COMMENTS OF THE AMERICAN BAR ASSOCIATION’S ANTITRUST LAW AND INTERNATIONAL LAW SECTIONS REGARDING THE PROPOSED REVISIONS TO THE CHILEAN MERGER NOTIFICATION REGULATIONS

These Comments are presented on behalf of the American Bar Association’s Antitrust Law Section and International Law Section. They have not been approved by the House of Delegates or the Board of the Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association as a whole.

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I. Introduction

The American Bar Association’s Antitrust Law and International Law Sections (the Sections) are pleased to offer these comments to the Chilean Fiscalía Nacional Económica (FNE) on its existing Merger Notification Regulations, originally published on March 1, 2017. The Sections applaud the FNE’s efforts to solicit input for the purpose of improving and making its Merger Notification Regulations more efficient.

In accordance with best practices from the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD), merger notification rules should use clear, objective, and quantifiable criteria. In designing merger notification rules, a competition authority should strive to avoid creating unjustified impediments to the free flow of capital, and instead have as an objective the “prompt and efficient control of mergers that guarantees legal security and does not constitute an unjustified brake on economic expansion and the growth of companies.” When possible, competition authorities should, “without limiting the effectiveness of merger review, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties.”

The purpose of a merger notification is to enable the competition authority to determine whether substantial investigation is warranted, and ideally notification requirements should be limited to what is reasonably needed for this determination. There is much the FNE can do to streamline its merger notification regulations and reduce burdens on parties without compromising the FNE’s abilities to make an initial assessment regarding the competitive risk of a proposed transaction. In preparing these comments, the Sections solicited input and drew from the experiences of practitioners located in a number of jurisdictions, including Chile, Argentina, the United States, and Europe.

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3 OECD RECOMMENDATION.
II. Executive Summary

The Merger Notification Regulations provide that parties notifying a proposed transaction must provide information to the FNE that is necessary to assess the risks that the transaction may entail for competition. Although the Sections support an approach under which specific and detailed information is provided to the FNE for its review, many of the existing notification regulations have an unclear purpose, are unnecessarily burdensome to parties, and are not clear about which party should provide the information. Below, the Sections have organized comments specifying when additional clarification would be helpful or when the information sought is burdensome to collect and is unlikely to substantially assist in the merger review process.

III. Suggested Revisions to Existing Merger Notification Regulations

a. Certificate issued by the legal representative (full notification)

The Sections note that the Regulations in Article 2 (3)(b) require that a certificate be issued by the legal representatives of each party which identifies their managing body and indicates the title under which they act (i.e., whether they are directors, managers or other equivalent positions). The Sections do not understand the utility of such certificates. Other Regulations already request identification of the parties’ legal representatives in Article 2 (2), and require information about ownership interlocks in Article 2 (3)(d). Since the information sought in Article 2 (3)(b) replicates information sought elsewhere, the Sections respectfully suggest that this requirement be removed from the Merger Notification Regulations.

b. Annual Report, balance sheet, and/or financial statements (full and simplified notification)

The Regulations in Article 2 (3)(c) (full notification) and in Article 7 (3)(b) (simplified notification) require the “Annual Report, balance sheet and/or financial statements, as the case may be, of the parties or entities of its business group . . . with respect to the last three fiscal years.” Although the purpose of these requirements is clear, the Sections note that it is unclear to whom these obligations apply (i.e., buyer, seller, target, or other entities of the business group). The Sections respectfully recommend that these requirements be aimed only at the buyer and seller in the case of an acquisition, the buyer and the target in the case of an acquisition of a subsidiary or assets of the seller, or the joint venture (JV) parents when the proposed transaction is for the purpose of creating a JV. To be consistent with other jurisdictions, the Sections also recommend that the requirements be limited to the last fiscal year instead of the last three fiscal years. (The U.S. DOJ and U.S. FTC request annual reports and financial statements for the last year. The EU Form CO requests that parties provide the most recent annual reports and accounts that are available.)

Modifying the Regulations in this manner would provide additional clarity to the parties as to the information that must be provided, and by whom, as well as help to focus the FNE on the most recent and probative financial information. The Sections also respectfully recommend that

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4 These comments make reference to seller or target. In many proposed acquisitions, a target business and seller will be the same party. In some acquisitions, however, the seller may be a parent or holding company with financial reporting obligations that are separate from that of the target company.
the Regulations include instructions if the most recent fiscal year’s financial statements have not yet been prepared at the time of filing. For example, the Regulations could allow filing parties to submit the prior fiscal year’s financial statement if financials for the most recent fiscal year are not yet available.

c. Other concentration operations (full notification)

The Regulations in Article 2 (3)(e) require an “indication of other concentration operations involving the parties or entities of the business to which they belong and involving economic agents that participate or have participated in the affected relevant markets, as defined in section 5 of this article, within the last five years.” The Sections note that it is unclear to whom this obligation applies, and further clarity would be useful. The Sections respectfully recommend that this requirement be aimed only at the buyer in the case of an acquisition, the merging parties in case of a merger, or at the JV parents when the proposed transaction is for the purpose of creating a JV. Provision of information about past acquisitions by a seller is unlikely to assist in a current competitive assessment, whereas targeting the request to the buyer or to JV parents is more likely to result in information that is useful to the FNE.

d. Reports, studies, presentations and/or internal or external reports (full notification)

The Regulations in Article 2 (4)(h)(iv) require “[r]eports, studies, presentations and/or internal or external reports that have been prepared or commissioned for the purpose of evaluating or analyzing the concentration operation or alternative concentration operations to that notified, whether issued for the parties, its controllers or any entity in its business group.” To streamline the FNE’s assessment of the potential competitive risks, the Sections respectfully suggest that this obligation be limited to documents discussing topics relevant to a merger control assessment (i.e., relating to rationale for the merger, market conditions, competition, competitors, etc.). The Sections also respectfully recommend that the requirement not extend to other alternative transactions with a different buyer/seller/merging parties/JV partner. Limiting the requirements in these ways would help to focus the FNE on information relevant to the merger control assessment of the transaction at issue, while also not overwhelming it with extraneous information about other alternative transactions.

e. Description of the goods or services (full and simplified notification)

The Regulations in Article 2 (5)(a) (full notification) and in Article 7 (5)(a) (simplified notification) require “a list and description of the goods or services corresponding to the economic activity carried out by the parties to the concentration operation and by the entity concerned, where relevant, grouping them by significant commercial categories shall be submitted.” The Sections note that it is unclear whether these Regulations require information about all the products of the seller and buyer, or only the products of the target business, or only the products in relevant market(s) in which the parties overlap horizontally or vertically. The Sections respectfully suggest that these obligations be limited only to the products in the relevant market(s). The Sections also respectfully recommend that the Regulations clarify what is meant by a “significant commercial category.” Parties are oftentimes large businesses with many diversified activities. A more streamlined request for information about products in the relevant market(s) could help to lessen the burden on parties while also help to ensure that the FNE is focused on the information that is
most useful and targeted to its review. Such a modification would not constrain the ability of the FNE to request further information for any specific product category during Phase 1 of the notification.

f. Alternative plausible relevant product and geographic markets (full and simplified notification)

In Article 2 (5)(b) (full notification) and Article 7 (5)(b) (simplified notification) the Regulations require the notifying parties to define the relevant market(s) and submit extensive market information. The Regulations also require the parties to indicate why their product market and geographic definitions are adequate, and explain why other “plausible alternative” market definitions should be rejected. The Sections recommend that the Regulations be modified to require information only about the market definition the parties believe to be adequate. It is burdensome for parties to explain why other alternative market definitions should be rejected, as well as provide market information for those rejected market definitions. Chilean practitioners have informed the Sections that parties often need to engage specialized economic advisors for the purpose of preparing alternative definitions, which may then be rejected by the FNE. The requirement appears to create unnecessary burdens, costs and delay in the process of preparing and filing a notification without any material benefit to the FNE.

The Sections recognize that there may be differences in views between the notifying parties and the FNE regarding the most accurate market definition. In these instances, the Sections recommend introducing a new provision whereby the FNE will not declare a notification incomplete based on a difference in views about market definition. This proposed new provision would not constrain the ability of the FNE to make additional requests for information pertaining to other potential relevant market definitions during Phase 1.

g. Inconsistencies in Title II Art. 2 (5)(c) (full notification) and Title III Art. 4(c) (simplified notification)

Article 2 (5)(c) states that any proposed transaction in which the relevant market gives rise to a combined market share of at least 20% (horizontal relationships) must be considered as a relevant affected market and, therefore, result in an ordinary notification. However, there is a significant discrepancy between this provision and Title III Article 4(c) of the Regulation, which authorizes the notifying parties to use a simplified form for transactions in which the parties’ combined shares in a horizontal relevant market are below 50% and the increment in the HHI is below 150.

The discrepancy between the two Articles is apparent when a proposed transaction involves relevant markets in which the combined shares are over 20% but below 50%, and the HHI increment is negligible. In such instances, since Article 2 (5)(c) does not make any reference to the increment in the HHI, all the markets included would require use of the ordinary form. This would result in requirements that notifying parties provide substantial amounts of information, despite the fact that, generally, the impact of the concentration operation in such markets would not be competitively significant.
To make the two Regulations more consistent, the Sections respectfully propose an amendment to Article 2 (5)(c) as follows:

(c) Relevant affected markets are considered as those relevant product and geographic markets that the notifying parties consider to be appropriate, and those plausible alternative definitions, in which, in Chile:

i. Two or more economic agents participating in the concentration operation carry on activities in the same relevant market and the concentration operation gives rise to a combined market share of at least 20% (horizontal relationships), unless both of the following conditions are met:
- the concentration operation gives rise to a combined market share of less than 50%, and
- the increase ("delta") of the Herfindahl-Hirschman Index ("HHI") resulting from the concentration operation is less than 150...».

h. Scope of affected markets (full notification)

The Regulations in Article 2 (5)(d) discuss when a concentration operation in a relevant affected market may lead to a possible substantial reduction of competition. The Sections believe that the Regulations’ approach in considering what constitutes an “affected market” is overly broad. For example, the Regulations currently consider a potential relevant affected market to include a “market closely related to a product market in which another party operates.” To help simplify the FNE’s assessment, the Sections respectfully recommend narrowing the definition of an affected market to a market in which the parties to the transaction have an actual horizontal overlap and/or vertical relationship. If the FNE maintains a very broad definition of “affected markets,” extensive information must be provided for markets even when there is no horizontal overlap or a significant vertical relationship (Article 2 (6)). Requesting extensive information for those markets risks making the FNE’s review more difficult, while also making the parties’ notification obligations unduly burdensome. Similar to the EU Form CO, the FNE could instead ‘invite’ the parties to identify such markets and submit information if deemed relevant.

i. Market data (full notification)

The Regulations in Article 2 (6)(b) request market data for the last three calendar years and for all competitors. The Sections respectfully suggest narrowing the scope of the data request. The Sections recommend that this obligation be limited to the last calendar year, which would help to focus the FNE’s assessment on the most recent market data. The Sections also respectfully request that this data request be limited to market data that exists in the ordinary course of the parties’ business to avoid the burden and delay that would result if the parties are required to create market data for filing purposes. If the FNE determines that market data must be provided in all cases, the requirement may be less burdensome if, in cases in which such market data does not exist in the ordinary course of business, the parties may provide reasonable estimates.
j. **Monthly sales (full notification)**

The Regulations in Article 2 (6)(c) request “[m]onthly sales in quantities and in value of each of the economic agents involved in the concentration operation in the relevant affected market(s) … For this purpose, the information must be included disaggregated by brand, category and sub-category of goods and/or services, indicating their origin in case they are imported.” The Sections note that such detailed data requests can be unduly burdensome for parties and may unnecessarily complicate the FNE’s analysis. By contrast, aggregated sales on a yearly basis would likely be sufficient for the vast majority of notification assessments. The Sections therefore respectfully recommend that the Regulations be modified to require aggregated data on a yearly basis.

k. **Production capacity (full notification)**

The Regulations in Article 2 (6)(d) request “an estimate of the total production capacity in the Chilean market during the last three years, … the location of the production facilities and the rate of capacity utilization.” The Sections note that such detailed data requests can be unduly burdensome for parties and not necessarily useful to the FNE’s analysis. The Sections respectfully recommend that this requirement be removed. If the FNE determines that this data is necessary for its analysis in some cases, the Sections respectfully request that the information be sought in such cases after the initial notification is submitted, and that the FNE more clearly define how production capacity and rate of capacity utilization should be calculated.

l. **Customer information (full notification)**

The Regulations in Article 2 (6)(f) request “a list of the main customers; annual or monthly sales regarding each major customer previously singled out; the role of change costs in terms of time and expenses for customers when they change providers.” The Sections respectfully suggest that this requirement be limited to customer information for the top five customers (*e.g.*, similar to the European Commission’s approach in the Form CO, which requests information about the parties’ top five customers in each of the affected markets), and that the requirement to provide switching cost information be removed. Information regarding switching costs likely will not be relevant to the vast majority of FNE merger assessments, and it is burdensome and time consuming for parties to collect as part of the basic notification submission. Furthermore, information regarding switching costs is typically not readily available to the parties, but rather to their customers.

m. **Researches, reports, analyzes, surveys and any comparable documents (full notification)**

The Regulations in Article 2 (6)(i) request a copy of research, reports, analyses, surveys and any comparable documents drawn up over the last three years analyzing the relevant affected market(s), competition conditions, actual or potential competitors, consumers’ preferences, brand strength, and potential growth or expansion to new products or geographic areas. To help focus the FNE on the most useful documents and reduce the burden of the initial notification, the Sections recommend that the requirement to produce these types of documents with the notification be limited to those documents that have been considered by corporate decision-makers - that is, those presented to the board or directly used in a report to the board. The Sections also respectfully request that the FNE consider whether this information is necessary in addition to the
“[r]eports, studies, presentations and/or internal or external reports that have been prepared or commissioned for the purpose of evaluating or analyzing the concentration operation or alternative concentration operations to that notified, whether issued for the parties, its controllers or any entity in its business group” required in Article 2 (4)(h)(iv).

n. Description of entry and exit conditions, entry barriers, and other similar information (full notification)

The Regulations in Article 2 (6)(i) request a description of the entry and exit conditions to or from the relevant affected markets, as well as the possibility of expansion within them (including total entry costs for a viable competitor; legal, regulatory or other barriers; relevance of economies of scale or scope, and network effects; conditions or limitations of production factors; any barriers to accessing customers; etc.). The Sections note that collecting such information is burdensome for parties and should be requested only in certain situations (e.g., when the number of competitors post-transaction does not exceed five).

o. Provision of competitors’ information (full and simplified notification)

Title II Article 2 (6)(o) (full notification) and Title III Article 7 (6)(d) (simplified notification) require the submission of very detailed contact information for the legal officers of the main competitors of the notifying parties. However, the Sections respectfully submit that this information is not typically available to companies (particularly as competitors are advised to limit contacts among one another) and is not a requirement in other jurisdictions. The Sections respectfully recommend modifying these provisions to require that parties provide only their competitors’ website and general contact information (e.g., central desk phone number, general contact email).

p. Provision of documents in English (full notification)

The final paragraph of Article (2) provides that information must be submitted in Spanish unless the notifying parties receive special authorization from the FNE to submit information in English. The Sections respectfully recommend formalizing the FNE’s current practices by modifying the Regulation to permit documents annexed to the notification form to be written in English without a requirement for express prior authorization from the FNE.

q. Requests for Exemptions (full and simplified notification)

Title II Article 3 (full notification) and Title III Article 8 (simplified notification) currently provide that the FNE may grant an authorization to exempt the notifying parties from submitting information in two cases:

(a) when the information is not reasonably available to the parties; or
(b) when the information is not necessary or relevant for the assessment of the transaction.

Pursuant to the Regulations, authorizations from the FNE must be requested prior to the filing of the notification. Furthermore, when the notifying parties claim the information is not necessary or relevant, they must also submit a draft of the notification that allows the FNE to assess the merits of that claim. In practice, this means that parties working under tight timeframes need
to prepare arguments for an exemption request at the same time that they finalize the notification document.

In order to expedite the notification process, the Sections respectfully recommend allowing the parties to request exemptions in the notification, and not prior to it. The Sections note that allowing the parties to apply for an exemption in the notification would still leave the final decision on the exemption to the FNE. The Sections also suggest that the Regulations further clarify under which circumstances the notifying parties are exempted, as this would provide more legal certainty to the notifying parties.

r. Reporting economic activities for transactions with no overlap (simplified notification)

Title III Article 7 (7) currently requires the notifying parties to specify the nature and describe the economic activities of all the entities within their corresponding business groups. When the notifying parties belong to business groups with diversified areas of activities, the requirement can result in the production of information that is not useful to the FNE, while also constitute a significant burden on parties.

The Sections respectfully recommend limiting the scope of the information required. One suggestion may be to require a short description of the economic activity of each entity to be included in each of the parties’ corporate charts, without prejudice to the FNE’s authority to request further information from one or more of those entities during Phase 1. Alternatively, a sworn statement signed by the notifying parties’ representatives guaranteeing that there are no overlaps between their corresponding business groups could also be a way of simplifying the process.

IV. Proposed New Articles

a. FNE decisions regarding incomplete notifications (full and simplified notification)

The Regulations do not currently comment on the FNE’s decisions regarding the incompleteness of a notification. The only provision in Chilean law regarding this subject is Article 50 of Law Decree No. 211, which states that in circumstances in which the FNE considers a notification form to be incomplete, it must communicate this circumstance to the notifying parties within ten business days from the date of the submission, and identify the notification’s errors or omissions.

The Sections have learned from Chilean practitioners that the FNE sometimes declares a filing’s incompleteness more than once, based on new elements that were not identified in the prior decision. This practice has significantly delayed the beginning of Phase 1 for a number of transactions, and makes the overall notification process less efficient.

The Sections respectfully propose that the Regulations include a new provision stating that the FNE shall inform parties at one time of all the errors and omissions in the notification form, and that the FNE shall not be able to declare incompleteness again at a later time based on
omissions or errors in the notification form that were not previously notified. This provision would provide more legal certainty and avoid delays for notifying parties and inefficiencies for the FNE.

b. Exemptions when information is not reasonably available (full and simplified notification)

Some of the information requested by the Regulations may be unavailable to the parties, such as non-public information regarding market share, size of the market, or production capacity. When data is not reasonably available to the parties, the Sections suggest that its absence should not require an express exemption, which could delay the notification process.

To avoid delays in the notification process, the Sections suggest adding a new general exemption in the Regulations that would apply to all FNE notification requirements. The suggested provision could explain that when information is not reasonably available, parties are not required to receive an express exemption from the FNE in order to not produce it.

The suggested new article could apply to ordinary and simplified procedures, and state “The notification will be complete even if not all the information needed for ordinary or simplified procedure is delivered, provided that such missing information is not reasonably available to the parties and that the parties state and justify such circumstances.”

c. Clarifying simplified notifications in unconcentrated markets (simplified notification)

Title III Article 4 (Simplified Notification) contemplates two situations where a proposed transaction will have limited effects in the market and a simplified form is appropriate: (i) parties do not have a joint market share of more than 20% in a horizontal merger or (ii) parties do not have a joint market share of more than 30% in a vertical merger.

There are markets in which the parties will not have readily available information sufficient to show that there is a combined horizontal share below 20% and below 30% in vertically related markets, though there may be other information sufficient to show the parties’ participation in the market is limited and not likely to lessen competition.

The Sections propose adding a provision that would clarify that parties may submit a simplified notification in instances in which the parties do not have detailed market share information but it is quite evident that the market is not concentrated. A new Title III Article 4 (d) could provide the following: “In its discretion, and upon the request of the notifying parties in the notification writ, the FNE may authorize a simplified procedure when information about market shares in the related horizontal or vertical markets is not available, but it is evident to the FNE that the market is not horizontally or vertically concentrated.”
V. Conclusion

The Sections appreciate the opportunity to offer comments on the Chilean Merger Notification Regulations, and would be pleased to respond to any questions the FNE may have.