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Our File No.	69459
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Comisión Nacional de Defensa de la Competencia
Reconquista 46, 7th Floor
C1003ABB, Buenos Aires
Argentina

Attn: Señor Esteban Manuel Greco, President

Estimado Sr. Greco:

Re: Proyecto notificación concentraciones

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] It 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* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Comisión Nacional de Defensa de la Competencia ("CNDC") 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.*, the European Union, the United Kingdom, France, Spain, Russia, China, Japan, Korea, Australia, Brazil, Chile, the United States, Canada and many others) to promote reforms consistent with the *Recommended Practices*. The MSG has closely followed the evolution of merger control law in Argentina, and its efforts have included a prior submission to the CNDC in October 2016 in respect of the Draft Legislative Proposal to Update the Rules and Institutions for the Defense of Competition in the Argentine Republic.

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[1] The current members of the MSG include Accenture, BHP Billiton, 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 >.

The Group appreciates the opportunity to provide these comments regarding the Draft Guide for Merger Notification published on February 19, 2019 (the "*Draft Guide*"). The Group commends the CNDC's ongoing efforts in improving the merger control process in Argentina and for its willingness to consult with stakeholders on these important issues. The preparation of an English-language translation of the *Draft Guide*,[3] which facilitates input from interested international stakeholders, is particularly appreciated.

The Group recognizes that the CNDC, in publishing the *Draft Guide*, has consolidated its interpretation of various jurisdictional issues previously contained in numerous advisory opinions into a single document. This is a very useful step for enhancing the transparency and certainty of the merger control rules of Argentina for merging parties, their advisors, and indeed for CNDC staff. However, as described more fully below, the Group believes that there are certain areas in which the *Draft Guide* could be clarified or further improved. We hope that this submission, which draws upon our members' very substantial experience with multinational merger control matters, will prove useful to you.

I. Transfer Of Goodwill

Section 7 of the *Act for the Defence of Competition* (the "ADC") lists several acts that may constitute an economic concentration subject to mandatory notification. In particular, section 7(b) identifies a "*transfer of goodwill*" between companies as one such act.

The *Draft Guide* notes at page 7 that the *Business Goodwill Act* of Argentina provides that business goodwill includes "*facilities, merchandise stocks, business names, clientele, right to premises, innovation patents, trademarks, industrial designs, honorific distinctions, and all the other rights derived from commercial, industrial or intellectual property*." The *Draft Guide* further explains that "*the change of control in the business goodwill of a firm, through the acquisition of any of the elements previously mentioned, whether total or partial*", may constitute a notifiable merger.

ICN *Recommended Practice* I.B advises that "*[j]urisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws."* The Group respectfully submits the guidance provided in the *Draft Guide* concerning the transfer of goodwill does not lend clarity to the meaning and applicability of section 7(b) of the ADC. It is difficult for merging parties to assess whether a transaction involving a partial transfer of goodwill would be subject to mandatory notification. The Group suggests that the guidance should focus on whether the transfer of goodwill involves a complete business or operating unit. This would be a sensible approach for merger control notification requirements because local turnover in Argentina can be readily identified and attributed to a business or operating unit and competitive effects can then be analyzed. Requiring *ex ante* notifications for other partial

[3] Comisión Nacional de Defensa de la Competencia, *Draft Guide for Merger Notification*, available online at <https://www.argentina.gob.ar/sites/default/files/traduccion_ingles_guia_notificacion_1.pdf>.

acquisitions of portions of goodwill assets will create uncertainty; it is also likely to cause both merging parties and the CNDC itself to expend valuable resources in notifying and reviewing transactions that are unlikely to raise substantive competition concerns in Argentina.

II. Change In The "Nature Of Control"

The *Draft Guide* notes at page 8 that "*when any change in the nature of control takes place, that is when a transaction results in joint control being transformed into exclusive control, or vice versa, this may constitute a notifiable merger*." As an example, the *Draft Guide* specifies that the scenario in which Undertaking A obtains exclusive control over Undertaking B (over which Undertaking A already had joint control, presumably together with a third Undertaking C), this may constitute a notifiable merger. This effectively describes a situation of a majority owner buying out a minority owner and thus causing the minority owner to lose its veto rights. The Group respectfully submits that such a transaction should be exempt from notification.

In all of the other examples described on page 8 of the *Draft Guide*, an entity which previously did not have substantial influence over the target acquires substantial influence over the target through a transaction. Such transactions all result in the combination of previously independent undertakings and are legitimately subject to merger control.

In contrast, in the example at issue, Undertaking A, which previously had joint control over Undertaking B with Undertaking C, acquires exclusive control over B by buying out C's interest in B, resulting in C losing its substantial influence over C. Undertaking A and B are not independent entities both before and after the transaction. Such a transaction concerns Undertaking C losing its substantial influence over B, rather than about A acquiring influence over B (which A already possessed). Such transactions are unlikely to raise competitive concerns. Requiring *ex ante* notification of them is likely to impose costs and burdens on merging parties — and on the CNDC in reviewing such filings — without any corresponding enforcement benefit in Argentina.

Notably, ICN *Recommended Practice* I.A states that "*jurisdictions should […] seek to include in the scope of their merger laws only transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure*".

Therefore, the Group respectfully suggests that CNDC clarifies that a transaction in which an entity gains exclusive control over a target entity in which it already had joint control should not be subject to pre-notification. In particular, the exemption provided for in section 11(a) of the ADC should be available to such transactions.

III. Determination Of Local Effect

The *Draft Guide* helpfully notes at page 4 that "*transactions that do not produce effects in the Argentine national territory are exempt from notification*." As an example, the *Draft Guide* suggests that notification is not required when "*an Argentine company acquires a*

foreign firm that makes non-substantial imports into the country." The same principle presumably would apply to foreign-to-foreign mergers, where both merging parties are foreign and only have non-substantial imports into Argentina.

The *Draft Guide* suggests that the significance of imports is to be evaluated based on several factors, including their "*importance, regularity and predictability*". We note that it may prove difficult for merging parties to determine whether a foreign merging party's imports into Argentina are non-substantial. ICN *Recommended Practice* II.B advises that "*[n]otification thresholds should be based on objectively quantifiable criteria*." The Group therefore suggests that the CNDC provide objectively-measurable thresholds and time periods within which imports would be considered to be non-substantial.

IV. "First Landing" Exemption

Section 11(c) of the ADC exempts from notification the acquisition of a single company by a single foreign company without 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.

As noted above, it may prove difficult for merging parties to determine whether an acquiring company's exports to Argentina have been "*significant, habitual and frequent*". The *Draft Guide* provides no additional guidance on this point. The Group therefore again suggests that the CNDC provide an objectively-measurable definition of the phrase "*significant, habitual and frequent*". For example, the CNDC might adopt specific export value or share thresholds, below which the CNDC may presumptively consider that imports into Argentina are not "*significant*".

Moreover, the language "*for the past thirty-six months*" in section 11(c) of the ADC may be difficult to interpret or apply. In particular, it is not clear what portion of the relevant export shipments must have occurred within this period, and when such period would begin to run for any particular transaction. If measurement periods straddle fiscal years, this also adds burdens for calculating the required amounts. Generally speaking, the financial thresholds used in most merger notification regimes worldwide are based on a company's most recently-completed fiscal year. As a result, the Group respectfully recommends that the CNDC clarify that the 36-month period is to be assessed in reference to the company's three most recent consecutive fiscal years.

V. *De Minimis* Exemption And Inactive Target Exemption

Section 11(e) of the ADC provides an exemption from notification for mergers where the amount of the merger in Argentina or the value of the target assets located in Argentina does not exceed 20 million Mobile Units ("MU"). This exemption is not available if any of the companies involved in the merger (*i.e.*, the acquiror and its affiliates and the target and its subsidiaries) operated in the same relevant market and generated an aggregate of 20 million MU in the last 12 months or 60 million MU in the last 36 months.

The policy rationale of this limitation on the *de minimis* exemption is clear: the CNDC wishes to review mergers of companies with competitive overlaps, even if the target's business presence in Argentina is *de minimis*. However, to determine whether the section 11(e) *de minimis* exemption may be applicable to a transaction, it is necessary to first assess whether the merging parties operate in the same relevant market, which may require a complex substantive market definition analysis. The *Draft Guide* does not provide guidance on how this analysis should be conducted. The Group respectfully suggests that this feature of the *de minimis* exemption is inconsistent with the principle in ICN *Recommended Practice* I-B, that "*notification thresholds should be based on objectively quantifiable criteria*".

Similarly, section 11(d) of the ADC provides an exemption from notification for acquisitions of firms that are inactive or without economic activity in the last year, unless the main activities of the acquiring firm and the acquired undertaking were the same. For the section 11(d) "inactive target" exemption, the *Draft Guide* provides that the standard procedure for this determination consists of comparing the economic activities declared before the Federal Administration of Public Revenues of Argentina (the "AFIP").

The Group recognizes the CNDC's attempt at providing a basis for assessing whether the merging parties' activities were the same for purpose of the "inactive target" exemption. However, the Group understands that, when companies register with the AFIP, they have to declare their primary and secondary economic activities, in accordance with options chosen from AFIP's economic activity classification system. Such activity classifications may not accurately or sufficiently describe the specific products and services that are offered in the marketplace, particularly for companies with multiple business segments. Therefore, reliance on the AFIP declarations can be significantly under-inclusive or over-inclusive as a proxy for identifying competitive overlaps between the merging parties.

The Group acknowledges that the *de minimis* exemption and "inactive target" exemption are codified in the ADC and there are limitations on the matters that can be addressed in the *Draft Guide*. In the longer term, the Group respectfully suggests that the CNDC consider whether amendments to sections 11(d) and 11(e) should be considered. Removing the requirement that merging parties must assess whether they have a competitive overlap in order to determine the applicability of the *de minimis* exemption and "inactive target" exemption would allow these exemptions to operate more fully and would avoid the expenditure of CNDC and merging party resources on the notification of transactions that are unlikely to have any material anti-competitive effects in Argentina.

Moreover, our earlier comments about the 36-month assessment period for the "first landing" exemption similarly apply to the *de minimis* exemption and "inactive target" exemption. The Group respectfully suggests that the CNDC clarify that the "*last year*" referenced in section 11(d) is to be assessed in reference to the company's most recently-completed fiscal year and that the 12-month and 36-month periods referenced in section 11(e) are to be assessed in reference to the company's most recently-completed fiscal year and the most recent three consecutive fiscal years, respectively.

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The MSG appreciates the opportunity to provide this input on the *Draft Guide*. 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,

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
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