Through Resolution 905/2023 published in the Official Gazette on May 18, 2023, the Secretariat of Trade approved the new Regulation for the Notification of Economic Concentrations Transactions that will replace that approved by Resolution 40/2001 of the former Secretariat for the Defense of Competition and Consumer Protection as from June 18, 2023.

The Resolution has few differences with the draft circulated for public consultation by the National Commission for the Defense of Competition (CNDC) in May 2022, and in general terms:

- updates and turns information requirements for the different stages of notification more complex, mainly based on the experience gathered by the CNDC in the more than 20 years elapsed since Resolution 40/2001
- creates a new abbreviated procedure (Form 0) for transactions of minor competitive impact, in accordance with criteria to be defined by the CNDC within 15 days
- adopts a stricter stance regarding the opportunity in which the notifying parties may provide the information that the agency may consider incomplete, establishing more severe sanctions in cases of non-compliance, without limiting the events enabling the CNDC to suspend or interrupt legal deadlines
- incorporates the possibility for the parties to argue novel issues in the analysis of complex economic concentrations, of uncertain application
- provides for the possibility of holding preliminary meetings with the CNDC to clarify doubts on the filing

The Resolution completely modifies the existing Forms 1 and 2, eliminates Form 3 (rarely used and with specific content for each transaction) and creates a new Form 0, to be optionally used in the framework of an Abbreviated Procedure in cases of economic concentration transactions that do not have significant effects on competition, according to the criteria to be established by the CNDC within 15 days of the issuance of the Resolution.

The new Abbreviated Procedure implemented by Form 0 has the following main features:

- Requires the parties to submit two mandatory market definitions: (i) one that maximizes the concentration of the relevant market, i.e. that
there be no alternative where the level of concentration generated by the transaction could be higher; and (ii) another one based on the precedents of the CNDC for the same or a similar product and the same geographic scope (if any). The parties may submit a third market definition, different from the two previous ones.

- Eliminates the requirement for the parties to submit arguments in favor of the approval of the transaction.
- Includes the obligation to report the existence of joint ventures between the parties to the concentration and other market players.
- Incorporates the requirement to report the existence of general and antitrust-specific compliance programs of the involved companies.
- Within 45 business days of the filing of the new Form, the CNDC must issue a request for information (RFI) requesting the parties to adequate the filing to the requested information, for which the parties will have 20 business days (as opposed to the current 30 days). The CNDC reserves the right to issue additional RFIs -which suspend the review period- and/or consider that the transaction requires the filing of a Form 1 and/or 2, which interrupts the notification period and resets the notification period.
- If the CNDC considers that the transaction only requires the filing of Form 0, the opinion issued by the CNDC to the Secretary of Trade recommending the approval of the transaction without conditions will use a “publishable version” of the notification, prepared by the parties in a format to be provided by the CNDC, presumably to speed up the issuance of the final resolution.

The new Ordinary Procedure represented by Forms 1 and 2 has the following main features:

- The submission of these forms will be required by the CNDC, although nothing prevents the parties from voluntarily deciding to submit a Form 1, or Forms 1 and 2. In any case, they must also submit Form 0.
- If the information contained in forms F1 and/or F2 is incomplete and the justifications provided by the Parties in this respect are insufficient, the CNDC shall require them to adapt the corresponding forms within 30 business days. In the event that the Parties do not comply with what is required within the term indicated, or that the information submitted in response to such requirement is incomplete or defective, the CNDC shall summon them to provide the missing or incomplete information within a maximum term of five business days. Once this term has elapsed, and after the CNDC has issued an opinion, the Secretary of Trade may consider that the transaction has not been notified, which will give rise to the application of fines for late notification.
- If the transaction has been notified in other jurisdictions, the parties may, within the framework of Form 1, attach the corresponding authorizations for the CNDC to exchange information with the competition authorities of such jurisdictions.
- The CNDC’s requirement to file Form F2 must be complied with within
30 business days.

- In Form 2, under the heading “Benefits of the operation to the general economic interest”, not only efficiency gains are included, but also “those benefits that the operation could have on aggregate variables such as generation of employment, income, import substitution, investments, protection of the environment, gender policies, among others”, significantly broadening the scope traditionally granted to the concept of “general economic interest” (ultimate value legally protected by the competition law and encompassing total and/or consumer welfare) and consequently generating uncertainty as to the direction that the CNDC will take in cases where the traditional and new concepts collide.

As a new feature, the Resolution contemplates an optional “Pre-notification” procedure, in which the parties may contact the CNDC prior to the notification of their transaction in order to prepare the information to be submitted and to raise doubts regarding the notification procedures. This novelty is welcome, particularly in case if were to allow the parties to raise doubts as to whether or not a given economic concentration requires mandatory notification, an issue covered by the procedure of Advisory Opinions, which however is not very efficient timewise.

Finally, it should be noted that the Resolution does not modify the current ex post notification regime of Law 27,442; however, to the extent that it improve the length of merger control procedures it will pave the way for an efficient transition to the ex ante notification regime, whenever the same is finally adopted, as foreseen in the law.