptions of the LFCE related to concentrations are met.

Regarding section II of the foregoing article, there are two aspects to verify, which must be met. The first is if the operation involves the transfer of at least 35% of the shares, assets, or any other form of participation of an Economic Agent. In the case of the transfer of assets, to determine the percentage they represent, the sum of the assets which are object of the operation must be considered and compared against the sum of the assets which are owned by the Economic Agent or Agents which act as direct sellers. Likewise, in the case of the transfer of shares, the percentage of shares of the Economic Agent which is the object of the operation must be considered. The second is to determine if the agent which is object of the transaction has assets in Mexico or if it had annual sales originated in Mexico, regardless of the destination, for more than 18 million times the UMA.

By sales originated in Mexico, it has been understood that they contemplate those sales that have a material nexus with the national territory. These are the sales made by Mexican companies, independently of their destination, as well as the sales made by foreign companies that have been delivered to clients located in the national territory.

Section III of article 86 of the LFCE, is composed by two parts that must be met simultaneously. According to the first, it is required an accumulation of assets or share capital, in Mexico, which exceeds in 8.4 times the UMA.[23] In the event that the acquisition is not for the totality of the shares, it is only taken into account the proportional part that will be effectively acquired.

As for the first part, it must be analyzed the effectively accumulated assets, whose value will be determined from the figure which results higher between the commercial value of the assets and their carrying value. The foregoing is made by taking the proportion of the accumulated assets or share capital in the national territory as of the financial statements of the acquired Economic Agent and its Mexican subsidiaries.

Regarding the second part, it is assessed if the Economic Agents that participate in the operation, which can be acquirer, the transferor or the object, have assets or annual sales, considered in separately or jointly, for an amount exceeding 48 million times the value of the UMA. For the effects of this section, it must be taken into consideration only the sales originated in the national territory, or the total assets located in Mexico.

Regarding the accumulation referred to in sections II and III of article 86 of the LFCE, when it involves a draft legal act with several acquirers or sellers, the Commission has considered that there is only one joint accumulation, even though when the sellers or acquirers belong to different Economic Interest Groups. The exception to this rule is determined by the cases in which the acquirers are from different Economic Interest Groups and the operation does not derive from a joint negotiation or a coordinated acquisition between buyers. In the latter case, it is not necessary that the minority acquirers notify when they do not meet the notification thresholds individually .

The Economic Agents must be careful in their analysis when the companies are consolidated from the fiscal point of view, to avoid that in the sum of the assets or sales there is a doble accounting.

23. Is not considered as accumulation assets or share capital that were already owned by the acquirer prior to the concentration.

3.4.1. Use of the financial statements

Financial statements are part of the necessary information required for the analysis of any concentration and this is recognized by article 89 of the LFCE. The financial statements, mainly the balance sheet and the income statement, contain most of the necessary information to determine the value of the assets, the sales or incomes and the share capital of the companies involved in a concentration. The notes to the financial statements are also important, since they are an integral part of each and every one of them.

The required financial statements are those audited or ruled by an authorized public accountant, corresponding to the fiscal year immediate previous to the notification of the concentration. In case of not having them, the most recent non-audited or non-ruled financial statements may be presented, as determined by the Commission. However, in case of not having the latter, the Economic Agent must justify said situation and submit before the Commission the internal financial statements that comply with the basic postulates of the Financial Information Regulations in Mexico or in the jurisdiction where the corresponding Economic Agent is constituted.

The financial statements presented by the promoters must always specify in what currency (pesos, euros, dollars, among others) are presented; as well as the units (thousands, millions, among others).

3.4.2. Maquiladora companies

The maquiladora companies are not exempt from compliance in matters of notification of concentrations. For such, the analysis of the meeting of thresholds prescribed by article 86 of the Law is conducted, as in any transaction. However, due to their nature, maquiladora companies sometimes operate with assets which are not necessarily of their property nor are these recorded in their financial statements as their own assets. This situation may generate uncertainty to the Economic Agents about their obligation to notify.

When involving maquiladora operations for export in its totality and for the effects of the meeting of the thresholds, it is not taken into account the value of assets that, despite being under their control, do not belong to the maquiladora and are not recorded in the accounts as own assets.

3.4.3. Share exchanges

In some operations, the transfer of shares from an Economic Agent (company A) is made giving as payment certain amount of shares to the other Economic Agent involved in the transaction (company B), to the shareholders of the company A. In such cases, there two acts of concentration of shares: the acquisition of shares of company A by company B and the acquisition of shares of company B by the shareholders of the company A, which is the way of payment for the first operation. There is an obligation to notify if any of the two concentrations meets the thresholds of article 86 of the LFCE.

If both acts of concentration meet the thresholds, it is only necessary the presentation of a written notification in which both acts are notified; the effects of these are analyzed jointly. This way of proceeding applies to analogue situations, for example, exchanging assets for-shares.

3.4.4. Trusts

The constitution of trusts – of administration, guarantee or of any other kind- in which an Economic Agent contributes its assets, shares, or social shares, without the necessary purpose or consequence being the transfer of these to an Economic Agent other than the settlor, it is a concentration that does not require to be notified.

An example of the above would be the constitution of a guarantee trust, which in terms of article 93 of the LFCE does not require to be notified. However, in case that the guarantee is made effective, it must be reviewed if there is any obligation in terms of the thresholds provided in article 86 of the law.

In the case that the assets affected in the trust are transferred to an Economic Agent other than the settlor or the fiduciary, it must be assessed whether the transfer meets any of the thresholds of article 86 of the Law. If so, the Economic Agents will be obliged to notify before the transaction takes effect.

It is possible that some Economic Agents use the figure of trust for a purpose different from the indicated in previous paragraphs. In particular, through a trust it may be established a business relationship that allows the combination of two or more Economic Agents with a productive purpose. In those cases, it may occur that the figure of trust is the form adopted by an association between Economic Agents that, prior to the constitution of the trust, act as independent Economic Agents. In these cases there would be a concentration that would have to be notified mandatory, in accordance with article 86 of the Law.

For example, if two groups manage and are owners of hotel facilities and decide to combine them for a joint operation through a trust, this would fall within the definition of a concentration established by the Law.

Finally, there are occasions in which an acquisition of assets by a trust must be notified, due to the value of the assets that constitute the estate of the acquirer trust must be computed in order to determine if it meets the thresholds established in article 86 of the LFCE, although the assets held in a trust are relatively small.

3.4.5. Capital increases or reductions

The contributions or reductions of capital made by the current partners of a company are considered as a concentration for the effects of the provisions of article 61 of the LFCE when these modify the shareholding composition among the partners. If the contributions entail any modification in the shareholding percentages and, in the case of capital reductions, imply the acquisition of control over the object of the operation, then the analysis must be carried out in terms of article 86 of the LFCE.

3.4.6. Acquisition of stock in the securities market

The acquisitions of stock conducted in the securities market are not exempt from the enforcement of the provisions in matters of concentrations contained in the LFCE, except in those cases indicated in its article 93. In this way, the buyers must foresee the possibility of being obliged to notify before the realization of the transaction.

Since the market value of the shares of a company can have significative fluctuations depending on the economic moment, it is possible that when executing an operation there is an undervaluation that indicates that it is not within the assumptions of article 86 of the Law. However, the buyers should verify the value of the assets, sales, or share capital reported in the financial statements. Thus, the buyers must analyze the possible obligation to notify if they are not within the assumptions of article 93 of the LFCE, taking into account market securities or the value of the assets reported in the financial statements.

3.4.7. Acquisition of American Depositary Receipts ("ADRs")

ADRs are investment instruments that allow investors from the United States of America to invest outside their country. These are certificates that represent the ownership of shares or bonds of a non-US company. The issuance of ADRs is made with the support of shares that are in custody of the country where the company issuing the shares is located. Once issued, the ADRs could be the object of transaction in the stock markets of the United States of America. The ADRs can be converted into the original (or underlying) shares at any time, at the request of the holder.

The ADRs allow their holders to be entitled to a part of the profits generated by the non-US company. By their own, these do not represent any direct form of participation in the share capital of the non-US company.

As the holding of the ADRs offers the option of conversion into shares, as in the case of other financial instruments that also offer said option, such as some credits and guarantee trusts, it is considered that it is at the moment of the conversion that the last paragraph of article 87 of the Law is configurated and consequently the act of concentration and, therefore, it is then that the possible obligation to notify is assessed.

It is also possible to establish that there is an obligation to notify, if the purpose of the holder is to directly or indirectly exercise the vote or if the holding of the ADRs is used to participate in shareholders' assemblies, appoint members of the board of directors or influence the strategic decisions of the company, as long as any assumption of article 93 of the LFCE does not apply and, in addition, any of the monetary thresholds of article 86 of the Law is exceeded.

3.4.8. Hostile takeovers

Concentrations in which the operation is carried out without the consent of the acquired party are not exempt from the notification requirement. However, due to the nature of the act, there is information that the buyer cannot provide to Cofece given that there is internal information of the acquired to which the buyer does not have access.

Consequently, it can be justified that, in this type of operations, only the buying party notifies, who must accredit and argue the existence of a factual impossibility for the seller or the acquired to appear as notifiers. In these cases, the buying party is obliged to issue the most available information about the acquired and the activities that it develops.

3.4.9. Support in case of doubts about meeting the thresholds established in the Law

In case that the Economic Agents have any doubts regarding the enforcement of the established in article 86 of the Law with respect to any specific operation, they can make use of the procedure to request general guidance in terms of article 110 of the Law and 137 to 140 of the Regulatory Provisions.

3.5. Cases of exception to the obligation to notify

Article 93 of the LFCE states that authorization from Cofece will not be required in concentrations that fall under the following assumptions:

"I. When the transaction involves a corporate restructuring, in which the Economic Agents belong to the same economic interest group and no third party participates in the concentration;"

When conducting the analysis of concentrations, the economic interest groups that participate in the operation must be determined. For this, as noted previously, it is necessary to establish whether any person or persons participating in the transaction, directly or indirectly, coordinate the activities of the group to operate in the markets.

In the case stated in this section, it is not enough that the parties involved in the operation belong to the same Economic Interest Group. It is also required that no other Economic Agent that does not belong to that group participate in the operation, directly or indirectly.

"II. When the holder of the shares, social shares or participation units increases its relative participation in share capital of a company in which it has its control since its constitution or start of operations, or, when the Board has authorized the acquisition of said control and subsequently it increases its relative participation in the share capital of the referred company;"

In this case, the person or persons who have the control in a company, increase their participation without the control of the company being modified.

"III. When concerning the constitution of trusts of management, guarantee or any type in which an Economic Agent contributes its assets, shares, social shares or participation units without the necessary purpose or consequence being the transfer of said assets, shares, social shares, or participation units to a company other than both the settlor and the corresponding fiduciary institution. however, in case of the execution of the guarantee trust it must be notified if any of the thresholds referred in article 86 of this Law is met;"

This case applies to those operations in which an Economic Agent contributes assets to a trust, in which essentially the settlor is the same as the trustee, that is the without the purpose of its contribution being its transfer to an Economic Agent other than the settlor or the trustee.

In the case of guarantee trusts, before the transaction is executed, it must be assessed if it meets any of the thresholds of article 86 of the LFCE.

"IV. When it involves legal acts on shares, social shares, or participation units, or under trust contracts that take place abroad related with non-resident companies for fiscal effects in Mexico, of foreign companies, provided that the companies involved in said acts do not acquire control of Mexican companies, nor accumulate in the national territory shares, social shares, units of participation or participation in trusts or assets in general, in addition to those which, directly or indirectly, they hold before the transaction;"

This assumption refers to operations which occur abroad, which do not result in a modification in the shareholding structure of any company established in national territory, nor the accumulation of participation in trusts or a modification in the holding of assets located in Mexico.

"V. When the acquirer is an investment company with variable income and the operation has as object the acquisition of shares, bonds, securities, titles or documents with resources from the placement of representative shares of the share capital of the investment company between the investing public, unless that as a result or due to the operations the investment company may have a significative influence on the decisions of the concentrated Economic Agent;"

Variable income investment companies or funds operate with securities, titles or documents whose nature corresponds to shares and bonds representing a debt in charge of a third party.[24] The purpose of investment companies is, on the one hand, to make savings in stock market instruments and, on the other hand, participate in the financing of the productive plant. In consequence, these companies place resources without having the purpose to participate in the decisions of the acquired Economic Agent. However, if the investment company does acquire significative influence in decision-making, it is necessary to notify the concentration.

"VI. In the acquisition of shares, securities, titles, or representative documents of the share capital of companies or the underlying of which are representative shares of the share capital of legal persons, and that are listed in the stock exchanges in Mexico or abroad, when the act or succession of acts do not allow the buyer to hold ten percent or more of said shares, convertible bonds in shares, securities, titles or documents and, furthermore, the acquirer does not have the powers to:
a) Appoint or revoke members of the board of directors, directives, or managers of the issuing company;
b) Impose, directly or indirectly, decisions in the general assemblies of shareholders, or associates or equivalent bodies;
c) Maintain the holding of rights which allow, directly or indirectly, to exercise the vote with respect to ten percent or more of the share capital of a legal person; or
d) Direct or influence directly or indirectly the management, operation, strategy or main policies of a legal person, either through the ownership of securities, by contract or any other way."

24. Investment funds have as purpose the acquisition and sale of securities, titles, and documents with resources from the placement of representative shares of their share capital through financial intermediation services. These societies form securities portfolios or investment portfolios with the resources they obtain from the public. According to the Investment Funds Law, there are four types of investment societies: i) of variable income, ii) in debt instruments, iii) of capitals, and iv) of limited object.

When conducting acquisitions of shares or securities of a company and the acquirer accumulates less than 10% of said shares or securities, it is not necessary to notify the operation, unless that, despite not exceeding that threshold, the acquirer has the capacity to influence the target's decision-making. The subsections provided for in section VI of article 93 establish the powers that would allow the acquirer to significatively influence in the decision making of the issuer.

According to what it is set forth in article 26 of the Regulatory Provisions, the 10% threshold on shares, securities, titles, or representative documents of the share capital of companies listed in the stock exchanges, must be made over the total of the issued shares that represent the capital of the acquired company. That is, the calculation must include also those shares that are not in circulation.

"VII. When the acquisition of shares, social shares, participation units or trusts are made by one or more investment funds for purely speculative purposes, and which do not have investments in companies or assets that participate or are used in the same relevant market that of the concentrated Economic Agent, or"

In these cases, the acquisitions are made for speculative purposes only and do not have as purpose to control, manage or participate in the decision-making of the company.

The Regulatory Provisions establish in article 27 that the investment funds for merely speculative purposes are those that acquire, on behalf of its investors or partners with limited rights, securities or participation in other Economic Agents with the only purpose of obtaining returns for their investors, without the investment fund having de facto or legal powers, nor the intention to participate, direct or influence, directly or indirectly, in the management, operation, strategy or commercial policies of the Economic Agent object of the operation.

"VIII. In the other cases established by the Regulatory Provisions."

The Regulatory Provisions do not provide for any additional assumption.

3.5.1. Support in case of doubts about the exceptions to notify

In case the Economic Agents have any doubts regarding the enforcement of the exceptions provided for in article 93 of the Law and their application to any specific case, they may use the procedure for the request of general guidance in terms of articles 110 of the Law and from 137 to 140 of the Regulatory Provisions.

3.6. Companies in a precarious economic situation

The LFCE does not provide specific mechanisms for processing concentrations in which the acquired party is in a precarious economic situation and the operation could give rise to a significative concentration of the market. However, and without prejudging, in case that a company meets this assumption, it must provide reliable information regarding the financial deterioration that prevents the company from meeting its financial commitments and that there are not reorganization alternatives, the risk of the imminent exit of the company and its assets from the market, as well as demonstrating the good faith efforts it has made to transfer the assets or shares to other companies.

In these cases, it is recommended to, within the framework of the sections IV and XII of article 89 of the LFCE, include documentation (assembly minutes, financial analyses and presentations to potential investors or buyers, among others) that demonstrates that there is an imminent risk that the company object of the transaction exits the market in the immediate future and that there are no other plausible solutions (e.g. a corporate restructuring or obtaining financing) other than the notified concentration. Additionally, it is advisable to provide documentation that proves that the acquirer has the capacity to mitigate the problem that gave rise to the financial situation of the object company, that reasonable efforts were made to find other buyers and/or that are no alternative buyers.

In relation to the financial information referred to in section VI of article 89 of the LFCE, it is recommended to submit the most recent financial statements (and not only those corresponding to the immediate previous exercise) that demonstrate that the financial situation of the company is permanent, that is, there are no plausible options or alternatives to mitigate the existing financial problems, and that there is an impossibility to meet its obligations in the short term in case that the concentration does not concrete. Likewise, it is recommended to present financial projections, reports made by external auditors, presentations to investors, and any other documentation in which demonstrates the financial situation of the object company.

3.7. Submission of the notification

3.7.1. Subjects that must submit the notification

Article 88 of the Law obliges that the notification be submitted by the Economic Agents that directly participate in it.

There are different types of concentrations. The determination of the Economic Agents that directly participate in a concentration depends on the type of operation. Economic Agents may take as a basis the draft of the legal act by which the operation will be carried out, in order to determine the directly involved Economic Agents. Specifically, those Economic Agents who sign the contract are considered to be directly involved, except for those persons who appear at the act for other purposes.

When it comes to a transfer of shares, assets, social shares, participation in trusts or the acquisition of control; it can be considered as direct participants as the one who acquires and the one who transfers its rights and obligations . In this regard, they are the ones who are obliged to notify the operation.

In the case of mergers, the Economic Agents that directly participate could be the merged company and the merging company

Article 88 of the LFCE establishes two cases of exception for the appearance those directly involved: i) When there is a legal or de facto impossibility, accredited and justified before the Commission, in which case the Economic Agent that notifies is obliged to demonstrate by written notification the reason that caused the legal or de facto impossibility for any of the Economic Agents directly involved in the operation not to have notified it before the Commission, in accordance with what it is set forth in article 19 of the Regulatory Provisions; or ii) In the case of the procedure described in article 92 of the LFCE (hereinafter, "notoriety procedure"), it is allowed that the notification is made by the merging company, that pretends to acquire the control of the companies or associations, or the one who intends to conduct the act or produce the effect of accumulating the

shares, social shares, participation in trusts or assets object of the transaction; that is, the purchasing or the acquiring party. In no case can a notification be accepted when at least the purchaser does not attend.

In some public takeover bids it is impractical and sometimes impossible to identify the identity of the potential sellers. In this case, the possibility that the notification is submitted only by the potential buyer may be assessed.

Likewise, there are cases in which multitude of Economic Agents concur as shareholders of the selling party or the object. In these cases, it is reasonable that the shareholders or companies that, as a whole, control the object appear at the notification. For such, they must demonstrate the legal or de facto impossibility for those directly involved in the transaction to do so.

The Regulatory Provisions, in article 20, establish another exception. When the concentration involves several acquirers or alienators that belong to the same economic interest group, the notification may be submitted by the person or persons or companies that control the group, who will be obliged to submit the information that the LFCE or the Commission requires regarding any of the members of the corresponding group. In addition, the Commission may require any member of the group involved in the transaction to adhere to the notification procedure.

In this regard, the directly related acquiring party may notify itself, or through its direct or indirect controller. However, in no case it is allowed for the notification to be made by a subsidiary or affiliate company of the parties which is not related to the operation.

3.7.2. Time of the notification

As it has been indicated, article 86 of the LFCE obliges that those concentrations that fall under any of the assumptions contained in any of the three sections of the article to be notified and authorized by Cofece before being executed. Article 87 of the LFCE establishes the situations in which prior notification must be made.

It has also been indicated that it is not necessary to wait to have a contract or draft of a final act to notify. However, it is necessary to have the basic elements to define the operation intended to be carried out, that is, the object of the operation, the subjects that must submit the notification (commonly the sellers or acquired or purchasers or acquirers) and the possible vehicles for conducting the acquisition, when the latter is defined, as well as any clause by which the parties are obliged not to compete.

In the case of collaboration agreements between Economic Agents or Joint Ventures, the following is suggested:

- When they imply the creation of a new company the concentration must be notified before the constitution of the new Economic Agent. The foregoing, as long as the forecasted contributions, regardless of the moment of their execution, meet any of the sections contained in article 86 of the LFCE.[25]
- When the collaboration agreement between Economic Agents is merely contractual,[26] and does not imply the constitution of a company, the concentration must be notified before the

25. In these cases, to prove the conclusion of the concentration, it will be enough to present the constitutive act of the new Economic Agent, regardless of whether the contributions made at the time of the constitution have exceeded the thresholds provided for in article 86 of the LFCE.
26. When the amount of the projected contributions is not specified in the contract signed between the Economic Agents participating in the collaboration agreement, the business plans that motivate the creation of the collaboration may be used as a reference.

contract that originates the collaboration agreement takes effect. The foregoing, as long as the contributions considered at the time of their completion meet any of the sections contained in article 86 of the LFCE.[27]

In any of the cases, the notifiers may execute the corresponding acts as long as clauses are established that impede the acts of the concentration from having legal or material effects, and subsequently notify it before the Commission.

Likewise, Economic Agents are recommended to consider that the notification of concentrations may be voluntary and precisely the analysis of the operations using the procedure for notification of concentrations can avoid the initiation of an investigation regarding a Joint Venture, even when it does not exceed the thresholds established in article 86 of the LFCE.

3.7.3. Terms established by law

All references to terms contemplated for the handling of the procedures of concentrations are in business days, in terms of what is provided for in article 114 of the LFCE. When terms are established in months or calendar years, the calculation is made from date to date and includes non-business days.

3.7.4. Place of notification and submission of motions

In terms of the Regulatory Provisions on the use of electronic means before Cofece and the Guidelines for the notification of concentrations through electronic means, the notification of concentrations is made exclusively through electronic means through the Electronic Procedures System of the Commission (SITEC).

Within the framework of the SITEC, an Electronic Notification of Concentrations System (SINEC) was created. In the same way that in traditional written means, the notification of a concentration procedure is initiated in the SINEC with the notification of the concentration and ends with the accreditation of the conclusion of the operation. That is, through the SITEC each and every one of the stages of the procedure of the notification of a concentration will be processed, including personal notifications made to the notifying economic agents.[28]

3.7.5. Information to process the notification by type of procedure

The LFCE contemplates two procedures for the analysis of concentrations. The first, established in article 90 of the Law, that for practical effects is known as the normal procedure, is applied to situations in which the Commission requires to make an analysis, even when minimal, of the possible effects of the concentration in the markets.

In this case, the agents must submit information that allows the Commission to assess the possible effects of the concentration, including information to determine the uses and the characteristics of the product, the geographic dimension of the market, the shares of the competitors in the market, among others. All of this will depend on a case-by-case analysis. Also, the procedure provides for the possibility that the Commission requires more detailed information from the promoters, other Economic Agents and authorities, in order to determine the repercussions of the possible concentration on competition and free market access.

27. To prove the conclusion of the concentration the notifiers may present the signed contract, regardless of whether the contributions made at the moment of the conclusion have exceeded the thresholds provided for in article 86 of the LFCE.
28. For more information, is recommended to consult the Cofece Electronic Notification System User Guide , available at: https://sinec.Cofece.mx/Content/Sources/Manual%20de%uso%20SITEC_%SINEC_%20SINEC_%20actualizado_a_marzo_2020.pdf.

The second, refers to the procedure by notoriety provided for in article 92 of the LFCE that applies to situations in which it is notorious that the transaction does not have as the purpose or effect of reducing, damaging or preventing free market access and economic competition. It corresponds to the individuals to expressly request this type of procedure be handled and to provide the elements to sustain notoriety. Otherwise, it will be handled in accordance with the normal procedure.

The principle of notoriety occurs when the acquirer does not participate in related markets to the relevant market in which the concentration occurs, or is not a current or potential competitor of the acquired party, and, in addition, any of the following circumstances must also concur:

"I. The transaction implies the participation of the acquiring party for the first time in the relevant market. For these effects, the structure of the relevant market should not be modified and should only involve the total or partial substitution of the Economic Agent acquired by the acquiring party;
II. Prior to the operation, the acquiring party does not hold control over the acquired Economic Agent, and with the transaction, the former increases its relative participation in relation in the latter, without attaining more power to influence the operation, administration, strategy and main policies of the company, including the appointment of members of the board of directors, directors or managers of the acquired;
III. The party acquiring shares, social parts or participation units has control of a company and increases its relative participation in the social capital of said company (...)"

The purpose of the procedure established in article 92 is to provide an alternative to the normal procedure for the handling of notifications of concentrations that do not affect competition, as long as the information and evidence provided confirm the aforementioned assumption of notoriety. According to what it is established in the last paragraph of article 92 of the Law, the notification must contain all the documentation stated in sections I to XII of article 89 of the LFCE and, if it is incomplete, the matter will be handled in accordance with the procedure of article 90 of the LFCE.

3.7.6. Information regarding authorizations in other jurisdictions and other authorities in Mexico

In international operations or in those whose relevant markets may have international nature, it is useful for the Commission to know if the transaction should be analyzed and authorized by competition authorities of other countries. In this context, it is advisable that the notifiers inform about the status of the processes they carry out to obtain of the mentioned authorizations and about the possible conditions to which the authorization is subject, including their scope in terms of the products, territory and repercussions in the markets in Mexico. In addition, it is desirable that the Notifiers submit information and documents that are useful for the analysis of the operation and that have been submitted to the competition authorities from other countries.

It is possible that public officials of the Commission may hold discussions with their counterparts from other jurisdictions regarding a concentration. In this regard, the Commission preserves the confidentiality of the information it receives in its procedures and does not disclose it to other authorities, unless it has express consent, in writing, of the Economic Agents involved in the operation to share the information with them.

Likewise, it may be pertinent for the notifiers to inform about other authorizations that they must obtain in Mexico, particularly in transactions related to markets subject to some type of regulation.

3.7.7. Obligation to conduct truthfully

The notifiers, as well as those Economic Agents from whom the Commission requires information, have the obligation to conduct truthfully. Article 127, section III, of the LFCE establishes a sanction of up to 175 thousand times the UMA for having falsely declared or provided false information to the Commission, regardless of the criminal responsibility incurred.

In this context, the notifiers must do an exhaustive exercise, before submitting their written notification, in order to identify all the information and documentation referred to in the sections of article 89 of the LFCE.

3.7.8. Confidentiality

In accordance with articles 124 and 125 of the LFCE, the information and documents that the Commission has obtained directly in the conduction of its investigations and verification proceedings are reserved, confidential or public.

Public officials will be subject to liability in cases of unduly disclosure of the information submitted to them. When there is an order of the competent authority to submit information, the Commission must indicate to said authority that the latter will have to dictate the measures that are conducive to safeguarding the information that was delivered in the terms of the applicable regulations. Only agents with a legal standing in the files have access to them.

In terms of article 3, section XI, of the LFCE, the reserved information is that to which only the Economic Agents with a legal standing in the procedure can have access. In the case of concentrations, the economic agents with a legal standing are those who formally submit the notification.

For its part, in terms of article 3, section IX, confidential information is that which, if disclosed, may cause damage or harm to the competitive position of that who provided it, contains personal data which dissemination requires consent, could risk its security or when its disclosure is prohibited by the law.

In terms of article 125 of the LFCE, in order for the information to be identified as confidential during the procedure, it is necessary that the notifiers: i) request the confidentiality of certain information, ii) accredit the nature of confidentiality, and iii) present a summary of said information, which must be endorsed by the Commission. This summary will be included in the file. In case that the notifier is unable to do the summary of the confidential information, they must state the reasons for said impediment, in which case the Commission may make the corresponding summary.

Specifically, they must argue which information in particular is confidential, what is the damage or harm that would be caused to the competitive position of the company in case of making it known to the other Economic Agents, which are the personal data whose disclosure requires consent, may put at risk the security of its owner, or the legal provision that prohibits its disclosure. This should be done as precisely as possible, for each paragraph of the writing or each of its annexes. In this sense, the promoters must avoid making general and vague statements about the confidentiality of the totality of the information submitted, since these general statements would not comply with the established in articles 124 and 125 of the Law.

For its part, in accordance with article 3, section X of the LFCE, this Commission will consider as public information that which has been made known by any means of public dissemination, or that is found in public records or accessible public sources. In this regard, it is common that the notifiers request that the Commission identifies as confidential information documents that are registered in any Public Registry – related to the granting of representation powers of the companies, articles of incorporation, the amendment or certification of the statutes, among others- as confidential information. In this respect, this Commission will identify as confidential the referred documents, except for their identification data (e.g. date, number of the public instrument).

In general, the conditions imposed by the Commission are public. However, in particular cases and fully justified by the notifiers, it will be identified as confidential those elements in which the Economic Agents demonstrate that, if made public, could risk the operation, compliance with conditions or the competitive position of the company or companies. Once fulfilled the conditions or the reservation period has elapsed, they will be made public.

Finally, during the handling of the concentration procedure, the information contained in the files has a reserved nature in the terms of what is set forth in article 3, section XI of the LFCE. Consequently, only the Economic Agents with a legal standing in the file will have access to its information.

For each case, Cofece will determine the identification of the information in accordance with the LFCE and the applicable regulations in matters of transparency and access to information, as well as the protection of personal data.

For more information, the notifiers may consult the website of Cofece, in which the regulations applicable to the Commission in this matter can be found.

3.7.9. Languages and translations

Article 112 of the LFCE states that the proceedings and documents must be submitted in Spanish. The promoter can submit documents in a language other than Spanish, but must accompany the translation made by an expert translator of the aspects that it deems relevant, without prejudice that the Commission may request the promoter to broaden or complete the translation, when it deems it pertinent.

For procedural economy and in order to not generate excessive cost for the notifiers, in matters of concentrations generally only translations of the fundamental parts of the documents are required, except that in special cases the translation of complete documents is required.

In this matter, the documents that are typically submitted in English or any other language are the contract of the operation, the financial statements, the constitutive acts, social statutes, and the documents that explain the objective and motive of the operation. In case that the social statutes or constitutive acts of the companies, can be translated aspects such as the place and date of the constitution, address, object or nature of the business, validity, corporate governance issues, and appointment of directors. The foregoing, without prejudice that full translations of the documents may be requested.

In case of the financial statements, in the first instance it will be sufficient to translate aspects such as monetary unit, accounting period, profits, sales, share capital, assets, and relevant elements of the notes.

In case of the contract, in the first instance it will be sufficient to submit the translation of the sections that describe the operation, the relevant terms or definitions of the contract (typically described at the beginning of the contract), non-compete clauses or similar, object of the operation (in case is contained in the contract), the suspensive conditions to which the contract is subject and the price or amount of the transaction.

The Regulatory Provisions state, in article 39 that, for the effects of the LFCE, an expert translator is the one who accredits, with an appropriate document, the technical knowledge of the language in question.

4. Types of procedures

4.1. Normal procedure (article 90 of the LFCE)

Article 89 of the LFCE states that the notification of a concentration must contain:

> *"I. Name, denomination or corporate name of the Economic Agents that notify the concentration and of those that participate in it directly or indirectly;"*

As indicated in section 3.7.1., the Economic Agents that participate directly in an operation are those that are obliged to notify it. When it involves a sale, both the buyer and the seller are considered as direct participants. In the case of mergers, the Economic Agents that participate directly are the merged company and the merging company (without these cases being the only ones in which there is an obligation to notify them in accordance with the applicable regulations).

The determination of the Economic Agents that indirectly participate in an operation must be made on a case-by-case basis and there is no general rule that applies to all matters. However, it may be considered that those Economic Agents that are part of the economic interest group of the buyer and the seller (including the object) participate indirectly in an operation, as indicated in section2.5, and that have been identified in the previous analysis provided for in section VIII of article 89 of the LFCE. The same applies to the case of merged company and merging company.

In case that the Commission identifies that it is necessary for an Economic Agent to adhere, it may require such adherence within the information requirements indicated in article 90 of the LFCE.

Section II of the same article provides that the notification must contain:

> *"II. As the case may be, name of the legal representative and the document or instrument that contains the powers of representation in accordance with the formalities established in the applicable legislation. Name of the common representative and address to hear and receive notifications and authorized persons, as well as the information that allow their prompt localization;"*

The Economic Agents, both natural and legal persons, can be represented by a legal representative in terms of the provisions of the Federal Civil Code and its related provisions in each state of the Republic.

According to what is provided for in the last paragraph of article 89 of the LFCE, the representation of Economic Agents before the Commission must be accredited by a notarial testimony or certified copy of the document or instrument that contains the powers for that matter. In general terms, this is the only document that is required in original or certified copy for the handling of a notification of a concentration.

For the granting of powers of representation it is necessary to meet certain requirements. Some apply in a general way and others will depend on the place where they were granted, as well as the place in which they will come into effect.

The power of attorney may be general or special, in accordance with what is set forth in article 2553 and 2554 of the Federal Civil Code. For the notification of a concentration it will be enough that the power is general for litigation and collections.

For the powers granted under public faith of a public notary in Mexico, it will be desirable that they comply with the following:

- The notary must state that the person appearing has the legal capacity to grant it and, in such case, state the current legal existence of the legal person in question;
- The notary must state the issuance dates and origin of the power of attorney; and
- The notary must mention whether it is a general or special power of attorney.

In case of powers of attorney granted abroad, these must be submitted in Spanish or translated into Spanish by an expert translator. In the cases in which it is possible, the powers must observe certain international rules, such as the following international treaties and/or conventions, depending on the case that applies:

- Protocol on Uniformity of Powers of Attorney which are to be utilized Abroad (also known as Washington Protocol)
- Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad
- Hague Convention abolishing the requirement of Legalization for Foreign Public Documents (also known as the Apostille Convention).

In the case that the country in which the power of attorney is granted is not included in the first two mentioned international treaties, it will be enough for the power to be granted before a public notary, to be legalized or apostilled and include its respective translation into Spanish by an expert translator or it is in this language.

The legalization of powers applies to the case of the countries that have not adhered to the Hague Convention, for which must they present its duly legalized powers, in the terms of the Bylaw of the Mexican Foreign Service Law (articles 83 and 84) and the Federal Code of Civil Procedures (article 130).

Regarding the powers of attorney granted abroad, it is not necessary for them to be presented certified before a public notary in Mexico.

In terms of article 88 of the LFCE and 5 of the Federal Code of Civil Procedures, of supplementary application of the LFCE, when submitting the notification of the concentration, the notifiers must designate a common representative. In case that the parties appoint more than one common representative, the Commission will name one of them ex officio, unless that these present a justified cause. For example, the duty to designate a common representative does not apply when, with justification, the Commission accepts that only the acquiring party notifies.[29]

Likewise, in terms of section II of article 89, the parties must designate common authorized persons to hear and receive notifications. This facilitates the process of notification of information requirements or resolutions.

The common representative may also designate authorized persons in terms of article 89, section II, of the LFCE. Therefore any notification made to the common representative or to the persons authorized by it will be considered valid for its represented. The foregoing, in accordance with what it is set forth in article 17 of the Regulatory Provisions.

The Economic Agents or their legal representative may designate authorized persons in terms of article 111, second and third paragraphs of the Law.[30]

In accordance with article 117 of the Law, the parties must designate a single address to hear and receive all kinds of notifications, in Mexico City (formerly the Federal District), with the purpose of expediting the procedure.

Section III of article 89 of the Law, states that the notification must contain:

"Description of the concentration, type of operation and a draft of the legal act in question, as well as a draft of the clauses by virtue of which they are obliged not to compete if these exist and the reasons for which these are stipulated;"

The notifiers must describe the operation clearly. By type of operation, they must identify whether it is a horizontal concentration (between competitors) or vertical (relationship between producer-distributor or producer of input-consumer of the same), between companies located in related markets or a diversification of conglomerate.

On the other hand, they must provide a copy of the draft of the legal act or legal acts that will support the transaction, which may be, among others, the contract, the letter of intent or placement prospectus. In the case of not having a definitive contract or equivalent document they must declare what the operation consists of. Likewise they must, at least, provide the draft of the non-compete clause, in the case the parties consider agreeing to one.

Section IV requires the following information to be submitted:

"IV. Documentation and information that explain the objective and motive of the concentration;"

The promoters must explain the objectives of the operation. Likewise, the LFCE is very clear in stating that "documentation" is also required to explain the objective and motive of the concentration. This should be understood as documents produced internally by or for the parties in order for them to make their individual decisions, within the framework of the negotiation, as

29. According to article 5 of the Federal Code of Civil Procedures, the common representative is one of the interested. Therefore, it can be a natural or legal person. The notifiers can appoint directly a natural person as a common representative. If the notifiers appoint a legal person as common representative, the Commission understands that the common representative is the legal representative of the appointed legal person.
30. Notwithstanding the foregoing, those who have a legal standing in the notification of the concentration may consult the file and use any means of reproduction to obtain copies of the documents contained therein, in accordance with the formalities established in article 43 of the Regulatory Provisions.

well as those that have been exchanged within the framework of the negotiation. These documents can be presentations, sales or purchase forecasts, business plans, as well as evaluations and analysis of the impact of the operation on market shares, competitors, clients, distributors, expansion of the production and reductions in costs.

However, when the Economic Agents do not have any documentation that proves the objective of the operation, they can manifest it under oath. In case of providing false information or making a false declaration, the Economic Agent will receive an economic sanction in terms of section III of article 127 of the LFCE. Likewise, the Commission may investigate those concentrations that have been authorized based on false information, in terms of article 65 of the LFCE.

In the case of collaboration agreements between economic agents, the promoters must submit the documentation that proves the reasons by which the agreement will be entered into (motive) and of the goals that they seek to achieve with its collaboration (objective). Likewise, they will be able to submit all the business plans that stipulate the value of the project to be carried out and/or the total amount of the contributions that each of the economic agents plan to make. Finally, it is recommended that, in case of existing, the Economic Agents provide those agreements, guidelines or information exchange guides (or their drafts) in which it is demonstrated that the strategic or commercially sensitive information that is exchanged between the members of the collaboration agreement will be limited exclusively to the business object of the agreement.

Section V states:

"V. The constitutive document and its amendments or certified copy, as the case may be, the statutes of the involved Economic Agents;"

This section requires any of the following documents to be submitted:

- Constitutive document and its amendments to corporate statutes, or
- Certification of corporate statutes.

The documentation must be submitted in a simple legible copy.

It is necessary to submit this documentation with regards to the company object of the operation, as well as that of the companies that are part of its Economic Interest Group (towards the lower levels of their shareholding), in accordance with section2.5

Regarding the seller, in the case of a sale in which the totality of its participation is alienated and it does not remain as a co-shareholder, it will only be necessary to submit the documentation of the direct seller.

In case of the buyer, it must be submitted the documentation of the direct buyer and of those Economic Agents that are part of its economic interest group with presence in Mexico, as indicated in section 2.5, and have been identified in the analysis provided for in section VIII of article 89 of the LFCE (towards the upper and lower levels of the shareholding). The same applies to the seller, in case that it remains as partner or acquires shares from the buyer.

Finally, when there are several amendments to the corporate statutes that refer only to increases in the share capital, it will suffice to submit the latest amendment.

Section VI provides:

"VI. The financial statements for the immediately preceding exercise of the Economic Agents involved;"

The Economic Agents must provide the financial statements audited or certified by an authorized public accountant corresponding to the fiscal year immediately prior to the notification of concentration, including the notes. In case that the notifiers do not have them, which normally occurs when the notification is submitted during the first quarter of the year, the audited or certified financial statements of the two previous years or the most recent non-audited or non-certified financial statements can be used. Finally, in justified cases, internal financial statements that comply with generally accepted accounting rules may be used.

The financial statements of the same companies indicated in the previous section V must be submitted.

In accordance with section VII, it is necessary for the notifiers to submit:

"VII. Description of the structure of the share capital of the Economic Agents involved in the concentration, whether Mexican or foreign companies, identifying the participation of each partner or shareholder direct or indirect , before and after the concentration, and of the persons who have and will have control;"

It is desirable that the notifiers provide some type of formal certification of the way in which the share capital of the companies is distributed among the different direct and indirect investors. However, the certification is not essential, as the LFCE allows to submit only a description. This may simply be a diagram that reflects the several shareholding relationships between the companies and that indicates the shareholding percentages, with the understanding that the notifiers are obliged to declare the truth. In cases in which the Commission deems it necessary, it may request the corresponding certifications.

For the analysis of economic competition, it is essential to know the identity of the direct and indirect shareholders that are in control of the companies involved in the concentration or that could have any relevant or significant influence on the management of the companies. In this way, the promoters must submit the information that allows knowing the structure of the economic groups at all levels above the direct shareholding. It is desirable that the promoters identify at least the shareholders that, in last instance, hold share participations of 5% or more, as long as this information is available to the parties.

In the same way, it is necessary for the notifiers to inform with the greatest detail possible about the direct and indirect shareholding structure that the acquired company will have, or to detail in whom will fall the ownership of the acquired assets and the direct or indirect corporate rights that these grant, once the concentration has been carried out.

Specifically, the Economic Agents must submit the corporative structure of the acquiring party, until reaching a level in which the owners or controllers in last instance are identified. The same applies in the case in which the party that transfers the rights and obligations remains as partner or shareholder of the acquirer.

Regarding the selling party, in the case of a sale in which it alienates the totality of its participation and does not remain as co-investor, it will be only necessary to present the direct shareholding structure of the seller, without reaching a level in which the last instance owners or controllers are identified.

On occasions, the notifiers are not able to inform precisely which will the final shareholding structure once carried out the concentration. If so, they may indicate it and must inform about the definitive structure at the time they submit the information to the Commission to accredit the conclusion of the concentration. However, the notifiers should take care that the final structure of the operation does not modify the particular reasons and special circumstances that Cofece took into account in the analysis of the concentration in question. Particularly, they must take care that in the final structure of the operation no Economic Agents other than those that were informed to the Commission with the notification are involved. The foregoing is valid for any concentration, including those handled in accordance with article 92 of the LFCE, and not only those handled through the procedure set forth in article 90 of the Law.

Once a concentration has been resolved, the promoters may not substantially modify the structure of the notified operation.[31] If this occurs, they will have to notify again.

In the case that investment funds participate as buyers in a concentration, either directly or indirectly, it will not be required to submit information on their direct or indirect investors or "limited partners"[32] unless these fall within the following assumptions:

- The limited partner or investor, regardless of the percentage of shareholding rights or representation held, has the right or capacity to participate, intervene or influence directly or indirectly in the decision-making related to:
    i. The business plan, policies and objectives of the investment fund or the companies in which the fund invests;
    ii. The annual budget of the investment fund or the companies in which the fund invests;
    iii. The appointment or removal of the direct or indirect administrator of the investment fund or of the companies in which the fund invests;
    iv. In general, the operational activities of the investment fund.
- The limited partner or investor has rights or a holding that represents twenty percent (20%) or more of the assets, contributions, capital or shares with a right to vote in the investment fund.

In this regard, it is indicated that the analysis conducted for those concentrations that include the direct or indirect participation of an investment fund, is made on a case-by-case basis. Therefore, in case that this Commission deems it necessary, it could request additional information regarding the investors or limited partners of an investment fund that do not fall within the aforementioned assumptions.

"VIII. Mention about the Economic Agents involved in the transaction that have direct or indirect participation in the share capital, in the administration or in any activity of other Economic Agents that produce or commercialize goods or services that are the same, similar, or substantially related to goods or services of the Economic Agents participating in the concentration;"

31. As result of the business dynamics, notifiers sometimes modify some details, for example, the company they will use as a vehicle for the operation. Changes such as the inclusion of new investors or in the nature of the control once the operation has been executed may lead to a modification of the essence of the authorized operation.
32. "Investor" or "limited partner" shall be understood as those shareholders who contribute resources to the investment fund and that may or may not influence its management (generally identified in a foreign investment fund as "Limited Partners").

In terms of this section, the notifiers must identify whether the acquiring party, as well as its direct or indirect shareholders, participate directly or indirectly in the ownership or administration of other Economic Agents that develop or could develop similar or related activities to those carried out by the object of the transaction. The same applies to the selling party, in the case that it remains as partner or acquires shares of the buyer, regarding the activities of the acquiring party.

It is recommended that promoters submit information and evidence to support their affirmations.

For methodological purposes, when the acquirer or any of its shareholders participate in similar or related businesses to the acquired, the analysis must consider the most adverse scenario for competition, that is, assuming that the buyer and the other agent in which it has participation (even if it is a minority) form the same Economic Interest Group. If there is no possible affectation to competition, the analysis is normally concluded. On the other side, in case that the analysis of the concentration indicates that it is not possible to discard an affectation to competition, the shareholding links between the acquiring party and its shareholders regarding the other companies are analyzed in more detail, to determine whether the shareholding participation is sufficient to consider that there is a possibility to exert control, significative influence or having access to privileged information.

Section IX requires:

"IX. Information on the market share of the Economic Agents involved and their competitors;"

The Economic Agents must submit market shares regarding the goods or services in which there is a horizontal overlap or some vertical relationship between them, which will not necessarily coincide with what Cofece may determine in terms of the Law to determine the relevant market. In fact, in cases of doubt, the Commission may require the notifiers to submit information of the participations under different definitions of relevant market.

In this regard, some considerations are presented below to define the relevant market.

In terms of article 58 of the LFCE to determine the relevant market, the following must be taken into consideration: (i) the possibilities of substituting the good or service in question for others; (ii) the costs of distribution of the good; of its relevant inputs; of its complements and substitutes from other regions and abroad, taking into account freight costs, insurance, tariffs and non-tariff restrictions, the restrictions imposed by the Economic Agents or by their associations and the time required to supply the market from those regions; (iii) the costs and probabilities that users or consumers have to go to other markets; (iv) regulatory restrictions of federal, local or international nature that limit the access of users or consumers to alternative supply sources, or the access of suppliers to alternative customers; and (v) what is established in the Regulatory Provisions and the technical criteria issued by the Commission.

In terms of article 59 of the LFCE, to determine the market shares in the analysis of substantial power, it is possible to take into consideration the sales, number of clients, productive capacity or any other factor that the Commission may consider acceptable and that reflects in an appropriate manner the competitive presence of Economic Agents in the markets.[33]

At the time of submitting the information, the notifiers must indicate the source. Information should preferably come from an official source and be verifiable, but if this is not possible, notifiers should explain the difficulties in obtaining reliable information. In case of submitting estimates, they must indicate and describe the methodological aspects under which the information was obtained. They should also clarify from the beginning the monetary and volume units used.

The Commission has the possibility of requiring information from alternative sources, whether from other authorities, chambers, associations or competitors, among others, and making its decisions based on the best available information.

The references to markets in documents related to the analyzed activity may provide indications regarding Economic Agents, relevant products or services or geographic area with respect to which the market participants identify sources of rivalry, which constitutes proper information to determine the relevant market.

The information about market shares is used to calculate the concentration indices. The calculation methods to determine these indices, as well as the technical criteria for their application, are published in the DOF and in the website of the Commission.

Section X provides the following:

"X. Location of the facilities or establishments of the Economic Agents involved, the location of their main distribution centers and the relationship they have with said Economic Agents;"

This section requires the submission of information on the location of the facilities where they produce and from which the products are distributed. Likewise, they must inform the Commission about the relationship that exists with the distributors.

This information must be submitted regarding the company or the assets that are the direct or indirect object of the operation, as well as from the acquiring party. The same applies to the selling party, in case that it remains as partner or acquires shares of the buyer.

In cases that warrant it, the Commission requires the delivery of detailed information regarding the origins and destinations of the products, as well as the distances and geographic areas of influence of the distribution centers or the facilities where the goods or services are produced or offered.

Section XI requires the following:

"XI. Description of the main goods or services that are produced or offered by each Economic Agent involved, specifying their use in the relevant market and a list of similar goods or services and the main Economic Agents that produce, distribute or commercialize these in the national territory, and"

33. Normally, the easiest way to estimate market shares is by sales. This does not mean that it is the preferred way to do it. Depending on the particularities of the markets, a measurement of the installed capacity, clients or volume could be more appropriate to reflect the presence of the companies. Something similar can be said about the periodicity of data. In this regard, Cofece normally requires information on an annual basis. However, there are situations in which it is necessary to consider longer time horizons when it comes to markets in which a sale could mean significative variations in participation.

The foregoing means that the notifiers must provide a list and description of the products and services produced or offered by the company or the assets that are object of the operation, as well as with regards to the acquiring party. This information must also be presented with respect to the selling party, in the case that it remains as a partner or acquires shares of the buyer.[34]

Likewise, the notifiers must specify the use of the products and services and indicate other products or services that could have the same functionality that those of the acquirer and the acquired party. Depending of the complexity of the matter, more detail regarding this information may be required.

Finally, section XII states:

"XII. The other elements deemed pertinent by the Economic Agents that notify the concentration for its analysis."

In some cases, the Economic Agents submit complementary information to the sections I and XI of article 89 of the LFCE, in order to contribute to the analysis of the notified operation.

4.1.1. Handling of the procedure by article 90 of the LFCE

The procedure of notification in terms of article 90 of the LFCE begins when the promoters notify in accordance with that article or because the matter was rejected for processing in conformity with the procedure by notoriety in accordance with article 92 of the said regulations.

The procedure contained in said article establishes that the Commission has sixty business days to issue a resolution, counted from the reception of the notification (which is different to the date when the notification is submitted) when this covers all the requirements stated in article 89 of the Law, or after the Commission receives the additional documentation that it has requested. Once the previous term has elapsed without the Commission having issued a resolution, it is understood that the Commission has no objection.

When the notification is submitted, the Commission has ten subsequent days to prevent the notifiers to submit missing information in their written notification. In this assumption, the promoters must submit the information to Cofece in a term of ten days, although this term may be extended at the request of the notifier in duly justified cases.

If the required information its not delivered in the expected term, the notification is deemed as not submitted. In this case, if the notifiers intend to continue with the concentration, they must notify it again.

The Commission will deem the notification as received and issue the reception agreement for processing:

- The day it was submitted, in the cases in which Cofece did not require missing information in terms of the provisions of article 89 of the Law.
- If there was a requirement of missing information, then the notification is deemed as received on the day in which the private parties delivered the requested information.

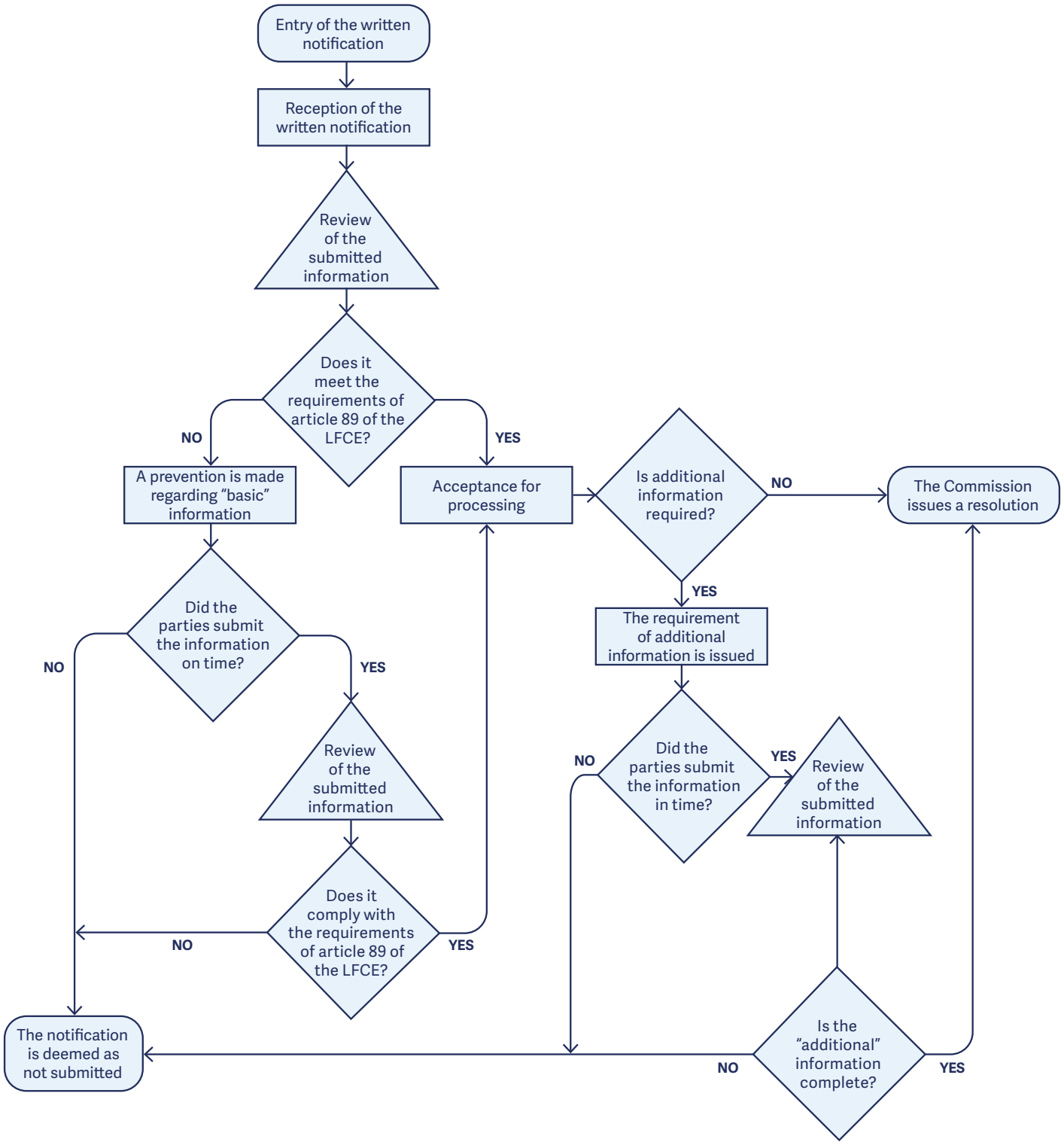
34. Co-investments usually require more information than in the case of acquisitions. In the first case, the Commission must analyze the possible coordination effects that could occur in markets other than the relevant markets; while in acquisitions, there is normally a withdrawal from the seller party of the company, that is, there is no business link between groups as it occurs with co-investments

Once the notification is deemed as received, the Commission has fifteen days to request information, which in practice is known as "additional information". Once the notification of the requirement of information comes into effect, the private parties have fifteen business days to submit the requested information.

As in the case of the information that must be contained in the written notification stated in article 89 of the Law (known in practice as "basic information"), if the additional information is not submitted within the term granted to the private parties, the Commission will consider the notification as not submitted and will proceed to close the file, informing the private parties of this within ten business days after the expiration of the term. Likewise, the Law provides that private parties may request the Commission to extend the deadline for the submission of the additional information, for which they must present a justification. The request must be submitted before the expiration of the term they have to deliver the additional information.

The Law, in section VI of article 90, establishes that the Commission may extend the term to request additional information up to forty business days, which occurs infrequently. Once the additional information has been delivered, if it has been requested, the calculation of the term of sixty business days to resolve begins. In exceptionally complex cases, the Commission may extend the term to issue a resolution to up to forty additional days.

4.1.2. Flowchart[35]



35. This flowchart is a simplified graphic representation of the procedure, which does not include, among others, the terms, the possibilities of extension, or the possibilities of extension of the term.

4.2. Procedure by notoriety (article 92 of the LFCE)

Article 92 of the LFCE provides that the notification of a concentration can be made through a procedure by notoriety, for which it is required that the notifiers request it in writing (expressly indicating the request that the matter be processed by article 92) and accompanying all the information and documentation referred to in sections I to XII of article 89 of the LFCE.

For the handling of this procedure, besides the foregoing, it is required that the Economic Agents submit an analysis and attach information and elements of conviction demonstrating that is notorious that the concentration will not have the purpose or effect of damaging competition.

The emergence of article 92 of the LFCE is fundamentally based on the following:

1. That the acquirer – and its main shareholders- do not participate in related markets in which the object of the transaction participates;
2. That said acquirer – and its main shareholders- are not current or potential competitors in the markets in which the object of the transaction participates; and
3. That any of the circumstances established in sections I to IV of this article concur.

These elements will be analyzed in the following section.

4.2.1. Handling of the procedure by notoriety (article 92 of the LFCE)

Once submitted the notification of concentration, the Economic Agents may expressly request the Commision to handel the procedure in terms of article 92 of the LFCE, for which the applicants must deliver to the Commission information and elements of conviction that demonstrate that it is notorious that the concentration does not have the purpose or effect of reducing, damaging or preventing free market access and economic competition.

The Commission will analyze that the concentration meets the requirements set forth in article 92 of the LFCE and, in case it is fulfilled, within the following five days to the date of notification, the Commission must issue the agreement of admission for processing in this way.

According to the Law, the Board of the Commission must issue a resolution within fifteen business days after the issuance of the reception agreement in the sense that the concentration meets the assumption of notoriety, and therefore this implies that the concentration is approved. In case of not issuing a resolution within said term, the operation is considered authorized.

In case that all the documentation indicated in article 89 of the LFCE is not submitted, the notifiers lose the benefit of the procedure by notoriety. In these cases, Cofece issues an agreement by which it rejects to process the file in this way, and agrees its handling in accordance with what it is established in article 90 of the LFCE. In this same act, generally, the notifiers are prevented to submit the missing information.

The matter can also be rejected during the five days after its notification when it is not proven that they fall in the assumptions of notoriety stated in article 92 of the LFCE. In this case, Cofece agrees to deem the notification as submitted for processing under the procedure provided for in article 90 of the LFCE and initiates the calculation of the several terms provided for the handling of the files in the aforementioned article 90.

It may occur that the matter is processed under the procedure of article 92 of the LFCE, but the Board of Cofece, at the time of analyzing the matter, resolves that the assumption of notoriety needed for this procedure is not met. In this case, the Board orders that the matter be admitted for a new process, but this time following the procedure provided for in article 90 of the LFCE. In

this case, the deadline to resolve resumes as if the notification had been considered as submitted on the day that the Board resolved its inadmissibility in accordance with article 92 of the Law and, therefore, it is possible that the Commission requires basic and additional information or that, from that moment, the period of 60 days to resolve begins.

In case that the matter is not admitted for processing in accordance with the procedure set forth in article 92, it will be necessary that, if they have not done so, all the Economic Agents directly involved in the concentration join the notification and not only the acquiring party. In addition, the Economic Agents that join the notification must appoint a common representative and ratify the terms of what it is stated in the initial written notification.

For a concentration to meet the assumption of notoriety, the Economic Agents must provide the sufficient elements of conviction in their written notification. The foregoing can be demonstrated as long as the following three points are met:

1. The acquirer does not participate in markets related to the relevant market in which the concentration occurs.

There are related markets if the conducts carried out in one market affect the competition conditions or free market access in another.[36] An example may be when the acquirer has no presence in the same market of the acquired, but carries out vertically related activities.

2. The acquirer is not a current or potential competitor of the acquired.

To consider the existence of actual competitors it is necessary that both are active in the same relevant market.

There are cases where the acquirer has no presence in national territory, but develops the same activities as the acquired in other countries or another geographic dimension. In this case, it could happen that the relevant market has a geographic dimension that exceeds the national territory. In this way, the two companies would be actual competitors. Thus, in this case it would be convenient that the notifiers also provide the Commission the information that allows to assess the implications of the concentration, for example that allows to determine the geographic dimension of the relevant market.

On the other side, it could be used as parameter to consider whether a company "A" is potential competitor of another company "B", when both produce similar goods or services and, in light of a small but permanent price increase in the product or service offered by company "B", company "A" could make the necessary investments to supply it or deviate productive capacity and enter the market of company "B" within a short period of time. This assessment is based on reasonably objective criteria, since the mere theorical possibility to enter a market is not enough.

3. In addition to the foregoing, it must occur one of the following situations, set forth in sections I to IV of article 92 of the Law:

"I. The transaction implies the participation for the first time of the acquirer in the relevant market, so its structure should not be modified and it should only be the total or partial substitution of the acquired Economic Agent;"

36. In conformity with what is set forth in article 6 of the Regulatory Provisions.

On the one side, it is convenient to clarify an element that frequently causes confusion to notifiers. If the acquiring party does not have a participation in Mexico in similar businesses to those that are object of the concentration, it does not necessarily mean that the assumption of notoriety is met, since the relevant market may have a geographic dimension that exceeds the national territory. In this way, when the acquirer is located in another country and does not operate or have sales in Mexico, this does not mean that it cannot be considered as a participant in the relevant market.[37]

On the other side, it is important to emphasize that if the acquirer holds a minimum participation in the relevant market or participates in related markets, the matter cannot be handled following the procedure by notoriety.[38]

Likewise, in relation to section I, when who transfers the rights and obligations remains as a partner in co-investment, it is necessary that they provide information about the activities of the latter, to verify that the agents are not competitors in different markets other than those of the concentration.

"II. The acquirer prior to the transaction does not hold control over the acquired and only increases its relative participation in it. Without granting it greater power to influence the operation, administration, strategy and main policies of the company, as well as the appointment of members of the board of directors, directors or managers of the acquired;
III. The acquirer has control before the transaction and simply increases its relative participation in the share capital of the acquired."

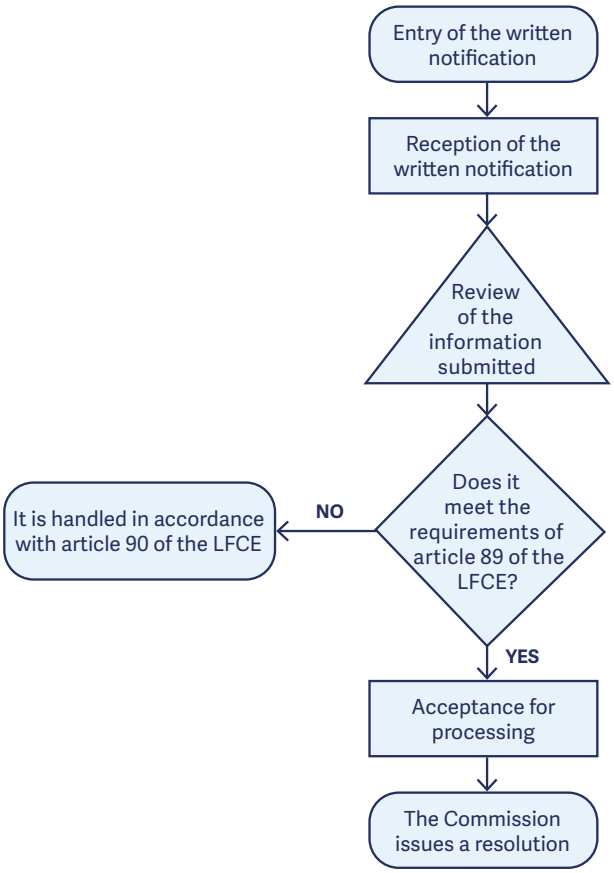
With respect to section III, in the case of consolidation of control, this is considered to happen when the acquirer already has control of a company. This issue was analyzed with greater detail in sections 2.2 and 2.5.

"IV. In the cases established by the Regulatory Provisions."

The Regulatory Provisions do not establish any other applicable assumption.

37. Although the jurisdiction of the Commission only covers the national territory, for analytical effects when the relevant market is defined, it may cover a territory that goes beyond the Republic.
38. The expedited procedure applies to specific situations in which the transaction does not modify the structure of the markets. In this way, it does not matter that the buyer has a minimal participation and it is unlikely, at first glance, that the transaction could negatively affect competition. If this is the case, it is considered that the conditions established to accept the assumption of notoriety are not met and formally the matter must be processed in accordance with the normal procedure. However, in practice, the Commission seeks to timely handle this type of cases in order to not interfere in the course of business.

4.2.2. Flowchart[39]



5. Information for the economic analysis

5.1. Simple cases

Not all cases imply the same degree of analytical complexity. For example, in operations such as the consolidation of shareholding control, it is sufficient for the notifiers to submit a description of the activities of the companies involved in the concentration. In cases like this, the competition analysis focuses on verifying, among other things, that as result of the transaction there will be no changes in the control of the companies.

Likewise, in simple operations that involve relevant markets that have been recently analyzed by the Commission and the Economic Agents that participate in them do not have high market shares, it may not be necessary for the notifiers to submit more information than what is required by article 89 of the LFCE.

5.2. Complex Cases

There are cases in which, because of their complexity, the Commission must conduct an in-depth analysis to determine the relevant market and related markets -in their product dimensions, geographic coverage, and temporality- and study possible repercussions that the notified concentration could have. For this, in these situations it is necessary that the notifiers provide different information related to the analysis of the transaction.

39. This flowchart is a simplified graphic representation of the procedure.

Below, and only in an enunciative way, a list of the information that could be required in complex cases is provided. This information is not routinely requested by the Commission and the list merely intents to guide the notifiers regarding what could be necessary to conduct the economic analysis in complex cases. Although it is not necessary to include this information in the written notification, notifiers may do so in a voluntary basis. Also, if potential notifiers have doubts about the pertinence of integrating this or other information in their notification, it is recommended that they contact the public officials of the DGC to analyze whether the case needs it.

Likewise, for all information that implies considerable volumes of data, the Commission considers fundamental that it is submitted in electronic format that allows the DGC to have fast access to them.

- ***Detailed description of products and services***. To analyze the effects of a concentration, it is necessary, in the first place, that the Commission has a list of products and services offered by the parties involved in the concentration, at a national level. In the case of activities that may have a geographic dimension beyond national frontiers, it is also important that the notifiers inform of their activities in other countries.

  The degree of detail of the list is difficult to define, since it is a case-by-case analysis. In some occasions, it is very easy to provide the information, since companies are dedicated to very specific activities and offer few goods or services. There are times in which companies provide up to thousands of products, so it is necessary to adopt some criteria for grouping the information by categories. If this is the case, the suggestion is that the promoters provide the information aggregated by families of products, following the practices of the industry and then talk to the public officials of the DGC about the feasibility and convenience of conducting a more detailed disaggregation.

  The information must be provided in a format that allows the comparison of products and services provided by the various parties involved in the operation and that allows the identification of overlaps between the buying and the acquired party, as well as any possible links of supply or vertical integration.

  Along with the list, a description of physical and technical characteristics of the products or services and their main uses and applications may be required. This same information may be required regarding possible substitutes and complements, alongside with an explanation and justification of why they are considered as such by the promoters. For that, it will also be useful to present price comparisons.

- ***Competitors***. In addition to the information on possible substitutes, it is important that the promoters identify their potential competitors, describing the range of products or services they offer, their presence in the market, indicating trademarks, access conditions for consumers and other information that allows Cofece to determine the capacity of the supposed competitors to serve the market.

  It is preferable that the identification of competitors is sustained by documents which are produced in the ordinary course of business and that contain that information (annual reports, reports to boards of directors, studies, business plans, among others).

- ***Objective of the operation and benefits***. It is important that the notifiers identify the objectives of the operation. Beyond generic remarks, Cofece requires to know with precision the rationale for the concentration.

  As previously noted, the LFCE requires the submission of "documentation" that explains the objective and rationale of the concentration. In this sense, notifiers must submit internal documents that the companies produce in their ordinary course of business and that have the reasons or considerations by which it was decided to carry out the concentration. These documents can be of various types, such as annual reports, reports to boards of directors, or those used for the decision making of the board of directors or assemblies of the shareholders, studies, business plans, etc. In addition to the previously mentioned, the parties can submit the documents they have exchanged in the framework of the negotiations of the operation, such as the sales or purchase forecasts.

  Along with this, it is important that the notifiers explain which are the possible benefits they seek to obtain from conducting this act.
- ***Internal Documents.*** Documents made in the ordinary course of business by the parties involved in an operation, that contain information on competition, market shares or competitive position of the notifiers and their competitors; strategies, business plans and expansion plans; strengths and weaknesses of the notifiers and their competitors; demand and supply conditions; effects in the supply, demand, cost or price, as a result of the competition of any Economic Agent in the markets involved; monitoring of prices and costs; market studies or surveys that contain, for example, information on the preferences of customers.
- ***Efficiencies***. Section V of article 63 of the LFCE, states that among the aspects to be considered for the possible objection or sanction of a concentration, are the elements that the Economic Agents provide to prove the greater efficiency on the market that would be achieved from the concentration and that would have a favorable effect in the process of competition and free market access.

  In relation to the ordinance stated in section V of article 63 of the Law, article 14 of the Regulatory Provisions establishes that it will be considered that a concentration will achieve greater market efficiency and will have a positive effect on the process of competition and free market access, when the Economic Agents demonstrate that the contributions to the consumer welfare from the said concentration will permanently exceed their anticompetitive effects. Among other efficiency gains that could be demonstrated by the Economic Agents are: savings in resources that allow to permanently produce the same quantity of the good at a lower cost or a greater quantity of the good at the same cost[40]and that result in a reduction of the final price of the good or service; the reduction in costs for the joint production of two or more goods or services; the transfer or development of production technology, and the reduction in the cost of production or commercialization derived from the expansion of infrastructure or distribution networks.

  It is not necessary that the Economic Agents inform in detail the efficiency gains set forth in the Law, since they are not obliged to do so. They have the right to argue efficiency gains when, in their views, this could contribute to a favorable decision by the Commission. However, in case of opting to argue efficiency gains, these must be detailed, quantified, and accredited through analysis, economic studies, expert reports or other documents that demonstrate that said gains will increase consumer welfare.

40. Without reducing the quality of the good.

Even when it involves a prospective exercise, the notifiers should use the objective elements available to them to delineate the possible efficiency gains.[41]

- ***Market shares***. The shares, by reflecting the market structure, are one of the elements to consider for the determination of possible substantial market power. Depending on the market in question, the Commission may require shares at the local, regional, national, NAFTA, global or other level. The shares must be referred in amounts of sales, units, productive capacity, number of users or any other similar indicator that has an objective basis, this means, that is quantitative, reliable and that reflects the competitive position of the companies in the markets. In any case, the notifiers must indicate the source of the information. In the case of estimations, the applied methodology must be explained.

  To determine the market shares, the following must be taken into account:

  - The current market shares can be adapted to reflect the foreseeable changes in the market.
  - The market shares resulting from the operation of concentration, are calculated from the assumption that the combined share of the parties after the concentration equals the sum of their shares before the concentration.
  - Data from the past can be used as a proxy variable of the current share, if the market shares have been volatile, for example, because the market is characterized by large and uneven orders.
  - The periodicity of the information will depend on the nature of the business, since in some cases information may be needed for periods greater than or lower than one year.

  The evolution of market shares over time can provide useful information about the functioning of competition in the market and on the possible importance of the different competitors in the future, since they indicate, for example, if the companies have been winning or losing share in the market.
- ***Origin of the products***. The notifiers must inform which is the country or countries of origin of the products offered, as well as identifying the origin of the possible substitutes.
- ***Clients or consumers***. In some analyses, it is necessary that the promoters identify the main clients or consumers (it is recommended that they be, at least, the top ten), as well as the percentage that each one of them represents in their sales. In this case, it will be necessary to provide the identification and location data of such clients. In cases in which the Commission considers it necessary for its analysis, it could require information from all the clients of the parties, as well as from the products commercialized to each one of them.
- ***Productive process***. This information refers to the description of the productive process, including production diagrams, description of equipment, technologies and inputs. It is suggested to indicate if in the last 5 years they have carried out any process of innovation and what benefits have been obtained or are expected to be obtained derived from its implementation.
- ***Installed capacity***. It refers to the installed capacity of the notifiers, the production, its destination and the percentage of use of each product and, as the case may be, for each plant.
- ***Costs***. The main production costs must be considered, particularly, the direct costs, distinguishing the main inputs and their percentage participation in the costs per product.

41. In practice, the accreditation of efficiencies is a complex task, since the promoters submit forecasts that are not necessarily met. Therefore, the arguments of private parties must be supported in a way that it is feasible for the authority to verify the probability of the possible efficiencies to be met in benefit of the consumer. In this regard, they must submit credible elements so that they can be considered by the authority.

In some cases, it may be necessary to have the information by plant. In other cases, the Commission may require information on profit margins. This information may be required, for example, on a monthly basis for the last five years.

- ***Inputs***. The provision of inputs and its prices should be considered, as well as the possibility of using alternative inputs, and the description of the relationship of the notifiers with the suppliers of the main inputs, including exclusivity contracts. In some cases, the Commission requires to know the percentage that its purchases represent with respect to the total sales of the suppliers.
- ***Distribution and commercialization***. This includes the description of the logistics used for the distribution and commercialization, including the information related to the type of relationship between the notifiers and their distributors.
- ***Distribution channels***. It refers to the breakdown of sales by distribution channel, indicating the existence of contracts of exclusive distribution and of distribution or supply. It might be necessary to identify whether the notifiers have their own distribution network or whether this is carried out through third parties, in which case it is important to explain the main differences, if any, in the relationship between the notifiers and the different channels and between distributors in the same channel.
- ***Prices***. It is recommended to submit price series, preferably monthly and for at least the last five years, for the domestic and export markets of the products offered by the notifiers. In particularly complex cases and for comparative purposes, it is possible that the prices at which the products are available in international markets for import into Mexico may be required, particularly from the United States of America, especially when the promoters argue that the relevant market is international or NAFTA. It is desirable that this information is submitted in electronic format, in order to facilitate its handling and analysis.
- ***Foreign trade and consumption***. It is recommended to submit monthly series, for at least for five years, of the value and volume of imports, exports, national production and apparent consumption, as well as the possible restrictions that may exist for their import or export. In the cases in which it is possible, it is advisable to also submit the breakdown of imports by company and country of origin, as well as to distinguish between temporary and final imports. It is desirable that this information is submitted in electronic format, in order to facilitate its handling and analysis.
- ***Transportation costs***. In the case of production that it is destined for the domestic market, it is recommended to submit the transportation costs in such a way that is possible to identify areas of influence by plant. For the case of imports and when the promoters argue that the market has a geographic dimension greater than the national, for example the NAFTA area or international, in addition to the transportation costs, it is important to identify other costs related with the mobilization of goods, differentiating the imports from countries of different regions of the world (for example, North America, South America, Europe or Asia). In this case, it will be necessary to identify the points of origin and destination, the means of transportation, as well as evidence to support this information.
- ***Access to imports***. It is possible that it is required to identify: suppliers located in other countries, particularities in transport, possible alterations in the consistency and physical or chemical properties of the relevant products caused by the handling and transportation; logistics; supply time; regulatory and environmental restrictions; international supply conditions; and limits on the productive capacity of suppliers, among other aspects.

- ***Tariffs, countervailing duties and other import restrictions***. It would be necessary to identify the tariff sections under which the relevant products and their possible substitutes are imported, as well as the applicable tariffs and countervailing duties by country. Information should also be given on the existence of non-tariff import restrictions, for example, import quotas, certification and standardization requirements, among others.
- ***Barriers to entry***. Barriers to entry should not only be understood as the cost and time of installation, but also the set of economic, technical and regulatory elements that determine the entry into the market and, in particular, those extraordinary costs (in relation to the expansion costs of an established competitor) in which new competitors must incur to gain access to the market. The analysis of barriers requires the Commission to be informed, among other aspects, about:
  - The financial costs or those for developing alternative channels, the limited access to the financing sector, to the technology or to efficient distribution channels;
  - The amount, indivisibility and recovery period of the required investment, as well as the absence or low profitability of alternatives uses of infrastructure and equipment;
  - The need to have concessions, licenses, permits or any type of governmental authorization, as well as rights of use or exploitation protected by the legislation in matters of intellectual or industrial property.
  - The investment in advertising required for a brand or trademark to acquire a market presence that allows it to compete with already established brands or names;
  - The limits to competition in international markets;
  - The restrictions constituted by common practices of the Economic Agents already established in the relevant market; and
  - The acts of federal, local, or municipal authorities that discriminate in the granting of incentives, subsidies or support to certain producers, marketers, distributors, or service providers.

When the entry into a market is relatively easy, it is unlikely that a concentration could pose a significative anticompetitive risk. For this entry of new competitions to be considered as a compensatory factor of the possible market power of the resulting entity, it must be shown that said entry is probable, that it can occur promptly and that it will be sufficient to deter or prevent the potential anticompetitive effects of the concentration.

6. Resolutions

The Commission may: i) authorize a concentration; ii) object it; or iii) subject it to compliance with conditions. Likewise, in case of not complying with the obligation of the prior notification, the Commission may apply sanctions.

6.1. Authorization and objection

The resolution by which a concentration is authorized refers to situations in which the Commission did not find that, as result of the transaction, an adverse effect on competition and free market access could arise in any market.[42]

42. The authorization could also be obtained through the figure of *afirmativa ficta*, in case that the Commission does not issue its resolution within the terms established in the procedures set forth in articles 90 and 92 of the Law.

Once the operation is authorized, the parties must submit the documentation that validates it within a period of thirty business days from the date on which it was concluded, in accordance with article 23 of the Regulatory Provisions. It is important to point out that the final terms under which the transaction was carried out must be verifiable in the documents submitted that proved the conclusion of the concentration and, if this is not the case, the Commission may require to the promoters information and documents that it deems convenient to verify the compliance and execution of the resolution. The foregoing, in accordance with what it is set forth in article 120 of the Regulatory Provisions.

Since the operation that is notified occurs before the conclusion of the transaction, it is evident that some details of the transaction may vary from those indicated at the time of the notification. However, the modification of essential points in the concentration, such as the involved agents, the non-compete clauses or the scope of the operation, among others, could imply that it is a different transaction to the one analyzed by the Commission and not the one that it was authorized and could entail any of the sanctions contained in article 127 of the Law.

The concentrations that have been authorized by the Commission may not be investigated, except when the resolution was obtained based on false information, in accordance with article 65 of the LFCE.

On the other hand, the Commission will not authorize unlawful concentrations, that are those who have as purpose or effect of hindering, diminishing, damaging or preventing free-market-access or economic competition, in terms of article 62 and 63 of the LFCE. In this regard, article 64 of that ordinance contains the indications of an unlawful concentration, which are summarized hereinafter: i) the operation confers, may confer or increase the substantial market power of an Economic Agent; ii) has as the purpose or effect of establishing barriers to entry, preventing access to markets or essential inputs or foreclose other Economic Agents; and iii) facilitates any of the conducts prohibited by the LFCE.

6.2. Conditions

In the case of operations that could represent risks to the process of competition and free market access, it is possible to subject the authorization of the concentration to the compliance of conditions, in terms of article 91 of the LFCE. The Commission may only accept or impose conditions that are directly linked to the correction of the anticompetitive effects of the concentration and these must be proportional to the correction sought.

The Commission may impose conditions on the Economic Agents, or private parties can offer a proposal of conditions. In practice, it is preferable that the conditions are offered by the private parties, since they have a greater knowledge of the way in which conditions could materialize, minimizing the impact on them, facilitating their verification, but without affecting the process of competition and free market access.

Among the conditions that the Commission can accept or establish, in terms of article 91 of the LFCE, are the following:

"I. Carrying out certain conduct or abstaining from doing it;
II. Divest certain assets, rights, social shares or shares to third parties;
III. Modify or eliminate terms or conditions of the acts intended to be executed;
IV. To be obliged to implement acts aimed at promoting the participation of competitors in the market, as well as giving them access or selling goods or services to them, or
V. Other whose purpose is to prevent the concentration from reducing, damaging or preventing competition or free market access.
(...)"

It is possible for the Economic Agents to propose conditions in their written notification, and up to one day after the matter is listed for a session of the Board of Commissioners.

Likewise, when a concentration presents possible risks to the process of competition and free markets access, the Technical Secretariat will inform the notifiers with at least ten days of anticipation to the date in which the matter would be listed for the resolution of the Board, so that these may submit conditions that allow to correct the risks to the process of competition and free market access.

In accordance with article 21 of the Regulatory Provisions, said communication will be made through an agreement in order to summon the notifiers for the Technical Secretary to express to them the possible risks to the process of competition and free market access that are detected. This communication does not prejudge the resolution of the concentration.

In the case that the Economic Agents submit a proposal of conditions or any modification to them, the term will be interrupted and will restart from the beginning. The proposals submitted may only be modified once, and this may be done until before the matter is listed for the session of the Board.

In this regard, the Commission may carry out information requirements and other proceedings to have all the necessary elements to analyze the proposed conditions.

Also, the LFCE foresees that in case that the proposals of conditions are not submitted jointly with the written notification, the term that the Commission has to resolve will be interrupted and will restart from the beginning.

In some cases, in its resolutions, the Commission may request the promoters to accept the conditions.

According to their implications, conditions can be classified in two types: i) behavioral and ii) structural. Behavioral conditions refer to the obligation to behave in a certain way. Structural conditions are those that seek to modify the structure of the market such as the divestment of the assets to third parties. Likewise, in the experience of the Commission, the conditions can also be classified as prior and subsequent. Prior ones are those that must be fulfilled so that the Economic Agents can carry out an operation. In the case of subsequent conditions, the Economic Agents can carry out the operation and comply with the conditions at a later stage.

Normally, structural conditions are imposed to remedy problems derived from concentrations that generate market structures and behavior incentives that require the structural separation of certain assets of the companies to restore the incentives to compete in the market. These can be complemented with behavior conditions. For their part, behavior conditions are useful when the incentives to compete can be restored with commitments to do or stop doing certain behaviors by concentrated companies.

The Commission will assess the proposals of conditions to determine whether they correct the negative effects that the concentration may have and, as the case may be, will accept them or may impose other conditions to ensure the process of competition and free market access. As previously indicated, the conditions imposed by the Commission will be public, unless the Economic Agents request and justify their classification as confidential.

6.3. Sanctions

Article 127 of the LFCE lists the sanctions that the Commission can apply. Hereinafter, the applicable in matters of concentration are mentioned.

Section I of article 127 of the LFCE empowers the Commission to order the correction or suppression of the unlawful concentration in question. This means, those with the purpose or effect to hinder, diminish, damage, or prevent free market access or economic competition.

Section II allows ordering the partial or total divestiture of an unlawful concentration, the termination of control or the suppression of the acts thereof, as the case may be, without prejudice of the fine that, if applicable, proceeds.

Section III states that when the promoters falsely declare or provide false information, it is feasible to sanction with up to the equivalent of 175 times the UMA.

Section VII establishes the possibility to fine to up to the equivalent to 8% of the income of the Economic Agent, for having incurred in an unlawful concentration, regardless of the corresponding civil liability.

Section VIII allows fines for the equivalent of 5 thousand times the UMA and up to the equivalent to 5% of the income of the Economic Agent, for not having notified the concentration when it should have legally done. The foregoing, derived from the fact that the LFCE establishes that concentrations must be authorized by the Commission before they are carried out.

For its part, section IX empowers the Commission to fine with up to the equivalent of 10% of the income of the Economic Agent, for failing to comply with the conditions set in the resolution of a concentration, without prejudice to ordering the dissolution of the concentration.

Section X allows sanctioning with the disqualification to serve as a director, manager, administrator, directive, executive, agent, representative or attorney-in-fact of a legal person for up to a period of 5 years and fines for up to the equivalent to 200 thousand times the UMA, to those who participate directly or indirectly in unlawful concentrations, in representation of or on behalf or order of legal persons.

Section XI establishes the possibility to fine with up to the equivalent to 180 thousand times the UMA, to those who contributed, promoted or induced the conduction of unlawful concentrations or other restrictions to the efficient functioning of the markets in the terms of this Law.

Finally, section XIII provides a fine of up to the equivalent to 180 thousand times the UMA to those public notaries who intervene in the acts related to a concentration, when it has not been authorized by the Commission.

6.4. Validity

Article 90 of the LFCE establishes that the favorable resolution of the Commission "*will have a validity of six months, extendable for one occasion for justified reasons*".

Derived from this, in case that the notifiers are unable to conclude the operation within the 6 month period, or, within an additional 6-month extension, they must notify the operation again before the Commission.

7. Various aspects

7.1. Complaints and rights of third parties

In terms of article 90 section III of the LFCE, the Commission may require additional information to third parties that are related to the concentration, such as competitors, consumers and other authorities in applicable cases. These requirements do not confer the nature of a party in the procedure to the required private parties. In the case that the additional information is not provided within ten business days, the Commission can exercise the corresponding enforcement measure against the private parties. These requirements to third parties do not interrupt the counting of the deadlines to resolve.

Article 67 of the LFCE establishes that any person may file a complaint for unlawful concentrations (in terms of what it is established in article 64 of the LFCE). Their written complaint must contain, at least, the information referred to in article 68 of the Law.

In case that the complaint is dismissed due to notorious inadmissibility for involving a concentration that has already been notified and has not been resolved, the complainants may contribute with Cofece by submitting relevant data and documents to be taken into consideration for resolving. In addition, the information of the complaint must be incorporated to the file of the concentration. However, the complainant does not have access to the file, it is not considered as a party in the procedure and cannot challenge it.

7.2. Withdrawal

In terms of article 24 of the Regulatory Provisions, the notifying Economic Agent may withdraw from the procedure until before this is voted in a session of the Board.

Similarly, once issued the resolution that authorizes the concentration or that subjects it to the compliance with conditions, the notifiers may waive the right derived from it.

For both cases the ratification before the Commission of the persons who have the legal powers to do so will be necessary.

For the effects of the foregoing, those appearing, when ratifying their withdrawal or waiver of the right derived from the favorable resolution, must have the power or special clause for such effects. The proceeding in which the withdrawal is ratified can take place through electronic means.

7.3. Prescription of the obligations

According to article 137 of the Law, the powers of the Commission to initiate investigations that could entail responsibility and sanction expire within ten years starting from the date in which the unlawful concentration was carried out.

In the case of concentrations in which there was no obligation to notify, in terms of article 65 of the LFCE, these cannot be investigated once a year has elapsed since their realization. Those concentrations that have obtained a favorable resolution cannot be investigated, except when they have been authorized based on false information or the conditions to which they were subjected have not been met.

7.4. Publication of resolutions

The resolutions of the Commission, with the exception of confidential information, are published on the website of the institution, within a maximum period of 20 days after the coming into effect of the notification made to the Economic Agents involved.

The deadline for the publication of the public version may be extended by the request of the notifiers on duly justified cases, in which case it will be published within 5 days after the conclusion of the transaction is accredited before the Commission.

In this case, if the concentration is not carried out, the resolution will be published 5 days after the expiration of the term to prove the conclusion of the transaction or that this situation is informed to the Commission.

7.5. Collation and issuance of certified copies

The documents of the electronic file (which includes promotions and actions of the Commission) are always available to the Economic Agent and its authorized parties in the SINEC, in accordance with the permits assigned to them. In this regard, the Economic Agents at any time may consult and download any of these documents, with their electronic signature included.

However, the Economic Agents may request the issuance of certified electronic copies of documents that are in the electronic file in which they have a legal standing through the SITEC. To do this, the applicant must attach to its electronic promotion the corresponding proof of payment. Once fulfilled the aforementioned requirements and in case that it proceeds, the Commission will issue the corresponding agreement, attaching the certified documents with the Electronic Signature of the public official, so it can be downloaded through the SINEC.

In the cases in which a file must be handled in traditional means, the Technical Secretary, the General Director of Concentrations and the Executive Directors of Concentrations have the power to certify the documentation. The certified copies will be issued and the certification of the collations will be made after the payment of the respective fees and the acknowledgement of receipt is recorded.

In case of requiring the return of original documents entered, the promoter must request that a certified copy be entered into the file, for which the corresponding payment of fees must be covered.

In the case of requesting the return of the original documents or testimonies that are exhibited to prove the personality, these can be requested at any time, previous collation and certification in order to leave a certified copy of the document in place.

7.6. Notifications

Articles 163 to 175 of the Regulatory Provisions establish the conditions and modalities of notification of the actions of the Commission. Likewise, in the case of concentrations, article 74 to 87 of the DRUME are applicable.

Generally, in matter of concentrations, the preventions, the agreement of reception for processing, the resolutions, requests of information and extensions of terms to resolve are personally notified through the SINEC. To hear and receive notifications through SINEC, they must sign electronically. The persons that intend to receive the notification, must have a user account and be previously authorized through the system.

Nevertheless, in the case of those actions or information requirements made by the Commission to other Economic Agents, different from the notifiers, or other authorities, the notifications are made personally by traditional means, or by publication on the list, as it corresponds. The list of notifications is made available to the public at the premises of the Commission and on its website. It is published every day and it contains the number of the file; the name, denomination or company name of the Economic Agent involved in the procedure; the administrative unit that issues it; and an extract of what was agreed.

Finally, even when the notifications are made through the SINEC, it is possible to consult the matters that the General Direction of Concentrations is processing. For this, those interested may access the section "Resolutions and Opinions" of the website of the Commission, select the "Concentrations" tab and, afterwards, check the box "In progress".[43]

7.7. Collaboration with authorities from other countries

The Commission has established various collaboration agreements with competition authorities from other countries. Within the framework of said agreements, it is possible for the public officials of the Commission to hold conversations with their counterparts from other jurisdictions on general aspects of a concentration.

The Commission preserves the confidentiality of the information it receives in its procedures and does not disclose it to other authorities, unless it has the express consent of the involved Economic Agents to share information with them.

7.8. Communication between Cofece and notifiers

The Commission maintains a policy of openness, dialogue and communication with the Economic Agents that notify a concentration, or those who want to do it. In this regard, the notifiers may request, at any time, to interview with the public officials of the Technical Secretariat, the General Directorate of Concentrations or with the Board.

For this, article 56 of the Statute stipulates the basic rules that must be observed when public officials of the Commission other than the Commissioners, interview with the Economic Agents for the handling of their affairs:

- At least two public officials must always be present;
- The meeting requests will be made through institutional e-mail in which the identification of the file, the Economic Agents, or the legal representatives that request the meeting, persons who will attend, the public officials they intend to meet and the purpose of the meeting will be stated; and
- The public official will keep a record of the interview, either through electronic or physical means, in order to integrate it, in the latter case, into the registry of the Commission, and must indicate the date and time of the meeting.

Due to the usefulness they have shown in terms of making the analysis conducted by Cofece and the presentation of the information by Economic Agents more efficient, the Commission recommends that a meeting be requested with the DGC, through the email indicated in the contact section of this Guide, before submitting a notification of a concentration, during the procedure and before submitting any proposal of conditions.

43. The section "Resolutions and Opinions" is available at the following link: https://www.Cofece.mx/conocenos/pleno/resoluciones-y-opiniones/

For their part, the Commissioners may address matters with Economic Agents only through an interview. Article 25 of the LFCE states that, for this purpose, the following formalities must be followed:

- All the Commissioners must be summoned, but the interview may be held with the presence of only one of them.
- In each interview a record must be kept that indicates the place, the date, the starting time and end of the interview. Likewise, the full names of all attendees and addressed topics must be recorded. This information will be published in the website of the Commission.
- The interviews will be recorded and stored in electronic, optical or any other technology media. These recordings will have the character of reserved information and will be available to the other Commissioners.

In any case, it is possible to conduct interviews through electronic means.

7.9. Non-compete clauses and shareholders agreements

This section has the purpose to describe to the economic agents involved in a concentration the characteristics of the agreements that the notifiers usually agree to in the legal instruments by virtue of which they intend to conduct the notified transaction, as well as the parameters used by the Commission when analyzing its effects.

In the first place, the Commission will evaluate whether said agreements fall in any of the following definitions:

1. **Non-compete clauses:** agreement of intents by virtue of which any of the participants in a contract or agreement (generally the selling party) assumes the obligation not to compete, directly or indirectly, with the acquiring party. That is, to not sell, distribute or produce certain goods, develop certain business lines, or provide certain services for a certain time, in a defined geographic area.
2. **Shareholders' agreement:** agreement of intent by virtue of which the shareholders or partners of a co-investment commit to not participate, on their own account, in same activities or directly related to those developed by the co-investment. Their rationale lies in generating incentives for the participants of the co-investment to do their best in developing the business.
3. **Non-hiring or non-solicitation agreement:** agreement of intents by virtue of which one of the notifiers (generally the seller or both), obliges itself not to hire those persons who already work or provide their professional services in the company object of the transaction or that will work in the transaction resulting from the co-investment. These agreements have as an objective to protect the knowledge, the human capital and the value of the transferred business or the object of the co-investment.[44]

The Commission will evaluate, case by case, the justification submitted by the notifiers and, furthermore, that the agreement has few possibilities to affect the competition and free market access, considering four dimensions: obliged subjects, coverage of the good or service; duration; and geographic coverage.

44. Generally, the Commission only makes pronouncements about the non-hiring or non-solicitation agreements when they are similar to non-compete clauses and will be evaluated according to the criteria established for this type of clauses. For example, when there is a non-solicitation agreement that also includes obligations that limit the seller party to "request" clients of the business object of the operation.

To provide greater transparency and certainty to the Economic Agents regarding this evaluation, as following, it is explained the way in which the Commission has conducted the analysis of this type of agreements, under the principles of economic competition and free market access.

7.9.1. Analysis of non-compete clauses

As a general rule, the first element to determine whether a non-compete clause is justified is to verify whether, in fact, the transaction involves the transfer of assets that lack property rights or regulatory protection and that, therefore, must be protected through the non-compete clause.

However, when the economic agents justify the need to incorporate a non-compete clause, the Commission assesses if this would have little probability of affecting competition and free market access in the four dimensions previously mentioned, according to the following parameters:

7.9.1.1. Obliged subjects:

When the obliged subjects are the seller and the companies that are part of the economic interest group to which it belongs, as well as their respective successors and assignees. Additionally, it may include, as an obliged subject an Economic Agent that has been created as a vehicle to carry out the notified transaction and that remains as part of the economic interest group of the seller.

7.9.1.2. Product or service coverage:

i. When it is limited to the products and/or services offered through the business object of the transaction;
ii. When products and services are included that are in an advanced phase of development by the business object of the transaction at the time of the notification.
iii. When goods or services are included that are fully developed, but have not yet been commercialized by the business object of the transaction at the time of the notification.

In operations that are carried out at the international level and involve products and/or services manufactured in multiple jurisdictions, the non-compete clause could be negotiated at the global level. In this case, it may include all the products and/or services that the business object of the transaction offers at the worldwide, even when in Mexico the activities of the seller are limited to only some of them.

Generally, it has been considered that it is not justified the inclusion of products or services that are not produced, distributed or commercialized by the business object of the transaction and that are not related with the transfer of full value of said business.

7.9.1.3. Duration

When the validity is up to three years after the conclusion of the transaction and this duration is justified;

7.9.1.4. Geographic coverage

The Commission may only pronounce on the effects that the non-compete clause may have on the process of competition and free market access in the national territory. In Mexico, it has been considered that the clause could have few probabilities to affect competition and free market access in the following cases:

i. When it covers the territory served by the company or the assets object of the transaction prior to the transaction; and

ii. When it includes regions in which the business object of the transaction is in an advanced phase of expansion, investments have been made or any other action has been taken tending to the expansion of the territory.

7.9.2. Analysis of shareholders agreements

The Commission will determine if the shareholders agreement is justified and if this has few probabilities of affecting the process of competition and free market access, in the four dimensions mentioned.

The Commission has considered that a shareholders agreement will have few probabilities of affecting the process of competition and free market access in the following cases:

7.9.2.1. Subjects of application

When the restrictions apply to the members of the co-investment, as well as to the companies of the economic interest group to which each one of them belong.

7.9.2.2. Product coverage

When it includes goods or services that are actually offered the business of the co-investment, as well as those that are developed during the time where the shareholders remain as partners.

7.9.2.3. Duration

When it applies to the partners during the validity of the co-investment or until the time when the shareholding of any of the co-investors is reduced to a percentage determined by the notifiers.

After the termination of the co-investment, the Commission has authorized that it is established an additional period in which the notifiers are obliged not to compete. This period will be comparable to the establishment of a non-compete clause.

7.9.2.4. Geographic coverage

i. When they cover the territory served by the co-investment at the time it was created;

ii. ii) If it concerns wider geographic regions than the territory served by the co-investment, when it plans to foray in them or when, derived from the characteristics of the business, it is feasible to serve them.

In all cases, the Commission will only pronounce on the effects that the non-compete clause may have on the process of competition and free market access in the national territory.

7.9.3. Final considerations

The parameters cited in this section are those that the Commission considers in this type of analysis. When the non-compete clauses agreed by the economic agents in a concentration are under these parameters, generally an exhaustive and detailed description of the clause is not required. It will only be necessary to explain the terms of the clause, and the reasons why they conform to these parameters.

On the other hand, when the clause exceeds these parameters, the Commission will evaluate whether there is a justification for it according to the specific case and in function of the need to protect the assets and rights involved through a greater protection. Thus, in some cases duly justified by the notifiers, the Commission has considered exceptions to these parameters. In this context, the Commission assesses the information and the arguments presented by the notifiers, in order to determine, on a case-by-case basis, whether these agreements could affect the process of competition and free market access.

For example, the Commission has authorized non-compete clauses for up to 5 years when the following circumstances have concurred simultaneously:

- The transferred business is characterized by high technical complexity;
- The acquirer has no experience in the transferred business;
- The seller maintains similar or related business to the acquired business, in such a way that it remains in contact with customers of the business object of the transaction and can incur in the market quickly, and
- There is a high customer loyalty to the brand, trade name or distinctive, and these are not part of the notified transaction.

The determination made by the Commission about this type of agreements between shareholders does not prejudge the execution of anticompetitive conducts that, in terms of the Law, reduce, harm or prevent free market access or economic competition.

Finally, once issued the resolution of concentration, the notifiers may not modify the terms of the non-compete clauses, unless in the case that the modification only implies changes related to a reduction of coverage or scope of the clause (for example, temporality, geographic coverage, product coverage or obliged subjects), and is within the parameters established by this Guide. In case that a change occurs increasing the coverage or scope, the Economic Agents will have to notify the Commission the transaction again.

8. Contact

This Guide contains general information that will be useful to conduct the process of the notification of concentrations. However, to address particular situations that may arise in specific cases, the Commission has a policy to handle all the consultations that are brought before it and clarify the doubts that private parties may have for the processing of their affairs.

The contact with the Commission in matters of concentrations can be made through the General Directorate of Concentrations by telephone, e-mail or personal interview.

For telephone assistance, private parties can contact the following number in Mexico City: (55) 2789-6659

By e-mail and to request an interview, the following address is made available: **concentraciones@Cofece.mx**

Second.- The Guide for the Notification of Concentrations as well as its modification, approved by the Board, respectively, the ninth of October of two thousand and fifteen and the twentieth of April of two thousand and seventeen are left without effects.

It was so agreed, unanimously, by the Board of Cofece in the ordinary merit session, based on the articles cited throughout the present resolution and in the faith of the Technical Secretary, based on articles 2, section VIII; 4, section IV, 18, 19 and 20, sections XXVI, XXVII and LVI of the Statute.

cofece

Comisión
Federal de
Competencia
Económica

Un México mejor es competencia de todos

cofece.mx | cofece @cofecemx CFCEconomica @cofece COFECE