

New Guidelines and Instructions of the FNE for Merger Control



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With the objective of updating and strengthening the merger control regime, the National Economic Prosecutor’s Office (“**FNE**”) announced yesterday the release of new Guidelines on the assessment of horizontal mergers (“**Guidelines** ”), which will be submitted to public review until June 11, along with instructions on Pre-Notification Consultations by the FNE (“**Instructions**”).

The Guidelines replaces the 2012 version, incorporating modifications related to mandatory filing for merger control, advances in jurisprudence, and specific guidelines on digital markets and platforms.

Some notable aspects of the new Guidelines which differentiate it from its previous version are:

- **Relevant Market and Substitutability:** the FNE will only define the relevant market when the effects of a transaction must be analyzed in depth, which will speed up the review process. Regarding substitutability, the FNE incorporates new economic indicators such as the GUPPI (*Gross Upward Pricing Pressure Index*), as well as other qualitative considerations.
- **Joint Ventures:** greater certainty is provided for analysis, emphasizing on the possible coordinated risks that may arise.
- **Digital Markets and Platforms:** competitive effects of two-sided markets are included, highlighting the consequences of mergers on new elements such as the privacy of personal data. At the same time, certain special characteristics of digital markets are identified (e.g., network effects and *tipping*), along with mechanisms that allow dynamism within them, such as multi-homing (simultaneous use of apps).

Additionally, through the new Instructions, the FNE recognizes and provides a procedure for the voluntary process prior to

notification (Pre-notification), through which parties to a transaction can contact the Merger Division to raise their questions and discuss their queries, to avoid errors or omissions in the filing, promoting speed and efficiency during merger control.

The Instructions distinguish between two types of pre-notifications, which will determine the procedure to be followed: (i) Pre-notification for simple questions; and (ii) Pre-Notification for complex questions and draft notifications.

Regarding the last procedure, it will last between 5 and 10 business days, and the consultant is required to provide information, such as a summary of the transaction, the identification of the parties and their economic activities, along with the specification of the consultation. When the queries concern the nature of the transaction, the FNE will grant a formal communication in writing when discarding that a certain act or contract has the nature of a transaction that is subject to merger control.

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