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Competition Policy Unit
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin2, Republic of Ireland
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Dear colleagues,

Re: "ECN+ Consultation": Public Consultation on Aspects of the Competition (Amendment) Bill 2021, relating to merger control

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, Brazil, China, France, Germany, India, Italy, Japan, Portugal, Russia, South Korea, and Spain) to promote reforms consistent with the *Recommended Practices*. In 2008 and 2017, the Group provided comments to the Department of Enterprise, Trade and

[1] The current members of the Group include Accenture, BHP, Chevron, Cisco, Danaher, 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*").

Employment (the "Department") in public consultations related to the operation and implementation of the merger control regime in the *Competition Act* (the "Act").

The Group writes in connection with the Department's public consultations on merger-related aspects of the Competition (Amendment) Bill 2021 (the "Consultation"). The Group applauds the Department for its ongoing efforts to improve the merger control process in Ireland. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger and acquisition transactions, will prove useful to the Department in finalizing proposed amendments to the merger provisions of the Act.

1. Remedial Action in Relation to Non-Notifiable Mergers

Under sections 4 and 5 of the 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. Part 2.4 of the Consultation proposes to clarify the CCPC's ability to review and take remedial action in respect of non-notifiable mergers that are voluntarily notified to the CCPC.

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 may diminish the legal certainty that merging parties seek to achieve when assessing their notification obligations under a mandatory notification regime. However, at the same time, a well-designed voluntary notification 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.

In order to reduce the risk of compromising the legal certainty of the mandatory notification regime, the Group respectfully suggests that the Act be amended to specify the time period within which a non-notifiable merger may be reviewed and challenged. Such a limit would be relevant, regardless of whether a transaction has been voluntarily notified or has not been notified.

Most regimes that allow for review of below-threshold mergers include a limitation period for enforcement action. A reasonable time limit for enforcement action provides important clarity for the merging parties, other market participants and the enforcement agency. The Group believes that an appropriate period for exercising such residual jurisdiction could be as short as four months and, in any event, should not extend beyond one year after the closing of the transaction. Such a time period should be ample for the review of a merger voluntarily notified to the CCPC and would also allow customers or other market participants to identify competition concerns for the CCPC to examine in respect of a non-notified merger.

We note that there is marketplace experience with similar time limits for residual jurisdiction enforcement in various other regimes. For example, a four-month period is used in the UK's voluntary merger control regime.[3] In Canada, the Competition Bureau may review and take enforcement actions against non-notifiable transactions, 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. [4] The same time limit applies to voluntarily notified mergers that are closed prior to completion of the review process.

As the ICN *Recommended Practices* make clear, "[w]hen a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority."[5]

The absence of a deadline or limitation period for the review of mergers subjects all non-notifiable transactions to considerable uncertainty. As the ICN *Recommended Practices* make further notes, 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>*."[6] They may also create uncertainty for employees as well as customers, suppliers and other market participants. Moreover, the ability of a competition agency such as the CCPC to obtain effective remedies will diminish with the passage of time following the closing of a transaction. 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*."[7] A limitation period aligns the incentives of agencies and private parties to identify and deal with competition concerns in a timely manner.

The Group therefore recommends that the Act be amended to specify a deadline for enforcement action in relation to voluntarily-notified and other non-notifiable transactions. We suggest that four months, and in any event no more than one year, after the closing of a transaction would be an appropriate period in which the CCPC should be required to take any enforcement action.

[3] *Enterprise Act 2002*, section 24.
[4] Competition Act, R.S.C. 1985, c. C-34, as amended, section 97.
[5] Recommended Practice, II.A. Comment 3.
[6] Recommended Practice IV.A, Comment 1 (emphasis added).
[7] Recommended Practice IV.A, Comment 3.

2. Interim Orders in Relation to Non-Notifiable Mergers

Part 2.4 of the Consultation further proposes to empower the CCPC to make interim orders to prevent any action (such as integrating the merging businesses) that may prejudice or impede its review of any voluntarily-notified transaction.

The Group is concerned that a unilateral power for CCPC to impose prohibitions and mandatory orders related to integration would be unfair and burdensome given the potential serious business and financial consequences to the affected parties. While restrictions on integration may, in certain (but not all) situations, be appropriate to prevent irreversible steps that would undermine adequate remedies in the event that a transaction is determined to be anti-competitive, such restrictions may also impose significant costs and disruption on a business and may delay the realization of any efficiencies or other benefits resulting from a transaction.

To ensure procedural fairness, the Group believes that it would be important to provide reasonable notice to merging parties, and an opportunity to respond, prior to a prohibition on further integration or any orders to reverse prior actions. In addition, the Group believes that, as with any form of injunctive relief involving significant consequences to the affected parties, a right to expeditious appeal should be available.

The Group suggests that the safeguards of notice and an opportunity to respond, and the provision of a right to appeal, would ensure that the CCPC's interest in the availability of effective remedies is limited to situations where these extraordinary interventions are shown to be needed, and the ability to impose them is implemented in a manner that respects fairness and due process.

3. Merger Notification Thresholds

The Act contains two primary financial thresholds that need to be met for pre-merger notification to be required. Following a consultation process in 2017, the notification thresholds were increased, effective in 2019. The Group commends the Department for recognizing that Ireland's thresholds had been subjecting a large number of very small transactions, with limited if any impacts on competition in Ireland, to mandatory merger review.

The new "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 €10 million, and the new "aggregate turnover threshold" requires that the aggregate turnover in Ireland for the involved undertakings must be at least €60 million. The Group believes that the changes proposed in the current Consultation, which will enhance the voluntary notification process, can allow further increases to be made to Ireland's mandatory merger notification thresholds. The anticipated result would be that merging parties will be

incentivized to voluntarily notify mergers that raise potential concerns, while the CCPC and merging parties will spend less time and resources on non-problematic transactions.

Such a change would be particularly beneficial in light of the enormous current demands on CCPC resources, and government resources more broadly, in the midst of rapid technological change and economic challenges arising from the pandemic. Notably, Germany has recently increased its merger notification threshold with the express intention of reducing the workload of the Bundeskartellamt, the German federal cartel office, an agency known for its efficiency. The President of the Bundeskartellamt noted that the agency was reviewing a large number of cases every year, "many of which were not really relevant cases in terms of competition" an, as a result, the agency welcomed the increase in the thresholds because "resources that will now become available to us will allow us to focus even better on those cases that raise serious concerns".[8]

(a) Individual Turnover Threshold

The 2017 Consultation Paper[9] correctly recognized that the financial thresholds for individual undertaking turnover in comparable European jurisdictions are much higher than in Ireland. While the individual turnover threshold was subsequently increased (turnover in Ireland of each of two or more of the undertakings involved is not less than €10 million), it is still low relative to comparable countries when considered in reference to their relative economic positions.

In the following table, we present the Gross National Income ("GNI") per capita and individual turnover threshold for Ireland and the same European comparison countries that were discussed in the 2017 Consultation Paper. Ireland and the Czech Republic currently have almost identical individual turnover thresholds, even though Ireland's GNI per capita is 72% higher than that of the Czech Republic. Denmark's threshold is 34% higher despite its GNI per capita being 10% lower than that of Ireland. Finland's and Belgium's individual turnover thresholds are twice and four times that of Ireland, respectively, even though Ireland's GNI per capita is 33% and 25% higher than that of Finland and Belgium, respectively.

[8] Bundeskartellamt, Press Release, "Amendment of the German Act against Restraints of Competition", January 19, 2021,https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

[9] "Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to merger and acquisitions", September 29, 2017, p. 6, see https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-review-certain-provisions-Competition-Act-2002-as-amended-merger-and-acquisitions.pdf

Country	GNI per capita, PPS (current prices), 2019 data[10]	Individual turnover threshold (as of May 2020)
Ireland	€46,635	Turnover in Ireland of each of two or more of the undertakings involved is not less than **€10 million**
Belgium	€37,283	At least two of the parties have an individual Belgian turnover of at least **€40 million**
Czech Republic	€27,171	Each of at least two of the parties to the concentration for the last completed accounting period has domestic turnover (in the Czech Republic) exceeding 250 million Czech koruna (**€9 million**)
Denmark	€41,921	The aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than 100 million kroner (**€13.4 million**)
Finland	€34,910	The aggregate turnover in Finland of each of at least two of the undertakings concerned exceeded **€20 million**

Further increasing the individual turnover threshold from the current €10 million to, for example, €20 million would bring Ireland into closer proximity with these comparable countries in Europe. It would also materially reduce the number of notifications received and thereby free up more time for the CCPC to focus on transactions that raise serious competition concerns. Given that the CCPC retains the residual jurisdiction to review below-threshold transactions and, as proposed in the current Consultation, the CCPC may be empowered to make interim orders and will have a clearer framework for reviewing voluntarily-notified mergers, raising the individual turnover threshold to a level similar to comparable European countries should not jeopardize CCPC's enforcement efforts. It will also reduce burdens for companies engaging in transactions in which one or both merging parties have Irish turnover levels lower than the increased individual turnover threshold.

(b) Aggregate Turnover Threshold

The 2017 Consultation Paper noted that aggregate turnover thresholds are, on average, six times the individual turnover thresholds in merger regimes that employ both types of thresholds.[11] This appears to be the basis on which the aggregate turnover threshold was

[10] Eurostat, GNI (gross national income) per capita in PPS, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_pp&lang=en

[11] The Department 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.

changed to €60 million in 2018 when the individual turnover threshold was changed to €10 million.

While the Group recognizes that there may be a general mathematical relationship between these two types of thresholds in various jurisdictions, the Group believes that it is also useful to consider the aggregate turnover threshold in relation to the order of magnitude of GNI per capita. Of the comparable European countries discussed above, Czech Republic has a comparable aggregate turnover threshold (approximately €58 million threshold) despite the significant GNI difference discussed above. Others are much higher: Belgium (€100 million threshold) and Denmark (approximately €121 million threshold).[12]

Therefore, the Group suggests that the Department consider an increase in the aggregate turnover threshold to a level such as €100 million or €120 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*."[13] In the Group's view, mergers among parties whose collective turnover in Ireland is less than €100-120 million are unlikely to raise significant competitive concerns in Ireland's economy. Moreover, the residual jurisdiction to review below-threshold mergers, and the incentives of merging parties to voluntarily notify transactions with potential concerns to avoid post-closing enforcement risks, provide substantial safeguards.

Thank you very much for considering the Group's input. We believe that the further updating of Ireland's merger control laws discussed 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 businesses as well as the CCPC.

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 truly,

Neil Campbell　　　　William Wu

cc: Members of the Merger Streamlining Group

[12] Finland has worldwide turnover thresholds instead of in-country aggregate turnover thresholds.
[13] Comment 1 to *Recommended Practice* I-C.