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Mr. Ricardo Riesco
Fiscalía Nacional Económica
Huérfanos 670 8, 9 & 10 floor
Santiago, Chile

Estimado Sr. Riesco:

Re: ***Reglamento sobre Notificación de una Operación de Concentración***

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 works 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* (the "*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Fiscalía Nacional Económica (the "FNE") is a longstanding member.

The MSG was founded in 2001. Its work has 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 competition agencies and governments in over twenty other jurisdictions (*e.g.*, Argentina, Australia, Brazil, Canada, China, the European Union, France, Japan, Korea, Russia, Spain, the United States, the United Kingdom and many others) to promote reforms consistent with the *Recommended Practices*. The MSG has closely followed the evolution of merger control law in Chile, and has made prior submissions in January 2013 in respect of the proposed introduction of a mandatory merger notification regime as well as in July 2015 in respect of the draft Bill Amending DL211.

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

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf >.

Recommended Practice XIII.A advises that "[j]urisdictions should periodically review their merger control provisions to seek continual improvement in the merger review process."[3] The Group commends the FNE's initiative to assess the efficacy of various aspects of the mandatory merger notification regime since it came into force in June 2017, including the financial thresholds for mandatory notification and the information requirements for merger notifications.

I. Notification Thresholds

In respect of the notification thresholds, the Group applauds the FNE for conducting the study as contained in the report *Informe de ajuste de umbrales de notificación de operaciones de concentración* dated March 22, 2019 and for implementing increases to the thresholds to enable the FNE to focus its limited resources on examining transactions that are most likely to result in anti-competitive effects in Chile.

II. General Comments About Information Requirements

The Group appreciates the opportunity to provide these comments regarding the current *Reglamento sobre Notificación de una Operación de Concentración* (the "Regulations"). The Group is providing this letter in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions. As detail below, the Group is of the view that the information requirements for merger notification under the Regulations are overly burdensome, and could be simplified to streamline Chile's merger control process without undermining its effectiveness. In Part II of this submission, we provide some general comments about the information requirements contained in the Regulations. In Part III, we provide recommendations about specific information items currently required by the Regulations.

(a) The Existing Information Requirements Go Beyond What Is Necessary For The Triage Function Of Merger Notification

The primary purpose of merger notification is to allow a competition agency to be notified of transactions which may present competitive concerns. The competition agency can assess the information provided in the initial notification and determine whether a transaction may raise competitive issues meriting detailed investigation. In this way, the merger notification process serves a triage function. It should enable the competition agency to quickly focus limited investigative and enforcement resources on transactions that are likely to raise competitive concerns and to expeditiously clear those transactions which do not raise such concerns.

Accordingly, the *Recommended Practices* state that "*[i]nitial notification requirements should be limited to the information needed to verify that the transaction exceeds*

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[3] *Recommended Practice* XIII.A.

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."[4]

The Group believes that the current information requirements of the Regulations for an initial merger notification go well beyond what is necessary for the FNE to effectively engage in the initial triage of notified transactions. Many of the items currently required for an initial merger notification may be relevant for in-depth investigations into substantively problematic or complex transactions, but are unnecessary for the majority of notified transactions (which do not present competitive issues). The *Recommended Practices* observe 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*."[5]

(b) The Availability Of The Current Simplified Notification Procedure Is Uncertain

The Regulations currently provide for a simplified notification procedure for certain transactions, which can be useful in minimizing notification burdens for merging parties as well as the agency resources required for reviews. Availability of the simplified notification procedure is limited to transactions with no horizontal or vertical overlaps or limited combined market shares. In practice, however, it can be difficult for parties to determine whether they are eligible to use the simplified notification procedure in cases where a complex substantive market definition analysis may be required.[6] Moreover, after the parties have done so, the FNE may disagree with the parties' assessment and require the parties to file the full ordinary notifications. The FNE currently has 30 business days after receiving the initial simplified notification to require the parties to provide a full ordinary notification, and the suspensory period restarts only after the full ordinary notification is filed.[7]

The Group believes that the period of 30 business days — which we understand is in addition to the period of 10 business days already afforded to the FNE to analyze whether merger notification filings in general are complete, and which 10-day period the FNE can also restart by requesting additional information to supplement the notification[8] — is substantially more than should be required to assess whether the notifying parties qualify for the simplified procedure. The ability of the FNE, after such a lengthy period, to reject parties' application under the simplified procedure and re-start the suspensory period creates substantial uncertainty for parties, and limits the utility of this procedure as a means of lessening the burdens for notifying parties and the FNE.

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[4] *Recommended Practice* V.A.

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

[6] Regulations, Article 4.

[7] Regulations, Article 9.

[8] Article 50, Law Decree No. 211 for the Rules for the Defence of Free Competition.

The Group therefore encourages the FNE to commit to determining whether use of the simplified procedure is acceptable within the same initial (and generous) 10 business day statutory period in which the completeness of filings is assessed. Now that the FNE has a considerable amount of experience with its mandatory merger notification regime, it should be in a position to make such assessments within this time period.

III. Comments About Specific Items Required For Notification

In this Part, the Group identifies specific information items currently required for the initial merger notification under the Regulations that are overly burdensome and are not necessary for merger notification's triage function. The Group respectfully recommends that these items be removed from the requirements for the initial merger notification, or at least be narrowed in scope. Such changes will free up FNE resources to focus on matters which raise more serious concerns in addition to reducing the filing burdens for merging parties.

(a) Information About Merging Parties And Affiliates

Article 2 item 3(a) and article 7 item 3(a) require notifying parties to identify all entities within their respective corporate groups (*i.e.*, their affiliates) and describe their ownership and control structures. This requirement can be especially onerous for large multinational firms with many affiliates all around the world. The Group submits that information about affiliates with no assets in Chile, and with no sales in/from/into Chile, or no connection to the relevant markets, is irrelevant for a merger notification filing and competitive effects analysis. Accordingly, the Group recommends that this requirement be narrowed to include only information about affiliates with assets in Chile or sales in/from/into Chile, or with operations in the relevant markets.

Article 2 item 3(c) and article 7 item 3(c) require notifying parties to provide financial statements for the last three fiscal years for the parties and the affiliates which participate in the same relevant markets. The Group recommends that only financial statements for the most recently-completed fiscal year should be required for the initial merger notification. Older historical financial information is usually not necessary for the competitive analysis of transactions. If, during the merger review process, the FNE determines that such older information is relevant for a particular transaction, it can be requested at that time.

Article 2 item 3(e) requires a description of all concentration operations involving the parties and affiliates that have participated in the same relevant markets within the last five years. The Group submits that information about historical transactions is generally not likely to be relevant to the competitive analysis of a new transaction. Instead, the Group suggests that a description of the parties' and affiliates' operations currently, and in the most recently completed fiscal year, in such relevant markets should be sufficient.

(b) Information About The Notified Transaction

Article 2 item 4(d) requires the parties to specify other jurisdictions where the notified transaction has been or will be notified and whether a waiver has been provided

permitting the FNE to share information with competition agencies in such foreign jurisdictions. The Group suggests that the Regulations be amended to clarify that the absence of waivers is not grounds for declaring a notification incomplete, as parties should be permitted to decide whether they are prepared to authorize communications between multiple jurisdictions. Indeed, the commentary to *Recommended Practice* X.D explicitly states that "*[w]here coordination would be facilitated by the discussion of confidential information, the competition agency should encourage voluntary confidentiality waivers, but should not pressure parties to provide waivers*."[9]

Article 2 items 4(h)(i), (ii) and (iii) and article 7 item 4(f) require the Parties to provide minutes of board of directors meetings and shareholder meetings in which the notified transaction was discussed and the reports and documents prepared for the purpose of evaluating the notified transaction that were reviewed during the board or shareholder meetings. These items are not limited to matters related to competition or relevant markets. They are likely cover a large volume of documents in which the notified transaction may have been discussed, creating a significant burden for the parties to collect and for the FNE to review. The majority of such documents would likely be irrelevant to the competitive analysis of the notified transaction. The Group recommends that these items be narrowed to cover only those documents discussing or analysing the competitive effects of the notified transaction in Chile (similar, for example, to the requirements in item 4(c) of the U.S. *Hart-Scott-Rodino Act* notification, or Appendix 6.1 of the Canadian *Competition Act* merger notification).

Article 2 item 4(h)(iv) requires the parties to provide other documents prepared for the purpose of evaluating or analysing the notified transaction and any alternative transactions. Similar to the commentary above, the Group recommends that this item be narrowed to cover only those documents that evaluate or analyse the competitive effects of the notified transaction in Chile. Moreover, documents relating to any alternative transactions should not be required, as they would generally be irrelevant to a competitive analysis of the notified transaction. Finally, limiting this item to documents prepared for or received by senior management (*e.g.*, officers and directors) is an approach used in many regimes to reduce burdens (on both parties and agencies) and to help identify documents with greater probative value.

Article 2 item 4(h)(v) requires the parties to provide commercial programs and/or business plans for relevant markets in Chile for the last three years. The Group suggests that such documents should not be required for the initial competitive analysis of the notified transaction. If, during merger review, the FNE determines that such older information is relevant for a particular transaction, it can be requested at that time.

(c) Information About Market Definition

Article 2 items 5(b) and (c) and article 7 item 5 require the parties to indicate plausible alternatives to the relevant market definitions and justify their exclusion. This is burdensome for the parties as there can be a large number of possible alternative market

[9] *Recommended Practice* X.D, Comment 2 (emphasis added).

definitions. While the parties should be expected to justify their chosen market definitions, it should not be necessary to require them to systematically justify why alternative market definitions were not chosen at the time of the initial merger notification filing. The Group recommends that information about alternative market definition should not be required *ex ante*; if, during merger review, the FNE determines that such information is relevant for a particular transaction, it can be requested at that time.

Article 2 item 6(b) and article 7 item 6(b) require the parties to provide market size and market share information for relevant market definitions in terms of both value and quantities. For many industries, market size and market share information can be difficult to obtain; data relating to quantities may also be of limited utility in industries in which sales are made, for example, primarily through a limited number of bidding/tendering opportunities. The Group recommends that the FNE clarify that parties may provide internal estimates for market size and market share where they do not have third-party data. Moreover, the Article 2 item 6(b) requirement to provide this information for the last three years should be reduced to the most recent year, subject to a requirement to indicate if significant recent changes have occurred. This would be consistent with the language used in article 7 item 6(b) of the simplified form and would recognize that two older years of market share data are not normally necessary for the initial phase of merger review.

Article 2 item 6(c) and article 7 item 6(c) require the parties to provide monthly sales data for the affected or reported markets. Article 2 item 6(c) in particular requires this data for three years, and that it be disaggregated by brand, category, sub-category and origin of import. This vast level of detail would be very burdensome to collect — and to review — in many situations where there are a large number of brands, sub-categories, *etc*. Moreover, it is not normally necessary for the initial competitive analysis of a notified transaction. For example, if the parties' combined market share is small in the relevant markets, it should not be necessary to examine monthly sales data, let alone disaggregated data, to conclude that the notified transaction is not likely to have anti-competitive effects. The Group recommends that this burdensome requirement be changed to annual sales data.

Article 2 item 6(d) requires the parties to provide an estimate of the total production capacity for the whole Chilean market and for the parties in the last three years, along with their capacity utilization rates. This information can be burdensome to collect or estimate, and may have little value for industries in which there only minimal or no production occurs within Chile. The Group recommends that such data should not be required *ex ante* since basic sales and market share information is sufficient to conclude for an initial assessment of most mergers. If the FNE determines that detailed production and capacity data is needed to assess a particular transaction, it can be requested at that time.

Article 2 item 6(f) requires the parties to provide three years of bidding data if customers procure the relevant products by way of bids or proposals. Bidding data with detailed information about the winner and ranking of competitors can be very burdensome to collect and analyze. Similar to the commentary above, such data should not be necessary for an initial competitive assessment of a notified transaction, and can subsequently be requested by the FNA where necessary.

Article 2 item 6(l) requires the parties to provide a list of trade associations to which the parties and their customers belong. The parties may not know the trade associations to which their customers belong. The FNE can easily gather this information, if required, through the market contacts it conducts during its investigation. The Group therefore recommends that information related to customers' trade associations should not be required.

Article 2 item 6(n) requires the parties to provide a description of the entry, expansion and exit conditions of the relevant markets. This information generally is not necessary for an initial competitive analysis of the notified transaction. If the parties' combined market share is small in the relevant markets, it is not necessary to examine the entry, expansion and exit conditions of the markets to conclude that the notified transaction is not likely to result in anti-competitive effects. The Group therefore recommends that such information should not be required for the initial merger notification, and should only be sought when relevant to the review of transactions that appear to raise potential competition concerns.

Article 2 item 6(o) and article 7 item 6(d) require the parties to identify their main competitors and potential new entrants and provide contact information for these players. While the Group understands that information about competitors can be useful to the FNE, the parties often will not have contact information for their competitors and/or new entrants. The Group suggests that the requirement for such contact information be removed. It normally should not be difficult for FNE to make contact with firms once they have been identified as competitors.

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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,

A. Neil Campbell

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
William Wu, McMillan LLP