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Our File No.	69459
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VIA Email to kirjaamo.tem@gov.fi

Ministry of Employment and the Economy
PO Box 32, 00023 GOVERNMENT
Finland

Re: **VN / 32496/2021. Proposed Changes to Notification Threshold for Acquisitions**

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 provides these comments in response to the Ministry's consultation on the proposed changes to the notification thresholds for acquisitions under the *Competition Act*.

The Group was founded in 2001. The cornerstone of the Group's 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] As you know, the Finnish Competition and Consumer Authority ("KKV") is a longstanding and active ICN member.

The Group's work to date has included submissions to competition agencies and governments in more than twenty jurisdictions (*e.g.*, Australia, Brazil, Canada, Chile, China, European Union, France, Germany, India, Italy, Japan, Russia, Spain, the United Kingdom, the United States, and many others).

We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to the Ministry and the KKV.

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[1] Accenture, BHP, Chevron, Cisco Systems, Danaher, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

[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 >.

I. Proposed Change to Notification Thresholds

We understand that under the current *Competition Act*, a merger notification to the KKV is required when (1) the turnover of at least two of the parties exceeds €20 million in Finland, and (2) the combined worldwide turnover of the parties exceeds €350 million. The Ministry proposes to change the latter threshold from combined worldwide turnover of €350 million to combined turnover of €100 million in Finland.

The Group commends the Ministry's proposal to change the combined turnover threshold from one based on worldwide turnover to local turnover.

One of the key themes of the *Recommended Practices* is that jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction.[3] In this regard, the *Recommended Practices* state:

> Determination of a transaction's nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction.[4]

The Group believes that the proposed change to the combined turnover threshold brings Finland's merger notification regime into closer alignment with the core local nexus tenet of the *Recommended Practices.* This change will help KKV better target its resources at mergers that may have significant impacts on markets in Finland.

The Group understands that the KKV estimates that the number of merger notifications each year is likely to increase by one-third if the proposed combined local turnover threshold is set at €100 million. This would be a very substantial increase in the scale of mandatory merger review. The Group suggests that the Ministry instead consider setting the new combined local turnover threshold at a higher level that would aim to maintain the number of merger notifications per year at current levels. A key reason for doing so is that each notification imposes significant cost burdens on merging parties and resource burdens on the KKV. The KKV's enforcement statistics indicate that during the past six years (2015-2020) it has only identified competition concerns that lead to a phase two decision in an average of less than four mergers per year.[5] In other words, of the expected ten new mandatory notifications every year, on average nine of them are likely to involve KKV resource expenditures and merging party cost burdens for reviews that do not identify significant competition concerns.

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[3] Recommended Practice II.A.

[4] Recommended Practice II.B.

[5] KKV, Financial Statements of the Competition and Consumer Agency for the Year 2020, page 9 < https://www.kkv.fi/uploads/sites/2/2021/12/kkv-tilinpaatos-2020.pdf>. A total of two mergers were prohibited during the past six years.

The shift from a worldwide to local combined turnover threshold should increase the quality and relevance of the transactions reviewed by KKV by requiring notification from only those transactions involving parties with sufficient local commerce in Finland. Instead of attempting to increase the annual number of notifications by setting the combined local turnover threshoild at €100 million, the proposed additional call-in mechanism (provided it is well-designed and effectively implemented, as discussed further below) would offer a much more targeted and cost-effective basis for identifying additional problematic transactions, including the average of one per year of the additional ten mergers that would be expected to trigger notifications using the proposed €100 million threshold.

II. Proposed Right to Require Notification of Below-Threshold Transactions

We understand that the Ministry is proposing to empower the KKV to require notification from below-threshold transactions if the parties have more than €50 million combined turnover in Finland.

The Group recognizes that residual jurisdiction to review non-notifiable transactions is a feature of a number of competition law regimes around the world. Such residual jurisdiction diminishes legal certainty for merging parties when assessing their notification obligations under a mandatory notification regime. However, at the same time, a well-designed residual jurisdiction regime can provide opportunities for merging parties and agencies to focus on mergers that raise genuine competition concerns, while avoiding the expenditure of time and resources on transactions that do not raise significant concerns.

The Group commends the Ministry's recognition of the importance of legal certainty and predictability for merging parties by establishing a meaningful combined turnover floor level that will ensure that the call-in power is not used for small transactions, as well as identifying the necessity of a time limit on the exercise of the right to require notification of below-threshold transactions.

The Group notes the Ministry's suggestion of a time limit of three months after the parties reach an agreement or the announcement of a public tender offer. It is not clear to the Group whether this suggested time limit would effectively mean that parties with between €50-100 million combined local turnover may not close their transactions until the three month period has passed without KKV intervention.

The Group is of the view that parties to all transactions that could be subject to call-in should not have to hold off closing their transactions until the limitation period expires. Call-in powers should be exercised sparingly, in situations where there are credible complaints or other compelling reasons to expect that a transaction involving certain industries or key competitors may be problematic. It is not necessary nor desirable to prevent all other transactions among firms with between €50-100 million of combined local turnover to wait for three months before closing their transactions. In our experience, call-in regimes do not impose waiting periods before closing and are best designed with a prompt (e.g. three month) time frame for the power to be exercised post-closing.

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In addition, the Group is pleased to see that the Ministry is considering a companion option for parties to initiate voluntary notifications of below-threshold transactions to the KKV. The existence of the call-in power and the associated lack of legal certainty will create an incentive for parties that have a transaction that raises competition issues which might be called-in to proactively seek review by the KKV.

To further foster certainty and predictability of transaction timing, the Group further suggests that the maximum review periods currently provided under the *Competition Act* (i.e. 23 working days in the first phase, 69 working days in the second phase, and a further 46 working days as may be extended by the Market Court) should apply equally to all notifications of below-threshold transactions, regardless whether the notifications are required by the KKV or are made voluntarily by the parties.

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Thank you very much for consulting on the Ministry's plans arising from the KKV's assessment of options for modernizing Finland's merger control regime, and for considering the Group's views. We would be pleased to respond to any questions or discuss this submission with Ministry officials at your convenience.

Yours very truly,

A. Neil Campbell

William S. Wu

Copy to: Members of the Merger Streamlining Group