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Reply to the Attention of A. Neil Campbell
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VIA COURIER and EMAIL to conspol@dbei.gov.ie

Competition and Consumer Policy Section
Department of Business, Enterprise and Innovation
Earlsfort Centre
1 Lower Hatch Street
Dublin, Republic of Ireland
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Dear colleagues:

Re: ***Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to merger and 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 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 Ireland's Competition and Consumer Protection Commission ("CCPC") is an 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 60 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty-five other jurisdictions (*e.g.*, the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*. In 2008, the Group provided comments to the Department of Enterprise, Trade and Employment of the Republic of Ireland ("Ireland") on the consultations on the operation and implementation of the *Competition Acts 2002 and 2006*.

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[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*").

The Group writes in connection with the Department of Business, Enterprise and Innovation's ("DBEI") *Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to merger and acquisitions* (the "Merger Consultation"). The Group applauds DBEI for its ongoing efforts to improve the merger control process in Ireland, and in particular for DBEI's willingness to consult with stakeholders on these important issues and for its consideration the *Recommended Practices* in drafting the Merger Consultation. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to you.

I. Local Nexus Requirement

The Merger Consultation correctly identifies that the significant proliferation of merger review regimes around the world during the past decade in combination with poorly designed notification criteria can impose significant burdens both on businesses and on competition agencies.

The ICN *Recommended Practices* contains three key principles to ensure that there is sufficient nexus to the reviewing jurisdiction that will limit these potential burdens:

- "*Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned*" (*Recommended Practice* I-A);
- "*Merger notification thresholds should incorporate appropriate standards of materiality as to the level of 'local nexus' required for merger notification*" (*Recommended Practice* I-B);
- "*Determination of a transaction's nexus to the jurisdiction should be based on activity 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 local territory*" (*Recommended Practice* I-C).

Both the ICN's *Recommended Practices* and the Merger Consultation note that the lack of a meaningful nexus requirement imposes unnecessary burdens on competition agencies as well as private parties. Where filing requirements are not circumscribed by meaningful local nexus requirements, they require the agency to deploy resources for no expected benefit — a transaction in which the target has little or no presence in Ireland is unlikely to raise substantive competition concerns or give rise to the imposition of a remedy. Furthermore, the merging parties may incur significant time and cost in responding to the filing requirements.

The *Competition Act 2002* as amended (the "*2002 Act*") contains two primary local nexus financial thresholds that need to be met for premerger notification to be required. The "individual turnover threshold" requires that the turnover in Ireland of each of two or more of the undertakings involved in the merger or acquisition is not less than €3 million. The "aggregate turnover threshold" requires that the aggregate turnover in Ireland for the undertakings involved in the merger or acquisition must be at least €50 million. The Merger Consultation is currently considering whether these financial thresholds should be amended. The Group commends the DBEI for initiating the Merger Consultation with an effort to ensure that the 2002 Act sufficiently fulfills local nexus requirements.

II. Whether the Individual Turnover Threshold Should be Amended

The Merger Consultation correctly recognizes that the financial thresholds for individual undertaking turnover in comparable European jurisdictions are much higher than in Ireland, and identifies jurisdictions with thresholds ranging from €9 million to €40 million. We note that the €9 million example is for the Czech Republic, a country whose GNI per capita is US$18,150. In comparison, Ireland has a GNI per capita of US$52,550, which is close to three times the GNI per capita of the Czech Republic. Ignoring the Czech Republic, the next lowest comparable individual threshold is €13.4 million.

The Merger Consultation considers raising the individual threshold to €5 million or €10 million. It notes, among other things, that if the individual turnover threshold had been €10 million during the years 2015 and 2016, the number of notifications received by the CCPC would have been reduced by close to 40%, while not excluding a single transaction that raised any serious competition concerns.[3]

The Group notes that €10 million would represent a materially lower threshold when compared to almost all of the other European jurisdictions discussed in the Merger Consultation. The lone exception to this is the Czech Republic, a jurisdiction whose GNI per capita is approximately 35% of Ireland's. In addition, the four additional jurisdictions in the Merger Consultation with GNIs per capita that exceed $25,000 have individual turnover thresholds greater than €10 million.[4]

Raising the individual turnover threshold to €10 million would have the effect of bringing Ireland into closer proximity with comparable neighbours in Europe. It would also materially reduce the number of notifications received — without jeopardizing enforcement efforts — and thereby free up more time for the CCPC to focus on transactions that raise serious competition concerns. The ICN *Recommended Practices* similarly support raising the individual turnover threshold to €10 million.

III. Whether the Aggregate Turnover Threshold Should be Amended

The Merger Consultation notes that there is a general relationship in merger regimes between the individual turnover threshold and the aggregate turnover threshold. In

[3] Merger Consultation, page 5.

[4] This includes France (€100 million), Italy (€50 million), Norway (approximately €10.6 million), Sweden (approximately €20.5 million) and Switzerland (approximately €85.5 million).

particular, it suggests that the aggregate turnover threshold is, on average, six times larger than the individual turnover threshold.[5] If the individual turnover threshold were to be raised to €10 million, then this ratio would dictate that the aggregate turnover threshold should be raised to €60 million.

While the Group recognizes that there may be a general mathematical relationship between the two thresholds in certain jurisdictions, the Group is not in favour of using a strictly mathematical formula between the two thresholds to determine the aggregate turnover threshold that should be used. Instead, the Group suggests linking the aggregate turnover threshold to GNI per capita, as the Merger Consultation did in connection with the individual turnover threshold. We note that, of the 18 countries listed on page 8 of the Merger Consultation, 8 countries have a GNI per capita that is 50% above or below Ireland's 2015 GNI per capita of US$52,550. The countries within this range are Austria, Belgium, Denmark, Finland, France, Germany, Italy and Sweden. Of these countries, only Austria (€30 million threshold), Belgium (€100 million threshold), Denmark (approximately €121 million threshold) Italy (€495 million threshold) and Sweden (approximately €102 million threshold) have in-country aggregate turnover threshold notification requirements.[6] Together, these countries average an aggregate turnover threshold of approximately €170 million.[7] Treating Austria and Italy as outliers provides an average aggregate turnover threshold of approximately €107 million.

The Group supports the proposed increase in the aggregate turnover threshold to €60 million. As the commentary to *Recommended Practice* I-C notes, "*notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities.*"[8] Mergers whose parties have less than €60 million in turnover in Ireland are unlikely to raise competitive concerns. Moreover, this threshold would still represent a materially lower aggregate turnover threshold in comparison to other comparable European jurisdictions.

IV. Whether the Number of Working Days Should be Amended

The Merger Consultation has asked whether the number of "working days" set out

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[5] DBEI considered the following European merger regimes in making this calculation: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Greenland, Hungary, Italy, Norway, Portugal, Sweden and Switzerland.

[6] Each of Finland, France and Germany have worldwide turnover thresholds instead of in-state aggregate turnover thresholds.

[7] If the scope of countries considered was broadened to include all countries listed on page 8 with in-state aggregate turnover requirements regardless of GNI per capita, the average aggregate turnover threshold would rise to approximately €125 million. Additional countries used in this calculation include Bulgaria, Cyprus, Czech Republic, Greenland, Hungary, Norway, Portugal and Switzerland. Croatia and Greece would be excluded as these countries have worldwide turnover thresholds instead of in-state aggregate turnover thresholds.

[8] Comment 1 to *Recommended Practice* I-C.

at various instances in the 2002 Act should be amended. The Group recommends that the CCPC should aim to complete its Phase I review in approximately 30 calendar days (or approximately 22 working days). Moving to 30 calendar days for Phase I reviews would bring Ireland in conformity with many global jurisdictions including Canada, China, Finland, Germany, Greece, Italy, Japan, Russia, Switzerland, the United States and others.

V. Other Issues

Finally, we note that the Merger Consultation also encourages respondents to raise "*any other issues relating to the merger and acquisition provisions of the 2002 Act*".[9] The Group respectfully suggests that the DBEI and CCPC consider minor adjustments to the CCPC's ability to review non-notifiable mergers. We understand that, under sections 4 and 5 of the *2002 Act*, the CCPC retains jurisdiction to review transactions that fall below the notification thresholds where such transactions have as their object or effect the prevention, restriction or distortion of competition, or where they may create or strengthen a dominant position.

The Group recognizes that the review of non-notifiable transactions is a feature of many competition law regimes around the world. However, we respectfully suggest that the *2002 Act* be amended to specify the time period within which such a review may be conducted in Ireland. For example, in Canada, the Competition Bureau may review non-notifiable transactions to determine if they are likely to result in a substantial lessening or prevention of competition — however, such reviews can only be conducted up to one year after the closing of the transaction.[10]

The absence of a deadline or limitation period for such reviews subjects all non-notifiable transactions to considerable uncertainty as to whether the CCPC will choose to initiate a review. As the ICN *Recommended Practices* make clear, 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 <u>marketplace uncertainty</u>.*"[11] Moreover, the ability of the CCPC — or indeed any competition regulator — to obtain effective remedies diminishes with the passage of time following the closing of a transaction. 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*."[12]

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[9] Merger Consultation, pages 9-10.

[10] *Competition Act*, R.S.C. 1985, c. C-34, as amended, section 97.

[11] *Recommended Practice* IV.A, Comment 1 (emphasis added).

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

The Group therefore recommends that the *2002 Act* be amended to specify a deadline — we suggest that one year after the closing of a transaction would be an appropriate period — by which the CCPC can initiate the review of a non-notifiable transaction.

* * *

Thank you very much for considering the Group's input. We believe that the updating of Ireland's merger control laws as described above would have the beneficial effect of focusing resources on transactions that are most likely to have significant competitive effects in Ireland while reducing unnecessary time and cost burdens for business (as well as the CCPC). Appropriate jurisdictional nexus will also help to position Ireland as a country whose economic framework legislation is modern and supportive of growth and investment.

The Group 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

Copy to: Members of the Merger Streamlining Group