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Reply to the Attention of	A. Neil Campbell Casey W. Halladay
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Isabelle de Silva
Président
Autorité de la concurrence
11, rue de l'Echelle
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Dear Mme. de Silva:

Re: Public Consultation — *Reform of merger law and ex-post control*

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group") with submissions related to the above-noted consultation. The MSG membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] 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. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network ("ICN"),[2] of which, as you know, the Autorité de la concurrence ("AdC") is a longstanding and active member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (*e.g.*, the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*. In November of last year, the Group provided comments to the AdC in connection with the AdC's *Consultation publique — Contrôle des*

[1] The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> ("*Recommended Practices*").

concentrations.

The Group writes in connection with the AdC's current public consultation on *ex post* merger control (the "*Consultation*").[3] The Group applauds the AdC for its ongoing efforts to improve aspects of the merger control process in France, and in particular for its willingness to consult with stakeholders on these important issues. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to the AdC.

The current *Consultation* addresses the subject of transactions that "*do not exceed the compulsory notification thresholds*" in France but are nevertheless "*likely to raise competition issues*".[4] The Group supports the AdC's conclusions, arising from the November 2017 consultation, that it should not "*change the level or type of the existing thresholds*" in France, as has been done recently in Germany and Austria. The MSG understands that the AdC has decided instead to assess whether the AdC should have the power to review non-notifable mergers, including after such transactions have closed.

As described more fully below, if the AdC is to be given such a power, the Group recommends that this power be accompanied by time limits, that it be based on an appropriate jurisdictional nexus to France, and that merging parties have the opportunity to initiate voluntary reviews on a pre-closing basis.

I. Timeline for *Ex Post* Review of Non-Notifiable Transactions

It is essential that any new power of *ex post* merger control be accompanied by a clearly-defined time limit within which this power may be exercised. The AdC has already recognized this important issue, noting in the *Consultation* that it is presently "*considering a time frame of between 6 months and two years, after which ex post control would no longer be possible*."[5]

The Group believes that an appropriate period for exercising *ex post* merger control could be four to six months and, in any event, should not extend beyond one year after the closing of the transaction. Such a deadline would provide the type of "*bright-line tests*" sought be the ICN *Recommended Practices*.[6] We also note that there is marketplace experience with *ex post* time limits as short as four months (in the UK merger control regime[7]) and that a

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[3] Autorité de la concurrence, Consultation Document, "Reform of merger law and ex-post control", available online at <http://www.autoritedelaconcurrence.fr/doc/note_controle_expost_en_final.pdf>.

[4] *Ibid.*, at Part 1 ("Observations").

[5] *Ibid.*, at Part 2(ii) ("*Ex post* control").

[6] *Recommended Practice* II.A, Comment 1 ("[...] *the business community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests*.")

[7] *Enterprise Act 2002*, section 24.

one-year period for *ex post* reviews has been effectively used in Canada for many years.[8] One year is an ample period of time for customers or other market participants to identify and bring competition concerns to the attention of the AdC.

A one-year period is preferable to a longer deadline as it reduces the uncertainty, unfairness and potential harm, that a longer period for *ex post* reviews may create. The ICN *Recommended Practices* clearly state that delays in merger review may "*have an adverse impact on the merging parties' individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty*."[9]

Moreover, in situations where competitive concerns exist, it is desirable for the AdC to promptly determine and implement a remedy (and the likelihood of the remedy being effective will be higher) Once the parties' operations have been integrated, it may become extremely difficult — and possibly inefficient — to implement structural remedies. The *Recommended Practices* recognize this, and counsel that "*the passage of time may render it more difficult for the competition agency to obtain effective post-closing remedies*."[10]

II. Jurisdictional Nexus

The *Consultation* indicates that, in order to "*ensure legal certainty for companies*", the AdC is considering other limits on the scope of *ex post* reviews, such as a requirement that "*the total global turnover of the companies excluding tax exceeds a certain threshold (for example, the current threshold of 150 million euro).*"[11] The Group is strongly supportive of providing certainty to merging parties, and limiting the potentially very broad scope of *ex post* reviews.

The jurisdictional basis for *ex post* reviews should have material local nexus with France. The suggested global turnover thresholds would not achieve this goal. The *Recommended Practices* clearly state that "*[j]urisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction*",[12] and that where "*additional, ancillary thresholds*" — such as global turnover, in this example — are used, those additional thresholds "*should not be sufficient to trigger a merger notification requirement in the absence of a material nexus to the reviewing jurisdiction*."[13] These principles are important both for avoiding unduly burdening merging parties, but also to avoid wasting scarce enforcement

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[8] *Competition Act*, R.S.C. 1985, c. C-34, as amended, section 97. The Canadian Competition Bureau may conduct *ex post* reviews of non-notifiable transactions to determine if they are likely to result in a substantial lessening or prevention of competition for up to one year after the closing of the transaction.

[9] *Recommended Practice* IV.A, Comment 1.

[10] *Recommended Practice* IV.A, Comment 3.

[11] *Supra* note 3 at Part 2(ii) ("*Ex post* control").

[12] *Recommended Practice* II.A.

[13] *Recommended Practice* II.B, Comment 2.

agency resources on reviewing transactions that are unlikely to raise substantive concerns in the local jurisdiction.

The Group respectfully suggests that the AdC carry out *ex post* reviews only on transactions with a clear and material local nexus to France. The Group believes that a more appropriate threshold would be one based on the value of the target's assets or sales in France (*e.g.*, in the range of €25-€50 million), rather than a threshold based only on global turnover. To ensure procedural fairness, proportionality, and to avoid the review of transactions lacking a material local nexus to France, an appeal mechanism could also be incorporated by which merging parties could seek review of AdC decisions to carry out *ex post* reviews of transactions lacking a material local nexus with France.

III. Voluntary Notifications

Finally, the Group recommends that, if *ex post* review powers are to be adopted in France, provisions should be adopted to allow merging parties to voluntarily notify below-threshold transactions to the AdC. This would provide a means to alleviate the timing and outcome uncertainty of a potential *ex post* review by giving merging parties the option to seek affirmative pre-closing approval for the transaction. Many jurisdictions, including Canada,[14] Indonesia,[15] Ireland,[16] Japan,[17] Korea,[18] and South Africa,[19] in addition to their mandatory notification regimes, permit merging parties to file voluntary pre-merger notifications and seek comfort from the competition agency where pre-merger notification is not required. (This is in addition to jurisdictions such as the United Kingdom and Australia that rely entirely on a voluntary notification regime.)

If voluntary reviews are to be permitted, we would emphasize that the relevant legislation or AdC guidelines should clearly indicate that parties voluntarily notifying a transaction can expect that the AdC's review will follow the same timelines, and will be afforded the same confidentiality protections and procedural safeguards, that would apply to a typical notifiable transaction. Parties voluntarily choosing to bring a transaction to the AdC's attention

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[14] Canadian Competition Bureau, Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act, § 3.4, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html>.

[15] Komisi Pengawas Persaingan Usaha, Implementation Guidelines for Merger, Consolidation, and Acquisition Pre-Notification, § 3.1, available online at <http://www.kppu.go.id/docs/Merger/juklak_merger_english.pdf>.

[16] Ireland Competition and Consumer Protection Commission, Notice in respect of the review of non-notifiable mergers and acquisitions (Oct. 31, 2014), §1.3, available online at <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Mergers-Non-Notifiable-Mergers-1.pdf>.

[17] Japan Fair Trade Commission, ICN Merger Notification and Procedures Template, Question 6.B, available online at <https://www.jftc.go.jp/en/policy_enforcement/mergers/ICNmerger.html>.

[18] Section 12(8) of the *Monopoly Regulation and Fair Trade Act* provides for voluntary notification before the ordinary notification period to request a determination of whether the transaction will substantially restrict competition.

[19] Section 13(2) of the *Competition Act* allows for voluntary notification of small mergers by the parties at any time.

should not be placed in any worse position under French merger control law than those required by law to notify a transaction.

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Thank you very much for considering the Group's views. We believe that the suggestions set out above would improve the *Consultation* while also providing important clarity to the business and legal communities. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell Casey W. Halladay

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