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**ORGANISATION FOR ECONOMIC
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THE CONTROL OF BUSINESS CONCENTRATIONS IN PANAMA

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The control of business concentrations in Panama is exercised through a dual system which consists of voluntary examinations by an administrative authority, in this case the Commission for Free Competition and Consumer Affairs (*Comisión de Libre Competencia y Asuntos del Consumidor*), or the contesting of business concentrations in courts of justice. There are no notification requirements and no thresholds necessary to submit a business concentration for voluntary examination.

There can be no doubt that the lawmakers' intention was to put in place a set of tools that would create legal certainty for economic agents who wish to amalgamate in a small and very concentrated economy such as that of Panama but one which is at the same time very open to international trade. It was most probably this last factor which determined the structure and form of the control of business concentrations in Panama.

In the following pages we shall try to provide a description of how the business concentration control system works in Panama, describing it with special emphasis from the point of view of the competition agency.

I. General legislative aspects:

The substantive legislative aspects that provide the framework for the control of business concentrations in Panama are as follow:

1. The concept of business concentration: What is meant by such is a merger, acquisition of control or any legal act which amalgamates assets, shares, shareholders' rights, fiduciary controls or any other form of control that is acquired between competitors, suppliers and clients. The two key concepts are the acquisition of control and amalgamation. The first refers to the ability to determine the decisions of the business group. The second refers to acts that affect economic agents that compete among themselves at a horizontal level or at a vertical level in the integration of suppliers, distributors and clients or through increasing the barriers to the entry faced by new economic agents in said markets. (See Art. 19 of Law 29/96; Points 19-45 of the Guide to Business Concentrations)
2. Exceptions to the concept of business concentration: Exempt from the concept of business concentration are (i) concentrations of businesses that are in a state of manifest insolvency which can prove that they have sought non-competing buyers; and (ii) temporary associations entered into for a specific period of time for a

specific project. (See Art. 19 of Law 29/96; Points 31-37 of the Guide to Business Concentrations)

3. **Illegal business concentrations:** The law prohibits business concentrations the effect of which is or could be to unreasonably restrict free competition of any sort in goods or services of an equal, similar or substantially related nature.
The law also establishes the presumptions that the business concentration has the intention or effect prohibited by the law when the result of the business concentration puts the combined business in a dominant market position; is or could be intended to displace competitors or deny them access to the market; or has the intention or effect of making it easier to engage in prohibited monopolistic practices. These presumptions allow for proof to the contrary. (See Arts. 19 and 24 of Law 29/96; Arts. 17 and 18 of Decree-Law 31/98)
4. **Entitlement to contest business concentrations and competent authority:** Any person, whether natural or legal, is entitled to contest business concentrations prohibited by the law, without needing to be affected by the legal act.
The competent authority to hear cases contesting prohibited business concentrations shall be the courts of justice, especially the competition courts created pursuant to Law 29. Entitlement to contest business concentrations and competent authority: Date from 1996, through the summary procedure referred to in the Law and additionally in the Judicial Code. (See Arts. 23, 141, 142, 143 and 145 of Law 29 of 1996; Arts. 21 and 24 of Executive Decree 31/98; Arts. 590, 666 and 1346 of the Judicial Code)
5. **Factors relevant to the contesting of business concentrations:** The factors that have to be taken into account in determining the illegality or otherwise of a business concentration are the parameters of the market in question, the parameters of substantial power on the market in question and any other criterion laid down by Executive Decree. To date, the only criterion laid down in this respect is that of economic efficiency. (See Arts. 16, 17 and 25 of Law 29/96; Arts. 11, 12, 17 and 18 of Executive Decree 31/98; Points 46-156 of the Guide to Business Concentrations)
6. **Limitation of action:** The right to contest business concentrations expires by limitation three (3) years from the date on which the business concentration took effect. (See Art. 22 of Law 29/96; Art. 15 of Executive Decree 31/98)

II. Procedure for prior examination of business concentrations:

The business concentration examination procedure is voluntary. The economic agent requesting the prior examination is not obliged to suspend proceeding with the business concentration in the event that the Commission's decision is unfavourable to its request. For that reason the prior examination procedure provides the applicant with security concerning the legal act that it has submitted for examination if it is approved and the certainty that the Commission will contest the business concentration in the courts of justice if it is prohibited or made subject to conditions. The most important legislative aspects are as follows:

1. **Substantiation of proceedings and legal recourses:** The administrative proceedings will be substantiated by a "Substantiating Commissioner", who will submit a

reasoned ruling for the rest of the Commissioners to consider. The final ruling which decides the prior examination carries the right of appeal for reconsideration; any such appeal must be submitted during the five (5) days following notification of the final ruling, following which the government channel options will be exhausted and the only remaining right of recourse will be to appeal to the Third Division of the Supreme Court of Justice. In practice, no use is made of this right of recourse for the reasons set out in the previous paragraph and also because there is no wish to face the risk of business concentrations being contested in courts of justice. (See Art. 118 of Law 29/96)

2. Notification and ruling: The economic agent requesting prior examination of a business concentration must notify the Commission of the legal act and provide it with whatever information it may require. The Commission may request data, additional documents and clarification of the information received with the notification within the following twenty (20) calendar days. Following receipt of the information asked for in the earlier request, Commission will have sixty (60) calendar days in which to issue a reasoned ruling in response to the prior examination request. If no ruling is issued within that period, the prior examination shall be deemed to have been passed. (See Art. 118 of Law 29/96)
3. Request for information: The economic agent giving notice of its wish for prior examination of a business concentration must submit the following documentation as a minimum:
 - (a) The details of the economic agents giving notice of the concentration and of those participating directly in it;
 - (b) The details of the legal representative or authorised agent and the documents authorising him to act;
 - (c) The articles of association and any amendments thereto, as well as the statutes of the economic agents involved;
 - (d) The financial statements of the economic agents involved for the immediately preceding financial year or period and for the part of the current period available on the date of the notification, certified by an authorised certified public accountant;
 - (e) Certification issued by the public register of the existence, duration, legal representation and share capital structure of the participating economic agents before the concentration; and a description of the new capital structure, of the participation of each member before and after the concentration and of the persons who hold and will hold control, issued by a legal representative or secretary of the company;
 - (f) A description of the concentration, its objects and the nature of its business and a copy of the draft legal act in question;
 - (g) Certification of those clauses under which the economic agents involved undertake not to compete and proof of their existence;
 - (h) A description of the main goods or services produced or offered by each economic agent involved, a list of substitute goods or services and the main economic agents that produce, distribute or market them on national territory, together with their market share data;
 - (i) A note of the main suppliers and clients of the economic agents participating in the concentration;

(j) A note of the economic agents involved in the transaction who participate directly or indirectly in the share capital, administration or any other activity of other economic agents who produce or market in markets connected with the activities of the economic agents participating in the concentration; and,

(k) The location of the plants or establishments of the economic agents involved, the whereabouts of their main distribution centres and the relationship that they have with said economic agents.

4. Commission decisions: The reasoned ruling containing the Commission's decision may approve or prohibit the business concentration or even order a total or partial deconcentration. (See Art. 118 of Law 29/96; Arts. 16-20 of Executive Decree 31/98)

III. Corrective measures procedure:

The Commission, after completing an administrative investigation of a business concentration, whether it had been the subject of a prior examination or not, may order corrective measures in order to prevent the legal act of the business concentration from impairing free competition in the market. Any corrective measures that are ordered must be directly linked to correcting the effects of the concentration and must be commensurate with the correction that is being sought. When the Commission issues such orders, it must do so by way of a reasoned ruling of the full Commission, in accordance with the following rules:

1. The Commission shall act through a Substantiating Commissioner in the first instance.
2. The economic agent which has been investigated shall be given prior notice in writing of the existence of the presumed illicit situation and shall be given a period of no less than five (5) days and no more than fifteen (15) days, according to the importance of the case, to submit its comments and alternative proposals in writing. In the same notification a date shall be set for a personal hearing of the economic agent, who may choose to be represented or accompanied by a lawyer. Nevertheless, if the concentration being investigated were to be on the very point of being concluded, or there were a danger of it collapsing at short notice or if it were of such a nature as to make immediate intervention unavoidable or advisable in order to avoid major damage to the process of free competition, the Commission may decree corrective measures without hearing the other party, by way of a reasoned ruling.
3. The economic agent which has been investigated shall be notified personally of the ruling. If it is not possible to find the natural person or the legal representative of the legal person involved in the establishment in which he works or at the address at which he is registered in public directories, the notifying agency shall issue a notarial certificate stating this fact, and notice shall be given by means of a proclamation which shall be affixed to the door of said establishment or premises and in the offices of the Commission for a period of two working days, in which case notice shall be deemed to have been given on the date and at the time displayed in the proclamation. A copy of the proclamation shall be sent to the economic agent by fax, telegram, mail or electronic mail at the address at which it is registered in public directories.

4. This Ruling carries the right of appeal for reconsideration and/or appeal in the alternative. Use must be made of one or other of the rights of appeal within five (5) working days following notification of the corresponding ruling. Appeals for reconsideration must be lodged and asserted with the Substantiating Commissioner who issued the ruling in the first instance. Appeals in the alternative must be lodged and asserted with the full Commission excluding the Substantiating Commissioner, whose place shall be taken by his alternate.
The full Commission shall have fifteen (15) working days to decide on the appeal, following which the government channel options shall be exhausted, thereby giving access to the administrative law channel. Interested third parties shall be advised of the findings set out in the ruling.
5. Once proceedings relating to a business concentration have been initiated before the competent court, the Commission shall refrain from issuing orders, prohibitions or decisions regarding the business concentration in question. In the event of a civil action being initiated and the Commission having already ordered corrective measures, the economic agent may apply to the court to have the Commission's ruling overturned or amended by way of a motion to that effect.
6. Acts committed by the economic agent in contravention of the ruling shall have no legal effect. In the event of contempt of the ruling, the Commission may impose on the economic agent a daily recurring fine of up to US\$ 5,000, without prejudice to its authority to re-issue the order in question.

This procedure may also be applied by any court of justice ruling on a challenge to a business concentration.

(See Art. 26 of Law 29/96; Arts. 19, 20, 21 and 23 of Executive Decree 31/98)

IV. Procedure for contesting business concentrations before courts of justice:

The Commission or any other person may contest the business concentration before the courts of justice created under Law 29 of 1996. Anyone contesting a business concentration will have to abide by the general legislative aspects referred to in Section I of this document. In the final ruling, the competent judge may approve or refuse the business or order the economic agent to make execution of the legal act establishing the business concentration subject to any or all of the following conditions: to refrain from taking or carrying out certain actions; to transfer to or confer on third parties rights to certain tangible or intangible assets, interests or shares; to modify, transfer or cease a certain line of production; or to amend or remove clauses from acts, agreements or contracts that it is seeking to conclude.

If the business concentration is not approved or is refused in its entirety, any corrective measures that the judge orders will have to be adopted after the corrective measures procedure referred to in Section III of document has been completed. (See the terms of Sections I and III of this document)