Introduction

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We are delighted to place this first supplement before the readers of *Merger Control Worldwide*. Early in 2004 and well in advance of the day on which we began turning into reality our idea of preparing an 'Encyclopedia' covering merger control regimes around the world, we had planned supplements to bridge the time gap between the first and second editions of the work. At the relevant time, we left it open whether such supplements would be annual or biennial. Indeed, we contemplated opting for the former only if *Merger Control Worldwide* received a sufficiently warm welcome and provided that recent developments in different regimes would merit it. We are pleased that that has turned out to be the case and that we are able to produce this first annual supplement. More importantly, however, we are pleased to be able to include two new chapters covering South Korea and Mexico - jurisdictions that we had intended to include in the first edition but unfortunately were unable to do so at the time.

This supplement does not cover all the jurisdictions included in the first edition. In the case of most jurisdictions, no important developments have occurred over the past year. It is envisaged that jurisdictions that have not been included in this supplement will be included in the second supplement next year, should they witness any interesting and important developments.

At an international level, the International Competition Network (ICN) continues to engage in highly interesting merger control initiatives with some impressive results. The 5th Annual Conference of the ICN was held in South Africa in May 2006. Merger control was not, however, the sole topic of discussion at that event. Reflecting the expansion in the scope of the ICN's work, the Conference included a discussion of non-merger control issues, most notably cartels and other important topics such as competition policy implementation and the provision of technical assistance. The ICN's merger control subgroups have been particularly active over the past year in producing highly interesting guidelines and recommendations. Those include a *Set of Recommended Practices for Merger Notification and Review Procedures*, developed by The Merger Notification and Review Procedure Sub-group (April 2004), and the *ICN Merger Guidelines Workbook* prepared by the Investigation and Analysis Subgroup (April 2004).[1]

Producing supplements of multi-contributory works is never easy. The completion of the task of producing this first annual supplement was made possible only through the great cooperation of our excellent team of contributors, who were able to give contributing to *Merger Control Worldwide* a high ranking in their busy and demanding agendas. Very warm thanks go to all of them. It is an honour for us to work with them all. We look forward to continuing to do so and hopefully also to welcoming to our team of contributors new names in the years to come.

1 Both available at http://www.internationalcompetitionnetwork.org.

Argentina

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1. Legislative development

1.1. 17 August 2005 Bill

On 17 August 2005 the Government of Argentina submitted to Congress a bill with proposed amendments to the Competition Act 25, 156 ('the Act'). The Bill has already been subject to criticism, for the following reasons:

1. The Bill provides that economic concentrations affecting the 'national interest' in the utilities, defense, energy or mining sectors, or those sectors having 'a high impact on employment or investment', may be subject to a second review, not by the competition authorities but by the Ministry of Economy. This new review is to be based on purely political grounds.
2. While on the one hand the Bill provides for the completion of the steps required for the formation of the new competition agency, the *Tribunal Nacional de Defensa de la Competencia* (National Competition Tribunal or TNDC), created by the Act, on the other the Bill appoints the members of the existing agency, the *Comisión Nacional de Defensa de la Competencia* (National Competition Commission or CNDC), as members of the TNDC for the first tenure, while at the same time providing that the two new members who must be appointed to complete the seven-member TNDC will be appointed by the President of Argentina within 30 days from the passing of the law. This procedure would change the rules for the formation of the TNDC as originally provided for in the Act (election through an independent jury in a competitive process).

The proposed amendment contained in the Bill appears to demonstrate the Government's opposition to the idea of an independent competition agency, as was intended by the Act. Given that the Act provided that the TNDC would be the only agency with powers over competition issues (today the CNDC issues a non-binding report to the Secretariat, which decides on the matter), the Bill seems to maintain the status quo by giving the Government broad discretion to overrule a decision of the TNDC on merger control matters when 'national interest' issues so require.

This Bill still needs to be approved by both Houses of Congress.

1.2. Other Bills

Two additional bills that are worth noting were submitted by a group of national representatives led by a former Consumer Protection Undersecretary. These bills were approved on 5 and 19 July 2006, respectively.

1.2.1. 5 July 2006 Bill

The first Bill proposes a potentially significant amendment to the substantive test contained in the Act as applied to anti-competitive practices (Section 1). Presently a conduct is in violation of the Act if not only it restricts competition but also harms 'the general economic interest', this term being interpreted by the CNDC in a similar way to the concept of economic efficiency (total surplus). Section 7 of the Act - comprising the substantive test for merger appraisal - uses the same language, but in this case the CNDC has assimilated the term to the concept of consumer surplus.

The Bill proposes to penalise acts that restrict competition while harming '*...the economic interest of consumers or the general economic interest.*'

Given that the interpretation of the term *general economic interest* offered by the CNDC and the Courts includes the concept of 'consumer surplus' (either directly or as part of total surplus), the introduction of a specific provision preventing harm to the *economic interest of consumers* might cause some confusion in terminology. During at least the last nine years, Section 1 of the Act has been basically taken to simply read that any act restricting competition (as modern economic theory defines it, that is, affecting consumer or total welfare) violates the Act. The new wording might lead the CNDC or the Courts to conclude that a practice that appears on its face anti-competitive might infringe the Act if it causes some harm to consumers apart from the one competition rules are intended to sanction or, alternative or concurrently, that the meaning given to the term *general economic interest* must be changed, to include interests other than total or consumer surplus.

Although the Bill does not seek to amend Section 7 of the Act, it seems inevitable that any inconsistency arising from it will spill over to merger review.

1.2.2. 19 July 2006 Bill

The second Bill appoints the Consumer Protection Undersecretariat (the 'Agency') to a prosecutorial role in all kinds of competition proceedings. The Agency is therefore granted the power to file complaints and have an active role in all filings submitted before the CNDC, including economic concentrations. Such role not only includes the capacity to submit opinions, documents and information, but most importantly to appeal final administrative decisions, a right which in the context of mergers the Courts have so far restricted as applied to consumers, and that under the Bill the Agency would be able to exercise more easily with the interest of the consumers in mind.

2. Case law development

2.1. Oxígeno Líquido

In the *Medical Oxygen* cartel case, decided on 15 July 2005, the CNDC examined – for the first time so specifically - the effects on competition of an acquisition that did *not* require mandatory notification. The CNDC concluded that Air Liquide's acquisition of competitor Messer, even when part of a foreign-to-foreign transaction, violated the Act, given that Messer, although a small company, was a strong competitor in a market that, in the CNDC's opinion, was cartelised. Consequently, it imposed on Air Liquide a separate fine of Pesos $ 1,185,938 (approximately USD 409,000).

2.2. Grupo Clarín S.A./Cablevisión S.A.

On 21 March 2006 the CNDC issued a long-awaited advisory opinion, declaring that the purchase by Grupo Clarín S.A. of a 20% in Cablevisión S.A. was not subject to notification.

Cablevisión is the largest cable-TV company in Argentina, with over 1.2 million subscribers. Grupo Clarín is the largest local media group, with interests in, among other things, the newspaper, radio, internet, open and cable-TV and sports programming businesses. Most notably, it controls Multicanal, the second largest cable company and competitor of Cablevisión. Over the years both companies have been the target of a considerable number of competition law investigations.

Through a series of transactions, Clarín became the indirect owner of 20% in Cablevisión. It then submitted a request for an advisory opinion with the CNDC, in order for the latter to determine whether the transaction required prior clearance.

Clarín pointed at several provisions of the relevant shareholders agreement in support of its view that the transaction entailed no transfer of control, namely that:

– directors appointed by Clarín have to be independent
– Clarín cannot appoint or replace key employees in Cablevisión
– Cablevisión cannot provide sensitive information to a shareholder that is also its competitor
– no special voting majorities apply, with the exception of issues related to the 'protection of the investment' of the minority shareholder, such as amendment of by-laws, merger, spin-off, financial indebtedness, etc.
– even when Clarín's vote is required to approve the budget if profits do not reach 28% of Cablevisión's EBITDA, in the last five years Cablevisión has exceeded that percentage.

Three of the five members of the CNDC, following certain past administrative precedents on the interpretation of the term 'control' (which triggers the application of the Act's merger control provisions) concluded that no notification was required at that point. They did, however, warn Clarín that any additional change in the current control structure, or the disclosure of Cablevisión's confidential information to one of Clarín's directors, could render the advisory opinion inapplicable and/or trigger the opening of an investigation and the imposition of sanctions.

The remaining two members of the CNDC – in separate opinions – dissented, claiming not only that there were past advisory opinions where the existence of some of the items listed above in support of the exemption were considered as granting some sort of control, but also that an 'economic reality' approach had to be taken, and consequently Clarín's position in Cablevisión should not be considered as that of a mere 'passive investor'.

Third parties have already commenced litigation in connection with the transaction described above. Considering that the Act provides that advisory opinions are not binding, in this case it is unlikely that the CNDC's advisory opinion will provide comfort to the acquirer, in particular given the stark difference of opinions within the CNDC.

2.3. Sanofi/Aventis

The Secretariat of Technical Coordination (the 'SCT') recently decided to approve an economic concentration in which a change in control occurred in several local companies belonging to the multinational pharmaceutical company Aventis, as a consequence of the foreign-to-foreign acquisition of Aventis by Sanofi and the subsequent merger of both companies.

Notwithstanding, the SCT imposed on the merged entity a penalty of $ 832,500 (approximately USD 277,500) for late filing of the transaction under the Act. It is worth noting that Article 8 of the Act provides for the obligation to notify certain acquisition of control of companies within a week of the conclusion of the relevant agreement. The transaction in the case at hand was carried out through a tender offer filed by Sanofi Synthelabo before the Paris, New York and Frankfurt Stock Exchanges. The offer expired on 20 August 2004. According to the administrative resolution, the transaction was notified in Argentina with a delay of 185 business days. The fine is the highest imposed up-to-date for late filing, both in absolute figures and when considering the daily fine taken into account by the SCT for purposes of the total fine (AR$ 4,500 vs. AR$ 3,000 in the *Air Comet S.A. – SEPI de España* case, where the previously highest fine had been imposed).

When setting the level of the fine in the case, the CNDC – in its recommendation to the SCT – took into account several mitigating and aggravating factors. Mitigating factors included the following circumstances: (i) that the tender offer was a hostile one, thus making the access of information about the target company by the acquirer difficult; (ii) that the transaction had to be notified in more than 18 jurisdictions worldwide; and (iii) the difficulty experienced by Sanofi to precisely determine the turnover of the relevant companies within its group. Aggravating factors on the other hand included the following ones: (i) more than 8 months had elapsed between closing and notification; (ii) should the transaction have been timely notified, the CNDC would have noticed in advance potential anti-competitive effects in the heparin market (a concern which however was addressed as a consequence of the undertakings imposed by foreign competition authorities); and (iii) the turnover of the companies in Argentina was significant, with over pesos $ 270 million in the relevant year.

2.4. Disco/Jumbo

In a recent judicial ruling in the *Disco/Jumbo* case (acquisition of a nationwide supermarket chain by a competitor) the Federal Court of Appeals of Mendoza expressly acknowledged that the CNDC has jurisdiction to carry out the merger control analysis prescribed by the Act, until the TNDC is finally constituted.[1]

Although several courts have already recognised the CNDC's power in this regard, they have generally also acknowledged that its role is an advisory one – as it was under former Competition Act 22,262 – namely a role complemented by a final decision by the Internal Trade Secretariat (the former SCT). This dual role – existent under the former Competition Act 22,262 and expressly continued by the regulation of the Act and the CNDC's and SCT's practice – has been somewhat challenged by this ruling, which contrary to prior decisions of the same court held that the CNDC had the same powers reserved to the to-be-created TNDC, and consequently the power is adjudicatory rather than simply one for carrying out advisory tasks.

However, the Federal Court also interpreted that due to the fact that the Act provides that the TNDC would have seven members and the CNDC has only five, CNDC decisions require unanimity in order to assimilate the CNDC operation as much as possible to that of the TNDC.

Given the recent resignation of one of the voting members of the CNDC and the non-appointment of his replacement as of the present date, it appears that the long-awaited *Disco* merger decision will be delayed even longer. Due to several judicial challenges the administrative review of this case has become one of the longest ever, stretching over 28 months.

Furthermore, if the criterion of the Federal Court is adopted by other tribunals - something that is doubtful but that remains to be seen – unanimous CNDC quorum would be required for all decisions based on the Act (not only merger control ones), thus effectively halting the adoption of decisions on this field.

1 The creation of the TNDC was provided for by Article 17 of the Act.

Armenia (Republic of Armenia)

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1. Economic growth

In relation to the economic growth in Armenia, GDP growth rate reached double-digit levels since 2002; real GDP growth for 2002 was 13.2%, for 2003 was 14%, for 2004 was 10.1% and for 2005 was 13.9%.

2. Relevant legislation and statutory standards

The Constitution of the Republic of Armenia was amended in 2005. Article 8 (2) of the new version of the Constitution stipulates that the "Republic of Armenia guarantees freedom of economic activity and free economic competition"

3. Due process

With regard to the right of merging parties to participate in the Commission's hearings, the Commission notifies the interested parties of the place, day and time of the hearings at least 10 days prior to the date of these hearings mentioning the essence of the case under consideration.

4. Final orders and sanction by the authorities

It should be mentioned that recent amendments to the Law on Protection of Economic Competition (the 'Law') (adopted in May 2005) are directed at strengthening the authority of the Commission and increase the responsibility of economic entities for violations of the provisions of the Law.

Failure to provide the Commission with the necessary material or correct information shall lead to an imposition of a penalty in the amount of up to 500 times of the baseline duty. If during a year the same infringement will continue the penalty will be raised up to 2000 times of the baseline duty each time

The third paragraph in section 5 of the chapter (which deals with information on penalties for illegal concentration) should be interpreted as follows:

In cases stipulated by this Law not to notify the concentration or putting into effect the prohibited concentration of economic entities shall be subject to imposition of penalties on the economic entity in the amount of two per cent of the revenue obtained from the sales of a particular type of goods during the calendar year preceding the first day of the month during which the infringement on the particular product market was made.

Chapter 7(37) of Law on Protection of Economic Competition states that "[i]nfringement of Commission Decision in the period stated in the Decision shall be subject to imposition of penalties in the amount of 1000 times of the baseline duty."

The Law on Joint Stock Company (1996) can be viewed alongside other regulatory guidance at the website of the Armenian Development Agency: http://www.businessarmenia.com

5. Co-operation with other competition authorities

With regard to the Commission's cooperation with international organizations (other than its involvement within the ICN and its cooperation with the OECD, UNCTAD, the World Bank and the WTO), the Commission also co-operates with EU funded projects, and the Organisation for Security and Cooperation in Europe (OSCE) as well.

Australia

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1. Notification requirements and procedures

This Supplement identifies proposed amendments to the existing "informal clearance" procedure used by the Australian Competition and Consumer Commission for merger review in Australia. This Supplement adopts the defined terms used in the original *Australia* chapter of *Merger Control Worldwide* and is intended to *replace* section 3.1.3 and Figure 1 of the original *Australia* chapter.

Relevantly, the *Trade Practices Legislation Amendment Bill (No.1) 2005* (the "Dawson Bill") referred to in section 1.1 of the original chapter was defeated in the Australian Senate in October 2005 and so has not been enacted into law. The Dawson Bill was intended to introduce a new formal merger clearance procedure that would operate in parallel with the existing informal clearance procedure in Australia. A political impasse is delaying the reintroduction of the merger reform provisions of the Dawson Bill into the Australian Parliament although it is likely to be reintroduced during 2006 or 2007.

2. Informal clearance

The third option is to seek informal clearance from the Commission for the merger on a confidential or non-confidential basis. If the Commission grants informal clearance to a merger, the parties to the merger obtain a "comfort letter", which usually states that the Commission will not oppose the merger but reserves the right to do so should new information come to light. While a comfort letter is not binding on the Commission, it is rare for the Commission to grant informal clearance and subsequently oppose the merger.[1]

The term "informal" is used in Australia because the informal clearance procedure has no statutory basis. In July 2006, the Commission published new *Merger Review Process Guidelines* (the "2006 Guidelines") to increase the transparency of the informal clearance procedure. The 2006 Guidelines are not binding on the Commission but should be followed by the Commission in most instances. As of August 2006, the Commission is also reviewing its *Merger Guidelines* (referred to in Section 4.1 of the original chapter).

The informal clearance procedure is usually initiated by providing a detailed written submission to the Commission which describes such matters as the businesses of the acquirer and vendor, the nature of the proposed acquisition, the rationale for the proposed acquisition, the proposed timetable for the acquisition, an analysis of the reasons why the proposed merger would not be likely to lessen competition substantially in any market in Australia (including estimates of market

1 See, for example, *Trade Practices Commission v. Santos* (1992) 38 FCR 382 where the Commission alleged that further information had come to light which indicated that the merger could result in a contravention of Section 50.

shares), and nominating persons for the Commission to contact should it require further information.[2] In some cases, the written submission will also set out contact details for the significant customers and suppliers of the acquirer and vendor. The acquirer usually takes the lead in the preparation of the submission (since the acquirer has the primary liability under Section 50 of the Trade Practices Act) but the submission is typically submitted jointly by the acquirer and vendor. The written submission is typically provided at a meeting with representatives of the Commission attended by senior executives of the acquirer and vendor and their legal representatives.

Less commonly, the Commission may initiate its own merger review in the absence of an application for informal clearance. This could occur as a result of a courtesy briefing where the Commission considers competition issues do arise. This could also occur as a result of information received by the Commission from other sources, including Australian and foreign regulators, media reports and third party complainants.

Following the promulgation of its 2006 Guidelines, the Commission has defined three separate procedures that it may apply to informal clearance applications, namely Confidential Review, Basic Review, and Comprehensive Review.

Confidential Review: Approximately half of all mergers reviewed by the Commission are confidential mergers. The Commission is willing to provide an interim confidential view on a confidential merger within 3 to 4 weeks of receiving a full submission from the parties, although information requests may extend this time frame. The Commission will typically give one of three responses. First, the Commission could indicate on a qualified and interim basis that the Commission does not propose to oppose the merger based on information received, but reserves the right to conduct market inquiries once the matter becomes public. The Commission would subsequently undertake a Basic Review or Comprehensive Review once the merger became public. Secondly, the Commission could identify that it has competition concerns with the merger and is unable to form a view without undertaking market inquiries once the merger becomes public. Thirdly, the Commission may indicate that it has formed a preliminary view that the merger would breach Section 50 of the Trade Practices Act.

Basic Review: If the merger is not confidential and the Commission decides that no or limited public consultation ("market inquiries") is required the merger will be subject to a Basic Review. Approximately half of non-confidential mergers considered by the Commission are subject to a Basic Review. The Commission will usually complete a Basic Review within 2 to 3 weeks, although information requests may extend this time frame. At the completion of a Basic Review, the Commission's decision and summary analysis is posted on the Commission's website.

Comprehensive Review: All other non-confidential mergers are subject to a Comprehensive Review which involves two distinct review phases. Phase I usually lasts 6 to 8 weeks from the date submissions are received, including a 2 to 3 week market inquiry process. If no substantial competition concerns are identified, the Commission will grant informal clearance at the end of Phase I. However, if substantial competition concerns are identified, the Commission will publish a Statement of Issues on its website and the comprehensive review will proceed to Phase II. Around 2.5% of mergers reviewed by the Commission proceed to Phase II. During Phase II, the Commission and the parties will discuss the issues raised in the Statement of Issues and any scope for remedial action. While the parties may not provide editorial comment on the Statement of Issues before it is published, they do have the ability to publish a reply on the Commission's website. The length and scope of Phase II depends on the nature and scope of the issues identified,

2 A detailed guide to the information requirements for informal merger assessments is set out in the Appendix to the *Merger Review Process Guidelines*.

but is typically completed within 6 weeks. At the completion of Phase II, the Commission will publish a Public Competition Assessment on its website containing its final decision and analysis.

A flow chart identifying the informal clearance procedure in the 2006 Guidelines is set out in Figure 1 below.[3]

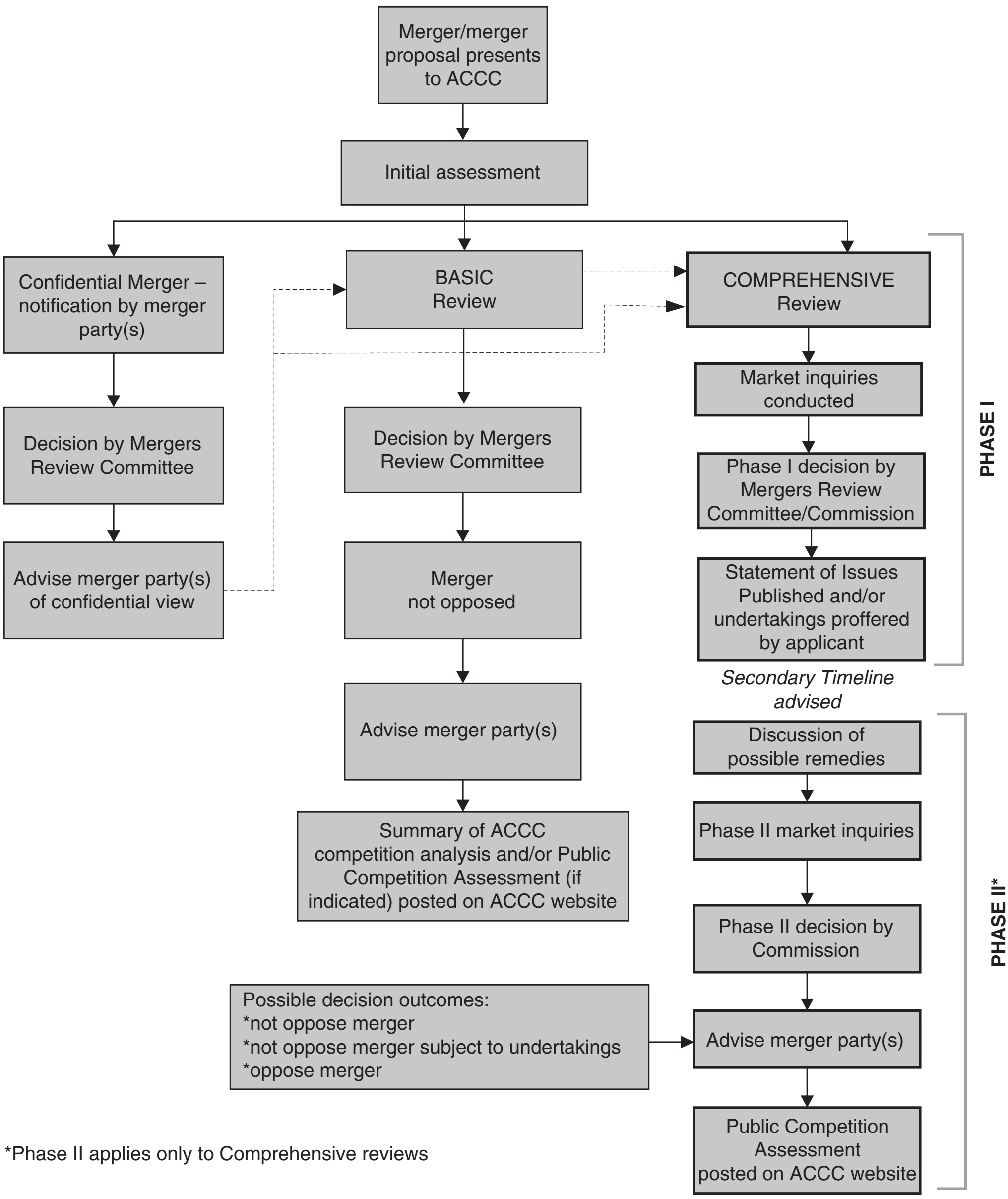

Figure 1 Assessment process for informal clearance applications

3 Source: ACCC *Merger Review Process Guidelines*, Australian Competition & Consumer Commission, July 2006, page 8.