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Our File No.	69459
Date	July 20, 2015

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Dear Messrs. Grunberg, Irarrázabal, Tuma and Rosselot:

Re: Bill Amending DL 211 — Competition Act

We write on behalf of the Merger Streamlining Group (the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient

and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Fiscalía Nacional Económica ("FNE") and the Tribunal de Defensa de la Libre Competencia ("TDLC") of Chile are members.

The Group's work projects to date have included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and to competition agencies and governments in over twenty other jurisdictions (including the European Union, the United Kingdom, Germany, Spain, Brazil, Peru, China, Japan, and India). In January 2013, the Group provided a submission to the Chilean Government in connection with the possible change from a voluntary to a mandatory merger notification system.

The Group commends Chile's ongoing efforts to modernize its competition laws and appreciates the opportunity to provide this submission in response to the recently-proposed Bill Amending DL 211 — Competition Act (the "Bill"). We encourage the Government of Chile to apply the *Recommended Practices* advocated by the ICN in further developing its merger control regime. The Group is providing this letter in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions.

1. Voluntary Versus Mandatory Merger Notification Regime

The Group believes that there are substantial benefits to Chile in preserving its voluntary notification system. The vast majority of mergers notified under mandatory notification regimes, even with well-designed notification thresholds, do not raise competition concerns. For example, in 2014, only 1.6% of transactions notified to the U.S. antitrust agencies (*i.e.*, 54 of 3,253), and only 2.6% of transactions notified to the European Commission (*i.e.*, 8 of 303), were subjected to Phase II review, illustrating the very small percentage of notifiable transactions that raise issues meriting in-depth review.[3] Similarly, only 12% of notifibable transactions in Canada (*i.e.*, 31 of 250), 16% in Brazil (*i.e.*, 69 of 423) and 5% in Mexico (*i.e.*, 7 of 129) were subjected to an in-depth review. The percentage of mergers notified that are ultimately challenged are also very low. A mere 6% (*i.e.*, 18 of 303) of mergers were found to be anti-competitive in the E.U. and less than 1% in the U.S. (*i.e.*, 33 of 3,253).[4] In Canada,

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[1] The current members of the MSG include BHP Billiton, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> [*Recommended Practices*].

[3] *See* Global Competition Review, *Rating Enforcement 2015* (June 2015), at Tables 14 and 15. The Group also recognizes that in some cases, competition concerns are remedied in the Phase I review process. *See infra* note 4.

[4] *Ibid.* at Tables 14 and 16.

Brazil and Mexico, the percentage of notified mergers that were challenged were, respectively, 4% (*i.e.*, 7 of 250), 2% (*i.e.*, 10 of 423) and 5% (*i.e.*, 6 of 129).

A voluntary notification regime relieves parties to non-problematic mergers from the time and cost burdens of unnecessary filings. Equally important, it allows competition agencies to focus their resources on those transactions (as well as cartel and other anti-competitive activities) that raise genuine competition concerns, rather than reviewing many transactions which do not. Maintaining Chile's current voluntary system would serve the goal of effective competition enforcement by furthering the ability of the FNE and TDLC to devote personnel and resources to high-impact transactions while limiting the burdens imposed on businesses.

As you may know, the United Kingdom, which like Chile also employs a voluntary notification regime, recently conducted a study[5] of that regime and chose not to adopt mandatory merger control. In reaching that decision, the U.K. government stated that "*mandatory notification would increase costs to both business and the [competition agency]*" and raise "*problems in setting effective thresholds and [the] difficulties of full mandatory notification.*"[6]

Similarly, Australia, which also employs a voluntary notification regime, undertook a comprehensive review of its competition regime last year, following which it decided to maintain its voluntary merger notification system.[7] The Final Report issued by Australia's Competition Policy Review Secretariat concluded that "*[t]he Panel considers that [the potential] sanctions provide sufficient incentives for parties to notify the ACCC of mergers without the need for mandatory notification*" and that "*firms proposing to engage in mergers that may affect competition generally choose one or more of the available processes*."[8]

A voluntary system which is accompanied by a residual power of the competition authority(ies) to review mergers of interest can be very effective. In the U.K. and Australia, for example, parties have an incentive to consider voluntary notification in order to understand pre-closing rather than post-closing whether the agencies will have concerns about a transaction. The existence of the residual review power allows other market participants who have concerns about a transaction to ask the authority to investigate. We understand that there is a residual review power available in the current Chilean merger control regime.

However, should Chile decide to adopt a mandatory notification system, the Group strongly encourages the Government and the FNE to design the regime in accordance

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[5] Department for Business Innovation & Skills, "Growth, Competition, and the Competition Regime: Government Response to Consultation" (March 2012), section 5.8.

[6] *Ibid.*

[7] *See* Competition Policy Review, "Issues Paper" (14 April 2014) and Competition Policy Review, "Final Report" (March 2015).

[8] Final Report, *ibid.*, chapter 18.

with the ICN *Recommended Practices*. In particular, as described in further detail below, the Group has four comments on the Bill currently being considered as well as suggestions for the regulations that would be made under the amended *Competition Act*.

2. Notification Thresholds Should be Based on Material Local Nexus

Article 48 of the Bill would require pre-merger notification where:

(a) the aggregate sales within Chile of the economic agents to the transaction equals or exceeds the threshold amount set out by regulation; and

(b) at least two of the economic agents to the transaction each have sales in Chile equal to or exceeding the threshold amount set out by regulation.

We understand that the amounts for these thresholds have not yet been determined.

The Group urges the Government and FNE to set threshold amounts that are material. Threshold (b) of the notification test is particularly critical because it effectively defines the degree of local nexus that will be required for a notification. The central goal of effective merger notification thresholds is to screen out transactions that are unlikely to create significant competition concerns. As noted in the ICN *Recommended Practices:*

> *Requiring merger notification as to such transactions [i.e., those unlikely to result in appreciable competitive effects] imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit. Merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or assets levels within the territory of the jurisdiction concerned.*[9]

By way of example:

- *Finland* — requires notification where each of two parties to the transaction has turnover in Finland in excess of €20 million (approximately US$21.7 million).
- *Greece* — requires notification where each of two parties to the transaction has turnover in Greece in excess of €15 million (approximately US$16.3 million).
- *Czech Republic* — requires notification where each of two parties to the transaction has turnover in the Czech Republic in excess of approximately €10 million (approximately US$11 million).

[9] *Recommended Practice* I.B, Comment 1 in particular (emphasis added).

- *Denmark* — requires notification where each of at least two parties to the transaction has turnover in Denmark in excess of approximately €13.5 million (approximately US$14.6 million).

- *Belgium* — requires notification where each of two parties to the transaction has turnover in Belgium in excess of €40 million (approximately US$43 million).

- *Slovakia* — requires notification where each of at least two parties to the transaction has turnover in Slovakia in excess of €14 million (approximately US$15 million).

- *Brazil* — requires notification where one party has turnover in Brazil exceeding 750 million reais (*i.e.*, approximately US$235 million or €217 million) and another party has turnover in Brazil exceeding 75 million reais (*i.e.*, approximately US$23.5 million or €21.7 million).

- *Mexico* — requires notification where the value of the target company exceeds a defined multiple of the minimum wage in the Federal District of Mexico City (currently approximately US$95 million or €87.5 million), or where two or more firms involved in the transaction have individual or joint sales of US$250 million (€231 million) or more, and the additional sales or capital acquired in Mexico exceeds US$43 million (€40 million).

The Group therefore recommends that when the regulations contemplated in the Bill are developed, they include specific financial thresholds that are material in size.

3. Notification Thresholds Should Focus on Target Entities, not Vendors

Notification thresholds should be limited to the entities that will be combined in the transaction and, in particular, the revenues or assets of the business(es) being acquired. We understand that, with the exception of asset acquisitions, the Bill would aggregate the sales of the economic agents involved in a transaction — including the target business(es) — to the business group level.

This approach to calculating the notification thresholds would require that transactions which are unlikely to result in appreciable competitive effects, and indeed may have little connection to Chile, be notified. For example, if two large corporations with sales in Chile exceeding the second branch of the notification thresholds create a joint venture in the U.S., pre-merger notification appears to be required by the Bill, notwithstanding that the joint venture has no connection to Chile. Likewise, if an acquiror with significant activities in Chile were to purchase a very small subsidiary of a large Chilean company, a pre-merger notification would be required if the acquiror and vendor have sales exceeding the notification thresholds, notwithstanding that the very small target entity may only have *de minimis* (*e.g.*, US$10,000) annual sales in Chile.

Accordingly, the ICN *Recommended Practices* indicate that "*[n]otification should not be required solely on the basis of the acquiring firm's local activities*". Similarly, they emphasize that "*the relevant local activities of the acquired party should generally be limited to the local sales or assets of the business(es) being acquired*."[10]

The Group therefore recommends that the second notification threshold, set out in Article 48(b), be amended to consider only the local sales (or assets) of the relevant entities that are being acquired in the proposed transaction.

4. Definition of a Merger ("Concentration Operation")

Article 47, as amended by submissions made by the Government to the draft Bill, provides that a "concentration operation" shall be any action, act, or convention which causes two or more previously independent economic agents to lose such independence in any area of their activities. Sub-articles 47(a) through (d) describe such losses of independence. The Group recommends that the following two clarifications be provided in respect of Article 47 and the types of transactions that will be subject to the new notification requirements.

(a) Clearly Define the Concept of "Decisive Influence"

A concentration operation would include situations in which one or more economic agents acquires rights allowing it/them to decisively influence the management of another economic agent.[11] The Group recommends the addition of a definition of "decisive influence" — such as the acquisition of more than 50% of the voting shares or interests of an entity, or the ability to appoint a majority of the board of directors. In the absence of such a definition, it is not clear whether "decisive influence" would exist where a minority shareholder has a veto power over particular business decisions, or where, for example, it has the power to approve appointment of the chief executive officer. As noted in the ICN *Recommended Practices*, effective notification thresholds should be clear and understandable.[12]

(b) Limit Notification to Transactions Involving Structural Changes

A concentration operation would also include the formation of an independent economic agent, performing its functions permanently.[13] The definition of an "economic agent" for the purposes of merger notification and review is very broad. We understand that it includes any entity, or a part of the entity, whatever the form of its legal organization or the lack thereof, that requires or offers products or services, as well as tangible or intangible assets allowing for the development of a business activity.

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[10] *Recommended Practice* I.B, Comment 3 (emphasis added).

[11] Bill Amending DL 211 Competition Act, Article 47(b).

[12] *Recommended Practice* II.A.

[13] Bill Amending DL 211 Competition Act, Article 47(c).

The Group believes that the definitions of "economic agent" and "concentration operation" could extend the merger notification obligations to many forms of business arrangements where no structural change or transfer of ownership or control occurs — for example, joint purchasing agreements or distribution arrangements. The ICN report on *Defining 'Merger' Transactions for Purposes of Merger Review* recognizes that "*merger review statutes and regulations are directed at business transactions in which two or more previously independent economic undertakings are combined in some fashion that involves a lasting change in the structure or ownership of one or more of the undertakings concerned*."[14] Moreover, the expansive definitions in the Bill are inconsistent with a central theme of the ICN *Recommended Practices*, namely that effective merger control regimes should "*avoid imposing unnecessary costs and burdens on parties*" to a transaction and corresponding impacts on agency resources.[15] The Group therefore recommends that these two concepts be refined to limit the notification obligation to acquisitions of assets or shares, amalgamations, combinations or joint ventures that result in some lasting structural change between the parties.

5. Documentation Requirements

Article 48 sets out the general categories of information that must be submitted with a notification (*e.g.*, "*all the necessary documentation for a preliminary assessment of the operation's competition risks*") but leaves the specifics to be later determined by regulation. The Group supports the provisions in the Bill allowing the regulation to set out a procedure for simplified notification, requiring a lesser degree of documentation.

With respect to the documentation requirements generally, the Group encourages the Government and the FNE to avoid unduly burdensome requirements. As indicated in the ICN *Recommended Practices*, "*most transactions do not raise material competitive concerns*"[16] and "*[i]nitial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns*."[17] As a result, "*the initial notification should elicit the minimum amount of information necessary to initiate the merger review process*" and should be limited to information that is necessary in order for the agency to determine that the transaction is properly before it and whether the transaction raises any competitive issues meriting a further review.[18] To the extent that the FNE requires more detailed information to properly assess more

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[14] International Competition Network, *Defining 'Merger' Transactions for Purposes of Merger Review*, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf> (emphasis added).

[15] See, for example, *Recommended Practice*, I.B, Comment 1; *Recommended Practice* VI.E; and *Recommended Practice* XII.B, Comment 1 (emphasis added). The ICN report, *ibid.*, recommends similar caution, noting that if the term "'mergers'" is defined too broadly, the result may be "*to capture many types of ownership changes that are unlikely to have a material impact on competition, thus placing a greater burden on business and law enforcement resources*": see part IV (emphasis added).

[16] *Recommended Practice* V.A, Comment 1.

[17] *Recommended Practice* V.B.

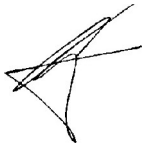
[18] *Recommended Practice* V.A, Comment 1 (emphasis added).

complicated mergers, this information can be requested from the parties on a case-by-case basis as necessary, rather than imposing burdensome document requirements on all transactions, regardless of their complexity, *ex ante*.

* * *

Thank you very much for considering the Group's views. We would be pleased to discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



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