

COFECE Issues Modifications on Concentration Notification Guidelines

On April 8, 2021, the Mexican Federal Economic Competition Commission (the “**Commission**”) issued the amended Concentration Notification Guidelines (the “**Guidelines**”)¹, which include several topics that were not previously addressed. The purpose of the amendments is to provide more certainty to economic agents on how the Commission analyzes concentrations. Among the most relevant amendments included in the Guidelines are the following:

- **Collaboration Agreements and Joint Ventures.** Given that in some cases Joint Ventures may have characteristics that can be equivalent to a concentration, the Guidelines provides additional information and criterions so the involved economic agents can determine if they must notify a collaboration or joint venture to COFECE. In this regard, the Guidelines point out some characteristics to define whether a Joint Venture or concentration must be notified. The following are some of these characteristics:
 - o *Term of the agreement.* Collaboration agreements that fall within the definition of concentrations when are designed to be permanent, of indefinite duration or of long duration.
 - o *Autonomy.* The creation of a new economic agent with functional and operational autonomy. When the incorporated economic agent has the possibility of autonomously determining its commercial strategies, among others, it is an indication that the corresponding agreement between competitors constitutes a concentration.
 - o *Scope.* When entering into a collaboration agreement between economic agents, the parties shall maintain the competitive pressure being exerted on the markets outside the collaboration agreement. If the competition between the participants of the collaboration disappears, it will be considered as an indicator that the collaboration could be regarded as a concentration.
- **Calculation of notification thresholds.** In order to determine whether a concentration must be notified, the Guidelines clarifies: i) the calculation of the amount of a concentration, ii) which companies must be considered for purposes of calculating the value of the transaction to be analyzed, and iii) establishes some guidelines as to when succession of acts must be notified.
- **Economic agents required to notify a concentration involving multiple purchasers, such as occurs in capital raising rounds for startups.** The Guidelines clarify the following:
 - o In cases in which there are several acquirers, it is not necessary for the minority acquirers to appear before the Commission provided that: (i) individually they do not meet the thresholds; and (ii) the transaction does not arise from a joint negotiation or a coordinated acquisition between the acquirers.
 - o In cases of economic interest groups, the Commission may require any member to appear before the Commission.
 - o It will not be necessary for an investment fund to provide information about its limited partners, provided that the limited partner holds less than 20% of the fund and does not have the right or capacity to participate, interfere or influence, directly or indirectly, in decisions related to the business plan, annual budget, appointment or removal of the fund manager or the fund’s investments or, in general, in the fund’s operating activities.

¹ [The complete Guidelines can be consulted here.](#)

- **Information that must be submitted to argue that a company is in a vulnerable economic situation (failing firm arguments).** The Guidelines recommend, among other things, the following:
 - o Provide documentation that demonstrate the imminent risk of a company to exit the market in the immediate future or that there are no other plausible solutions other than a concentration to mitigate their financial problems.
 - o Demonstrate that the acquirer has the capacity to mitigate the problems of the failing firm and that all reasonable efforts were made in order to find other buyers.
 - o Submit the financial information that shows that the precarious financial situation is permanent, as well as financial forecasts or independent audit reports, among other.

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Mexico City, April 13, 2021.

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