20 September 2024

Competition Review Taskforce
The Treasury
1 Langton Crescent
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Australia: Comments on the Consultation on Merger Notification Thresholds

Dear Competition Review Taskforce,

We have great pleasure in enclosing a submission prepared by the Mergers Working Group of the Antitrust Section of the International Bar Association in response to the public consultation process initiated by the Treasury of the Australian Government on potential changes to Australia's Merger Notification Thresholds.

The Co-Chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the Competition Review Taskforce as appropriate.

Yours Sincerely,

Samantha Mobley
Co-Chair Antitrust Section

Janet Hui
Co-Chair Antitrust Section

SUBMISSION TO THE COMPETITION TASKFORCE OF THE AUSTRALIAN TREASURY REGARDING CONSULTATION ON MERGER NOTIFICATION THRESHOLDS

1. INTRODUCTION

1.1. On behalf of the Mergers Working Group of the Antitrust Section of the International Bar Association ("**IBA**") (the "**Working Group**") this submission is provided in response to the Australian Treasury's consultation process on merger notification thresholds as described within the consultation paper released on 30 August 2024 by the Competition Taskforce of the Australian Treasury ("**Taskforce**") (the "**Thresholds Consultation**").

1.2. The Working Group is grateful for the opportunity to provide this submission to the Taskforce for its consideration, and expresses its willingness to be consulted (or to otherwise contribute constructively where possible and as appropriate), in terms of the development of any changes to Australia's merger rules and process, including the related guidelines, in due course.

1.3. The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession throughout the world. The IBA has a membership of more than 80,000 individual lawyers from over 170 countries, including Australia, and it has considerable expertise in providing assistance to the global legal community.[1] The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions on developments related to the implementation and refinement of competition laws worldwide.

1.4. The IBA's Antitrust Section includes antitrust / competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The Working Group's contributions draw on the vast experience of the Section's members in merger control law and practice around the world.[2]

1.5. As a general principle, the Working Group believes that there should be a convergence toward agreed best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty, and procedural fairness.

1.6. The International Competition Network ("**ICN**") (of which the Australian Competition and Consumer Commission ("**ACCC**") is an active member) has issued Recommended Practices for Merger Notification and Review Procedures (the "**ICN Recommended Practices for Merger Notification Document**") and the Recommended Practices for Merger Analysis (the "**ICN Recommended Practices for Merger Analysis Document**"),

[1] Further information on the IBA is available at: https://www.ibanet.org.
[2] Further information on the Antitrust Section and its Working Groups is available at: https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001.

which the Working Group considers are relevant and insightful in the context of considering the implementation of the potential changes to the existing merger rules and processes. The ICN Recommended Practices for Merger Notification Document and the ICN Recommended Practices for Merger Analysis Document are further referred to in this submission were relevant.

1.7. The Thresholds Consultation proposes a combination of monetary and market concentration thresholds, as well as additional targeted notification requirements set by a Treasury Minister.

1.8. The Working Group presents its contributions below, based on international experience and evidence, divided into the following sections: (i) comments on monetary thresholds based on international experience, including effective mechanisms to screen out transactions unlikely to result in appreciable competitive effects in Australia; and (ii) observations regarding the use of market concentration-based tests for mandatory notification thresholds based on international experience.

2. COMMENTS ON MONETARY THRESHOLDS BASED ON INTERNATIONAL EXPERIENCE

(A) Setting monetary thresholds at the optimal level

2.1. The Working Group welcomes the objective of the Thresholds Consultation to design targeted, risk-based notification thresholds, with reference to international practice and available data, for the purpose of identifying potentially problematic acquisitions for assessment by the ACCC.

2.2. The ICN recommends that mandatory notification thresholds should be based on objectively quantifiable criteria. With respect to the monetary thresholds proposed in the Thresholds Consultation, the Working Group welcomes the use of turnover-based thresholds, which are typically considered the best approach when set at an optimal level and clearly defined.

2.3. As acknowledged by the Thresholds Consultation, it can be difficult to find the optimal level for turnover thresholds. The Working Group welcomes Treasury's plan to perform a statutory review three years from commencement of the new system to evaluate the functioning of the system, including the notification thresholds. However, it remains important to avoid setting the thresholds too low for the introduction of the new system to avoid unnecessarily burdening benign transactions and committing substantial ACCC time and resources for minimal substantive benefit.

2.4. For example, since the current Brazilian pre-merger control regime entered into force in May 2012, the Brazilian competition authority, CADE, has analysed more than 5,000 merger cases. In 2023, CADE reviewed 611 merger cases, the vast majority (over 90 percent) through the fast-track procedure that applies only to non-issues transactions that result in immaterial overlaps or vertical links.[3] According to CADE's own statistics, out

[3] See CADE's own statistics at https://anuariocade2023.my.canva.site/site-anu-rio-tamanho-original.

of the 611 cases reviewed by the Brazilian competition authority last year, only five required remedies and only two were rejected. One of the main factors for the high number of notifications every year in Brazil is the relatively low revenue thresholds.[4] The current amount of the thresholds remains unchanged since 2012 – despite inflation – and the seller's turnover must also be taken into account when assessing filing requirements in Brazil, which further expands the merger cases caught by the Brazilian pre-merger control regime. This requires a commitment of significant resources for the public administration with a 100 percent increase in CADE's personnel and budget since the entry into force of the new Brazilian Competition law.[5] It has also imposed a significant burden on merging parties.

2.5. The Working Group respectfully observes that the Australian turnover thresholds that would apply for acquired businesses under the first and second limbs of $40 million and $10 million respectively would appear to be very low. As a basis for setting these thresholds, the Thresholds Consultation refers to an analysis performed by the Australian Taxation Office ("**ATO**") which defined medium businesses in Australia as those with group turnover from $10 million to $250 million, with about 80 percent having a turnover under $50 million.[6] The Working Group notes that the ATO's analysis identified a population of 39,881 medium businesses in Australia in 2019-20. Given that the proposed threshold of $10 million would cover that entire population, there appears to be a risk of over capture. Similar considerations are raised by the $40 million threshold, even if it likely reflects less than half of the 39,881 medium businesses in Australia.

2.6. The Working Group also refers to Table 1 in the Thresholds Consultation which sets out merger party thresholds in notable jurisdictions together with GDP comparisons. Spain is identified as one of the jurisdictions that has similar GDP per capita to Australia. The Working Group notes that when considering the turnover thresholds in Spain (combined annual turnover of €240 million or more and at least two parties with turnover of €60 million or more), it should be borne in mind that the level of those thresholds is unchanged since introduced in 1999 in Royal Decree Law 6/1999 ("**RDL**"). Specifically, that RDL indicated thresholds of 40.000 million pesetas and 10.000 million pesetas, later converted to the current euro amounts when pesetas were replaced by the introduction of the euro in 2002. The turnover thresholds have never been adjusted annually in line with inflation and, as a result, are widely considered too low. Had they been adjusted in line with inflation, the thresholds would be €413 million and €103 million, respectively.

2.7. Given these considerations, the Working Group respectfully encourages the Taskforce and Treasury to reconsider the proposed levels of the turnover thresholds that would apply for acquired businesses. To this end, the Working Group observes that the Thresholds Consultation describes an alternative to setting lower economy-wide thresholds. Specifically, the Thresholds Consultation proposes that, if there are evidence-based concerns about high-risk acquisitions of small businesses, the Treasury Minister could set additional targeted notification requirements to capture specific sectors, local

[4] For reference, the current Brazilian revenue thresholds are approximately $202 million (AUD) and $20.2 million (AUD).
[5] As noted by CADE's General Superintendent, Alexandre Barreto, in an interview to the book "10 anos da lei de defesa da concorrência", published by IBRAC in 2022, at: 10_Anos_da_Lei_de_Defesa_da_Concorrencia.
[6] Australian Taxation Office, Medium business income tax gap 2019-20: Latest estimates and trends, 2023.

markets or players and reduce the incidental capture of benign mergers within the thresholds.

(B) Incorporating a clearly defined material nexus requirement with transaction value thresholds

2.8. The Working Group welcomes the proposal in the Thresholds Consultation to include a requirement that an acquisition has a material connection to Australia in addition to meeting the monetary and market concentration thresholds limbs. The Thresholds Consultation acknowledges the importance of targeting acquisitions that directly affect Australian consumers and the risk that, without the requirement for a material connection to Australia, foreign acquisitions with negligible operations in Australia or impact on Australian commerce could be captured by the global transaction value threshold.

2.9. The Working Group observes that the most common means of providing for a material nexus is by requiring significant local sales or local asset levels in the merger notification thresholds. The Thresholds Consultation describes the concept of a material connection of a target business or asset to Australia as including being registered or located in Australia, supplying goods or services to Australian customers, or generating revenue in Australia. The Working Group respectfully encourages the Taskforce and Treasury to incorporate a clear measure for the materiality of that connection.

United States

2.10. The United States have always had a transaction value threshold test and has developed several valuable practices to accompany this test, which help avoid unnecessary filings for deals with little nexus to the United States or those unlikely to have a material competitive effect, thus reducing the regulatory burden.

2.11. Firstly, the thresholds are adjusted annually to account for inflation. The Premerger Notification Office ("**PNO**"), a joint FTC/DOJ office funded through the FTC, makes a clear announcement each year regarding the adjusted thresholds. For deals within a certain range, the threshold is used in conjunction with a test to assess the size of the parties: deals above the minimum size of transaction threshold (currently USD 119.5 million) but below the second threshold (currently USD 478 million) require filing only if the total assets or annual net sales of the parties in or into the United States meet certain thresholds.

2.12. Additionally, the HSR rules provide key exemptions even if the above threshold tests are met. These exemptions include foreign-to-foreign transactions, unless additional conditions ensure a material nexus to the United States, and "investment only" acquisitions. The latter exemption is enforced narrowly and strictly, but it has been extremely valuable in reducing notifications for acquisitions with no material competitive effect. However, this exemption does not apply to stock compensation for officers or directors, which imposes burdens on wealthy executives who still need to file when they exercise options. This is a minor quirk of the exemption. The key point is that a transaction value threshold, if there is no control requirement, must be paired with an exemption for passive institutional and other investors.

2.13. Lastly, it is important to provide guidance on calculating the transaction value, especially for transactions where the price is not definite or certain triggers have not yet occurred, such as milestone payments.

(C) Providing publicly available written guidance on the application of transaction value thresholds

2.10. The Working Group observes that the Thresholds Consultation indicates that there will be a process for businesses who are uncertain about whether they need to notify and encourages the ACCC to provide clear guidance regarding this process.

Germany and Austria

2.11. The experience in Germany and Austria indicated that the introduction of transaction value thresholds in 2017 caused significant concern and uncertainty within the business and legal community. These concerns were clearly expressed by the IBA and other stakeholders during the consultation phase of the 2017 bill. In particular, the IBA expressed concerns about the lack of legal certainty regarding the calculation of the value of consideration and the requirement of substantial domestic operations. The Austrian and German competition authorities took these concerns seriously and therefore published a draft Guidance on 14 May 2018.

2.12. When presenting the draft Guidance the two agencies highlighted its purpose and need as follows. For Andreas Mundt, President of the Bundeskartellamt, the Guidance provided companies and legal experts with assistance in interpreting new legal provisions. For Theodor Thanner, Director General of the Austrian Federal Competition Authority, the transaction value notification threshold was a key element in addressing issues raised by digitalisation.

2.13. Due to the close integration between the German and Austrian economies, a substantial number of mergers would need to be notified in both countries under the new provisions. The thresholds in Austria and Germany were similar in scope and, given the close cooperation between the two authorities, a joint guidance paper was considered appropriate. The paper was intended to clarify the interpretation of the respective laws, using case examples to explain the application and definition of key criteria.

2.14. Practical experience since then has shown that the Guidance has indeed made the new provisions significantly easier to apply. This applies in particular to the interpretation and calculation of the "*value of consideration*" as well as the criteria of "*substantial domestic operations*".

2.15. In December 2021, a revised version of the Guidance was published. The main reasons for the update were improving legal certainty and implementing the lessons learned after four years of practical experience with the transaction value thresholds (2018-2021).

2.16. The Guidance has proven to be very helpful in ensuring sufficient legal certainty and avoiding unnecessary filings. In 2022, 27 cases were notified in Germany based on the transaction value threshold and none of the mergers notified since adopting the new thresholds were prohibited.

(D) Enabling merger parties to obtain guidance by contacting staff of the authority to discuss the application of transaction value thresholds

2.17. The Working Group refers to the process mentioned in the Thresholds Consultation for businesses who are uncertain about whether they need to notify and considers that it will be important that the ACCC has the necessary resources to support this process.

United States

2.18. In the United States, a valuable practice has been the availability of guidance from the PNO. The PNO, at its discretion, makes some of the inquiries from parties and its responses available on the FTC's website. These interpretations are anonymized and stored in a searchable database. This allows parties to access both formal and informal guidance, enabling them to check if their questions have been addressed previously.

3. OBSERVATIONS REGARDING THE USE OF MARKET CONCENTRATION-BASED TESTS FOR MANDATORY NOTIFICATION THRESHOLDS

(A) Market share and share of supply-based tests are unsuitable for mandatory notification thresholds

3.1. The Working Group encourages Treasury and the Taskforce to avoid the use of market share and share of supply-based tests for mandatory notification thresholds. As acknowledged in the Thresholds Consultation, using market share thresholds might create uncertainty in a mandatory notification system and the OECD and ICN generally recommend they should not be used as they do not provide clear and objective notification criteria.

3.2. The Working Group observes that market concentration-based tests add complexity and burden. These tests are not straightforward in their application. They are inherently subjective which could result in potentially diverging conclusions. They are fact-intensive to apply and the necessary information might not be readily available to parties in the ordinary course of business. There is also limited experience with these tests outside of Australia which could disadvantage foreign businesses.

3.3. While there is considerable experience in Australia with applying market share thresholds under the voluntary, informal merger review process (as a guide to which transactions would likely be viewed as raising potential competition concerns and are appropriate for notification to the ACCC), they are unsuitable for mandatory notification thresholds. The Working Group encourages Treasury and the Taskforce to avoid thresholds that require a substantive pre-assessment and to adopt the recommended approach of the OECD and ICN to use clear, objective criteria for mandatory notification thresholds.

3.4. The Working Group observes that if market concentration-based notification thresholds are adopted in Australia, it will increase the importance of offering parties the opportunity to have confidential pre-notification discussions regarding whether to notify their transaction.

(B) Practical experience in Spain and Portugal applying mandatory market share thresholds

3.5. The Thresholds Consultation identifies Spain and Portugal as examples of jurisdictions that have successfully applied mandatory market share thresholds for many years.

3.6. Whenever the turnover threshold test is not met in Spain, an alternative market share threshold test applies. That test requires notification where a concentration results in the acquisition (i.e., no overlap) or increase (i.e., overlap) of a share of a relevant product market in Spain or local markets within Spain of at least 30 percent, or 50 percent if the Spanish revenues of the target are below €10 million. Similarly in Portugal, where the turnover threshold is not met a notification is required if a concentration results in the acquisition or increase of a share of a market in Portugal or within Portugal of 30 percent, or 50 percent if either the target or the acquirer have Portuguese revenues of less than €5 million.

3.7. This puts a huge burden on the parties, for a number of reasons:

3.7.1. First, they have to identify and define all relevant product and geographic markets in which the parties are active locally. This requires extensive research of competition authority precedents, both in the affected jurisdictions and in other EU and worldwide jurisdictions, and in those markets – the majority in practice - where there are no applicable precedents or the precedents do not clearly define the markets , an economic analysis of the appropriate market definition taking into account all the circumstances.

3.7.2. Second, the parties need to assess their market power in each of those product markets. In the case of differentiated products and local markets this can mean analysing a very large number of possible segments and local markets on a postcode by postcode basis. Moreover, it is relatively unusual for third party data on market sizes to be available with the level of detail required, obliging the parties to dedicate management time to preparing the necessary estimates. This requires a party to invest considerable time, money, and effort to accumulate, analyse, or purchase from external providers the available data to calculate market shares. Parties also need to ensure that their approaches and calculations are aligned to obtain consistent and credible results.

3.7.3. Only after these time-consuming steps can the transacting parties assess whether their concentration is notifiable. While it could be argued that this market share assessment may save time during the next phase of notification preparation, this will, of course, only apply should the transaction actually trigger the relevant threshold, and is only relevant in practice in overlap cases.

3.8. For these reasons practitioners in Spain and Portugal generally consider the thresholds unduly burdensome for parties, particularly in non-overlap cases, although the situation has been somewhat improved by the application of higher thresholds (50 percent in both jurisdictions) where the overlap in revenues is limited (in Spain where the target has Spanish revenues of less than €10 million and in Portugal where one of the parties has Portuguese revenues of less than €5 million). Indeed, based on that experience, Spanish

and Portuguese practitioners would strongly advocate to limit the use of market share thresholds to overlap cases, and subject to either a de minimis exception or graduated thresholds based on the revenues of the parties.

(C) Practical experience in United Kingdom utilizing a share of supply test in a voluntary notification system

3.9. The Working Group respectfully submits that a notification threshold based on the share of supply of goods or services would be wholly inappropriate for a mandatory notification regime. The United Kingdom's merger control regime includes a share of supply test which, as the Competition and Markets Authority's own guidance (CMA2 - Mergers: Guidance on the CMA's jurisdiction and procedure – "**CMA2 Mergers Guidance**") acknowledges, "*confers a broad discretion to identify, for the purposes of applying the share of supply test, a specific category of goods or services supplied or acquired by the merger parties.*"[7]

3.10. The Thresholds Consultation suggests that the share of supply concept could be applied in a more limited way in an Australian context with reference to quantity and/or value of supply of a good or service, or the capacity to supply a good or service. The Working Group respectfully submits that limiting the concept in this way would not overcome its broad application which is derived from the fact that the concept is not an economic assessment of the type used in substantive competition assessments. As the CMA2 Merger Guidance notes, the "*group of goods or services to which the jurisdictional test is applied need not amount to a relevant economic market …. [A]s such, the description of goods or services to which the jurisdictional test is applied may differ from the relevant economic market used for the purposes of the substantive assessment of the merger.*"[8] Further, in identifying the specific category of goods or services, the CMA will "*have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met. While the share of supply used may correspond with a standard recognised by the industry in question, this need not necessarily be the case.*"[9]

3.11. Given the broad scope of the concept and the inherently broad discretion it would confer on the ACCC, the Working Group considers its use would not be appropriate because it would not provide the requisite level of legal certainty and predictability for parties in applying it. Furthermore, such a test is arguably not consistent with ICN Recommended Practices for Merger Notification Document, which states that notification thresholds should be "*clear and understandable*" and "*based on objectively quantifiable criteria*".[10]

(D) Alternative administrative approach should avoid uncertainty and compliance costs associated with application of market concentration thresholds in a mandatory system

3.12. The Thresholds Consultation also sets out an alternative administrative approach "*to identify certain goods or services in certain local or regional areas where prior registration is*

[7] Paragraph 4.59, CMA2 Mergers Guidance, at: https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure
[8] Paragraph 4.59(a), CMA2 Mergers Guidance.
[9] Paragraph 4.59(b), CMA2 Mergers Guidance.
[10] ICN Recommended Practices for Merger Notification Document, II(D) and (E): Microsoft Word - ICN NP Recommended Practices I-XIII.doc (internationalcompetitionnetwork.org).

required". This alternative administrative approach is proposed to avoid compliance costs and uncertainty arising from the application of market concentration thresholds in a mandatory system. The Thresholds Consultation describes using a "*simple administrative form*" to register such acquisitions with the ACCC and that there would be no requirement to notify unless the ACCC requests notification within 5 to 10 business days of registration.

3.13. The Working Group observes that the alternative administrative approach appears to be a less burdensome approach to address concerns to capture acquisitions in small product markets, or local or regional areas, and that this alternative may be preferred over the introduction of market concentration thresholds provided what is captured is sufficiently clear upfront and it does not result in over-capture.

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