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VIA EMAIL to cndc@mecon.gov.ar

Comisión Nacional de Defensa de la Competencia
Av. Julio A. Roca 651 4to. piso, sector 16
CP1322 Ciudad Autónoma de Buenos Aires
Rca. Argentina
Attn: Señor Esteban Manuel Greco, Chairman

Estimado Sr. Greco:

Re: Reforma LDC

We write on behalf of the Merger Streamlining Group ("MSG" or 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 Group's core activity has been to work with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Comisión Nacional de Defensa de la Competencia (the "CNDC") is a longstanding member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (*e.g.*, the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Chile, Peru, Germany, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*.

[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>.

The Group appreciates the opportunity to provide these comments regarding the proposed Antitrust Draft Bill released for consultation (in Spanish) by the CDNC on August 30, 2016 (the "Draft").[3] The Draft includes numerous rules to implement a framework for mandatory merger notification and merger control in Argentina.

The Group commends the CNDC's ongoing efforts to modernize the Argentine competition laws, and appreciates the opportunity to provide this submission in response to the Draft. We encourage the CNDC to apply the *Recommended Practices* advocated by the ICN in further developing the merger control regime in Argentina. The Group is providing this letter in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger control matters. The *Recommended Practices* were developed by competition law agencies and play an important role in focusing scarce enforcement resources on the analysis of mergers that have the potential to result in significant local anti-competitive effects, while minimizing the expenditure of government resources on reviewing transactions that are unlikely to have such effects.

I. Notification Thresholds

Recommended Practice II-A of the *Recommended Practices* provides that "*[n]otification thresholds should be clear and understandable*". Below, we address three areas in which we believe that the Draft could be improved in order to provide greater clarity for merging parties and the CNDC.

1. Suggested Revisions to the Affiliate Calculation Rules

Section 8 of the Draft provides that the obligation to file a notification applies whenever the total turnover of the affected companies domestically exceeds the equivalent of 150 million Housing Units ("UVI"). To determine which affiliates of the merging companies' turnover must be included in the calculation, Section 8 enumerates a list of nine rules that are to be used to identify the relevant affiliates (the "Affiliate Rules").

Affiliate Rules (a) and (b) appear to have the effect of capturing the company subject to the change of control (the "Target").

However, Affiliate Rules (c) and (d) appear to have the effect of capturing the Target's direct and indirect parent companies, any other direct or indirect subsidiaries of the direct and indirect parent companies of the Target. Affiliate Rule (e) appears to capture any companies that are jointly controlled by any of the companies identified in Affiliate Rules (c) and (d).

To the extent that these rules include the turnover of the target's parents and other affiliates not being acquired in the transaction, they are inconsistent with the ICN *Recommended*

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[3] Our commentary in this letter is based upon an unofficial English-language translation that we obtained from local counsel colleagues in Argentina.

Practices regarding notification thresholds. The *Recommended Practices* clearly state that notification thresholds should "be confined to the relevant entities or businesses that will be combined in the proposed transaction."[4] The Commentary to *Recommended Practice* I.B elaborates that "the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired",[5] rather than the entire corporate group of the target.

In order to achieve consistency with these important international standards, the Group strongly encourages CNDC to eliminate Affiliate Rules (c), (d) and (e).

2. Definition of Notifiable "Concentrations"

Section 6 of the Draft provides that a notification will result from an "*economic concentration*" that "*shall be the takeover of one or more companies through any of the following actions*", and defines four such categories of a takeover. In particular, Section 6(b) includes a "transfer of goodwill" between companies as one of these four categories. The Group respectfully suggests the amendment of Section 6(b) to limit it to a transfer of goodwill that constitutes a complete business or operating unit, to which local turnover in Argentina can be readily identified and attributed.

3. Local Nexus Issues in Exemptions from Mandatory Notification

The Group recognizes that the Draft attempts to provide some exemptions to the mandatory merger notification rules for transactions that are likely to have only limited connections to Argentina. However, as set out below, the Group believes it would be desirable to revise and clarify certain of the exemptions in order to better serve this goal.

ICN *Recommended Practice* I-C describes the nature of the local nexus that should be required in notifiable transactions.[6] As noted in the Commentary to *Recommended Practice* I-C, requiring significant local activities by each of at least two parties to the transaction "*represents an appropriate 'local nexus' screen since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted*."[7]

A meaningful jurisdictional nexus not only reduces unwarranted regulatory burdens on merging parties, but also has the significant benefit of allowing competition agencies to allocate their enforcement resources efficiently, by focusing their time and efforts on those transactions that are likely to have significant effects in their jurisdiction.[8] The Group

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

[5] *Ibid.* (emphasis added).

[6] *Recommended Practice* I-C.

[7] Comment 2 to *Recommended Practice* I-C.

[8] As noted in Comment 1 to *Recommended Practice* I-B, the use of thresholds that require the notification of transactions that are "*unlikely to result in appreciable competitive effects within [a country's] territory […] imposes unnecessary*

commends the CNDC for including the exemptions at sections 10(c) and 10(e) that provide exemptions from notification where the acquiring company is a company foreign to Argentina with limited exports to Argentina, and where the Target has limited assets in Argentina and revenues generated from those assets.

In particular, section 10(c) exempts from notification an *"[a]cquisition of a single company by a single foreign company with not any prior assets (excluding those for residential purposes) or shares of other companies in Argentina, and whose exports to Argentina had not been significant, habitual and frequent for the past thirty-six months"*.

We note that it may prove difficult for merging parties to determine whether an acquiring company's exports to Argentina have been "*significant, habitual and frequent*", and would suggest that CNDC provide an objectively-measurable definition[9] of this phrase (for example, adopting specific export values to demonstrate what is "significant" and "frequent"). As well, it is unclear how to interpret the language "for the past thirty-six months", in particular what portion of the relevant export shipments must have occurred within this period, and when such period would begin to run in any particular transaction. If measurement periods straddle two or more fiscal years, this also adds burdens for calculating the required amount. The Group also considers the 36-month time period to be unnecessarily long for purposes of determining local nexus to Argentina. Generally speaking, the financial thresholds used in nearly all merger notification regimes worldwide are based on a company's most recently-completed fiscal year.

As a result, the Group would recommend modifying section 10(c) to provide a specific value of exports threshold that will determine the applicability of the exemption and that a 12-month period corresponding to a company's fiscal year end be used instead of the 36-month period.

In contrast to Section 10(c), which provides a notification exemption based on the Acquiror's activities, Section 10(e) provides an exemption based on the Target's lack of sufficient nexus to Argentina. It exempts from notification:

> *[e]conomic concentration acts envisaged in Section 6 and which require notification in accordance with Section 8, when the amount of the operation and the value of the assets located in the Argentine Republic which are absorbed, acquired, transferred or controlled do not exceed, respectively, a sum equivalent to FIFTEEN MILLION (15,000,000) Housing Units (UVI) each, unless within the preceding twelve-month period, operations were conducted for a total amount exceeding such sum, or the sum equivalent to FORTY-FIVE MILLION (45,000,000) Housing Units (UVI) for the past thirty-six months, provided both cases involve the*

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transaction costs and *commitment of competition agency resources without any corresponding enforcement benefit*." (emphasis added).

[9] In this respect, we would highlight *Recommended Practice* II.B, which states that "*[n]otification thresholds should be based on objectively quantifiable criteria*."

> *same market. To determine the volumes mentioned above, the National Competition Authority shall inform, on an annual basis, the amounts in legal tender that shall apply each year. To that end, the National Competition Authority shall consider the Housing Unit (UVI) value in effect as of the last business day of the preceding year published by the Central Bank of the Argentine Republic (BCRA).*

The Group understands that the goal of Section 10(e) is to exempt from notification those transactions where the assets located in Argentina which are "*absorbed, acquired, transferred or controlled*" represent:

- Fifteen million (15,000,000) UVI or less in value;
- Fifteen million (15,000,000) UVI in or less in turnover in the preceding 12 months; and
- Forty-five million (45,000,000) UVI or less in turnover in the preceding 36 months.

The Group respectfully suggests the following modifications to Section 10(e), in order to clarify its application for merging parties:

- The first three words of the phrase "*absorbed, acquired, transferred or controlled*" indicate that the focus is on the Target's assets, but the fourth word "*controlled*" may (inadvertently) capture the acquiring company's existing assets in Argentina as well. The Group expects that CNDC's intention was to refer to the Target's assets alone, but the Draft should be revised to remove this ambiguity, perhaps by deleting the reference to "*controlled*".
- The Draft exempts transactions where the assets located in Argentina have a value of fifteen million (15,000,000) UVI or less unless "*operations were conducted for a total exceeding such sum*" in the preceding 12-month period or exceeding a sum of forty-five million (45,000,000) UVI in the preceding 36-six month period. The phrase "*operations were conducted for a total exceeding such sum*" lacks clarity, and the Group suggests instead that the provision refer to "*revenue generated from assets located in the Argentine Republic*" or "*turnover generated from assets located in the Argentine Republic*", or similar wording to this effect.
- It is not apparent what is meant by the limitation of "*provided both cases involve the same market.*" The Group infers that the use of "*both*" may imply that that the limiting clause applies to both the 12-month and 36-month conditions, but would suggest that this language be clarified.

4. Clarifying Certain Exemptions from Mandatory Notification

Section 10 of the Draft provides a number of exemptions from the mandatory notification regime. In particular, Section 10(a) exempts from notification "*[a]cquisitions of companies with respect to which the buyer already had over fifty percent (50%) of the capital stock, provided that such acquisition does not entail a change in the nature of the control*" (emphasis added). However, in some transactions it will be difficult for notifying parties to determine if there has been a change in the "nature" of control. For example, as currently drafted, a majority owner buying out a minority owner and thus causing the minority owner to lose its veto rights could meet this definition of changing the "nature of the control", and thus fail to qualify for the exemption. As well, acquisitions by a majority owner of shares of a minority owner may change the rights of a minority owner under a shareholder agreement and could also potentially qualify as changing the "nature of the control", again resulting in the exemption being unavailable.

The Group recommends that the Section 10(a) exemption refer back to Affiliate Rule (b), with a "*change in the nature of the control*" being defined to mean only the acquisition by the buyer of:

1. Over half of the company in question's capital or working capital (where the buyer previously had less than half of the capital or working capital);

2. The power to exercise more than half of the company in question's voting rights (where the buyer previously could not exercise more than half of the voting rights);

3. The power to designate more than half the members of the Oversight Committee or the Board of Directors or the bodies that legally represent the company in question (where the buyer previously could not designate more than half of such members); or

4. The right to direct the company's activities (where the buyer was previously unable to direct the company in question's activities).

II. Topics for Future Consideration and Consultation

Section 9 of the Draft requires the CNDC to establish a procedure for parties to obtain consultative opinions as to whether a proposed transaction is notifiable. Section 11 of the Draft requires the CNDC to establish the details and background information that is to be provided to the CNDC in order to notify a concentration as well as the periods within which such details are to be provided. Section 13 generally provides that reviews should be completed within 45 days, and permits the CNDC to create a fast track procedure for reviewing economic concentrations that are less likely to raise a concern under Section 7 of the Draft. Based on its members' significant experience with international merger control matters, the Group believes that issues relating to pre-filing dialogue with agencies regarding the notifiability of transactions, the details and information required for notifications, and fast track filing procedures are all

extremely important for an effective merger control regime. The Group therefore recommends that the CNDC prepare discussion drafts for these procedures and actively engage with the stakeholder community on these procedures as soon as practicable.

1. Commencement of Review Periods

We understand that Section 13 of the Draft establishes, among other things, that "*within forty-five (45) days after details and background information are completely and correctly submitted*", CNDC will approve, reject, or approve (with conditions) a notified transaction. However, the phrase "*after details and background information are completely and correctly submitted*" raises some ambiguity about precisely when the 45-day review period will commence, and the Group therefore recommends that Section 13 be amended to clarify that this period will begin upon submission of the required transaction notification filing to CNDC. As the *Recommended Practices* clearly stipulate, "*[i]n suspensive jurisdictions, initial waiting periods should expire within a specified period following notification*."[10] The Commentary to this *Recommended Practice* further provides that:

> [u]ncertainty with respect to applicable waiting periods can be avoided only if the parties can readily ascertain the commencement and the anticipated expiration dates thereof. Competition agencies should therefore provide notifying parties with timely notice as to any deficiencies in their submissions, and should inform the parties of the specific details of any such deficiencies to facilitate the prompt submission of corrective filings.[11]

The Group also recommends that Section 13 be amended to clarify that the review period is to be counted in calendar days.

2. Pre-Filing Consultation

With respect to pre-notification procedures, the ICN's *Recommended Practices* contain the following key principle:

- "*Competition agencies should provide for the possibility of pre-notification guidance to parties on the notifiability of the transaction and the content of the intended notification* (Recommended Practice V-C)."

The Group commends the CNDC on including a proactive requirement for the agency to establish a procedure for consulting with merging parties to determine if a transaction is notifiable. The Group recommends that the scope of such pre-filing dialogue should also include resolving any questions the parties' may have as to the required content to be provided upon notification.

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[10] *Recommended Practice* IV.C (emphasis added).

[11] *Recommended Practice* IV.C, Comment 3.

3. Information to be Provided Upon Filing

With respect to the information required to be submitted upon notification, the ICN *Recommended Practices* contain two key principles:

- "*Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation*" (*Recommended Practice* V-A); and

- "*Initial 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*" (Recommended Practice V-B; emphasis added).

The Commentary to *Recommended Practice* V-A notes that "*[b]ecause most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process*."[12]

As a draft notification form has not yet been provided for public consultation, the Group would highlight the general principles described above and encourage the CNDC to adopt a notification form that is consistent with the *Recommended Practices*. In particular, the Group recommends that the information requirements of the form not exceed that information which is required for the CNDC to make an initial assessment as to whether a transaction merits detailed further investigation. Based on the Group's experience in other jurisdictions, it is likely that the vast majority of transactions notified to the CNDC will not raise any competitive concerns in Argentina and, therefore, extensive information about local markets should not be required for all notifiable transactions *ex ante*.

Rather, the CNDC should consider implementing a process that allows it to request additional information from merging parties during the course of its substantive review, where necessary on a case-by-case basis, to assess the competitive effects of a transaction. Reducing the initial information required by the notification form, while allowing the CNDC to request additional information for the limited number of potentially problematic transactions, would effectively balance the legitimate interest of the CNDC in obtaining the information required to review transactions with the legitimate interest of merging parties in avoiding unnecessary burdens in preparing merger notifications — and on CNDC in reviewing such information.

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[12] Comment 1 to *Recommended Practice* V-A.

4. Fast-Track Procedures

With respect to fast-track procedures, the ICN *Recommended Practices* contain the following key principle:

- "*Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns.*" (Recommended Practice IV-B).

The Group commends the CNDC for recognizing the utility of a fast-track procedure, and recommends that the CNDC establish such a procedure in consultation with stakeholders.

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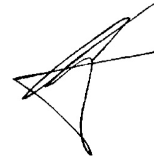
We would be pleased to respond to any questions that you may have, or to discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell



Casey W. Halladay

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