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Submitted Electronically via CompetitionTaskforce@treasury.gov.au

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Taskforce Members:

Re: Consultation on Merger Notification Thresholds

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 MSG 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 *Guiding Principles for Merger Notification and Review* (“Guiding Principles”) and the *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”) of the International Competition Network (“ICN”).² As you know, the Australian Competition and Consumer Commission (“ACCC”) is a founding and leading member of the ICN.

The Group’s work to date has included submissions to competition agencies and governments in more than twenty jurisdictions (e.g., Australia, Brazil, Canada, China, European Union, France, Germany, India, Japan, Spain, the United Kingdom, the United States, and many others). With respect to Australia, the Group last provided a submission in response to the Treasury’s consultation on Merger Reform in January 2024.

The Group applauds the Treasury and the ACCC for their ongoing effort to improve the merger control process in Australia, and in particular for consulting with stakeholders on these important issues. The Group appreciates the opportunity to provide these comments in response to the Treasury’s consultation on proposed notification thresholds for the proposed mandatory merger notification regime. We hope that this submission, which draws upon the Group’s very substantial experience with multinational merger transactions, will prove useful to the Treasury and the

¹ Accenture, Cisco Systems, Danaher, Procter & Gamble.

² International Competition Network, *Guiding Principles for Merger Notification and Review*, available online at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf; International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

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ACCC.

1. General Comments

The Group welcomes the Treasury's "risk-based" approach to designing merger notification thresholds that seeks to balance between several important considerations:

- "keeping compliance costs low for business";
- "ensuring expedited review of notified mergers that do not raise competition concerns";
- "not capturing foreign acquisitions that do not have sufficient connection with Australia"; and
- targeting "those acquisitions most likely to harm competition and/or consumers".³

The Group observes that the proposed notification thresholds blend the traditional turnover-based thresholds with thresholds based on transaction value and market concentrations. While turnover-based thresholds have worked effectively in major merger control regimes around the world for decades, thresholds based on market concentrations have largely fallen out of favour and transaction value thresholds do not have wide adoption around world, because they raise substantial concerns regarding insufficient local nexus and uncertainty of application. Accordingly, the Group respectfully cautions the Treasury regarding the potential adoption of thresholds based on transaction value and market concentration.

The remainder of the Group's comments reflect these general considerations.

2. Transaction Value Threshold

A few jurisdictions, including Germany, Austria, Korea and India have implemented transaction value thresholds based on a perceived "enforcement gap" regarding review of large-value acquisitions of start-up companies with small sales and total assets. In the Group's respectful view, there is still limited evidence of such an enforcement gap. Indeed, neither the Consultation Paper nor the Treasury's prior Merger Reform consultation provided such evidence.

Notification thresholds based on transaction value were introduced in Germany (and Austria) in 2017. The experience of the German Federal Cartel Office ("FCO") has so far confirmed the Group's views that there does not appear to be any significant enforcement gap that is being addressed by the transaction value threshold. Since its implementation in 2017, the number of transactions notified under the transaction value threshold has steadily increased, to 61 in the

³ The Australian Government the Treasury, "Merger Notification Thresholds", August 30, 2024, pages 5 and 9 [Consultation Paper].

2021/2022 reporting year, representing approximately 8% of the approximately 800 merger notifications the FCO receives each year. In the seven years since Germany's implementation of the transaction value threshold, the FCO conducted a second phase review in only one transaction notified under the transaction value threshold in the *Thermo Fisher / Olink* case, which led to unconditional clearance.⁴ Therefore, Germany's transaction value threshold has yielded minimal enforcement benefit while imposing significant unnecessary compliance burdens on merging parties as well as the FCO.

In addition, notwithstanding the guidance the FCO provided about the local nexus requirement applicable to its transaction value threshold, there remains significant uncertainty on the part of merging parties on this issue. As a result, the FCO issued revised guidelines in January 2022.⁵ Even under the revised guidelines, significant uncertainty regarding the application of the local nexus requirements remains.

The Group respectfully encourages the Treasury and the ACCC to keep Germany's experience in mind when considering its proposed transaction value threshold and the associated local nexus test, to ensure that they do not create undue burden and uncertainty for merging parties.

a. Local Nexus

Under the Treasury's proposed transaction value thresholds, a transaction is subject to mandatory notification where:

- The global transaction value is at least 200 million AUD and the combined Australian turnover of the merger parties⁶ is at least 200 million AUD (even if fewer than two merger parties has at least 40 million AUD in Australian turnover), or
- The global transaction value is at least 50 million AUD and the acquirer group has Australian turnover of at least 500 million AUD (even if fewer than two merger parties have at least 10 million AUD in Australian turnover).

As a preliminary matter, the Group notes that the 200 / 50 million AUD transaction value thresholds appear to be much too low, as there are a huge number of transactions around the world every year which have total transaction values that exceed 200 million AUD (or approximately 134 million USD) or 50 million AUD (or approximately 34 million USD).

⁴ Fabian Badtke and Lorenz Jarass, "First Second Phase Proceedings under the Transaction Value Threshold in Germany", July 8, 2024, online: <https://competitionlawblog.kluwercompetitionlaw.com/2024/07/08/first-second-phase-proceedings-under-the-transaction-value-threshold-in-germany/>.

⁵ FCO, *Guidance on Transaction Value Thresholds* (January 1, 2022), available online: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionswertschwelle.pdf ("*FCO Guidance*").

⁶ The merging parties are defined to include the acquirer group and the target, excluding the seller group.

With the transaction value thresholds being so low, the accompanying criteria become more important in screening out the large number of transactions with insufficient local connection to Australia that are not likely to have a harmful effect on competition in Australia. In this regard, the Group respectfully submits that neither the accompanying turnover thresholds nor the local connection criteria provide an adequate screen or nexus.

Regarding the proposed local connection criteria, the Consultation Paper suggests that it can be met with the target being registered or located in Australia, supplying goods or services to Australian customers or generating revenue in Australia.⁷ This simply provides that the target has a mere presence in Australia, but cannot ensure that the target business has sufficient market presence in Australia to potentially give rise to competition concerns.

Similarly, the accompanying turnover-based thresholds mean that a transaction meeting the transaction value thresholds may be subject to notification if the acquirer has substantial turnover in Australia but the target has *de minimis* turnover in Australia.

The *Recommended Practices* state that:

*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.*⁸

Accordingly, the Group recommends that the additional criteria accompanying the transaction value thresholds be revised to provide for a more meaningful minimum turnover threshold, to ensure that the target business and the transactions subject to notification have more connection to Australia and are more likely to raise competition concern.

The *Recommended Practices*' recommendation for the use of local sales and assets to establish material local nexus supports this approach.⁹ Similarly, the German FCO's January 2022 revised guidance provides that it would exclude the application of Germany's transaction value threshold where the target's revenues in Germany are below 17.5 million EUR and these revenues adequately reflect the target's market position and competitive potential.¹⁰ The Group further suggests that thresholds for absolute levels of local economic activity should be set sufficiently high so that they can "screen out transactions that are unlikely to result in appreciable competitive effects"¹¹ within Australia.

⁷ Consultation Paper, page 13.

⁸ *Recommended Practices* II. C.

⁹ *Recommended Practices* II. B., Comment 1.

¹⁰ FCO Guidance, para 82.

¹¹ *Recommended Practices* I.B, Comment 1 and I.C, Comment 2.

3. Market Concentration Threshold

The proposed notification threshold further proposes market concentration thresholds, defined based on market share or share of supply.

The Group encourages Treasury to consider the *Recommended Practices*' strong caution against thresholds based on market shares:

*Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.*¹²

Notification thresholds based on share of supply suffers from even greater lack of objectivity. The UK's Competition and Market Authority ("CMA"), which applies a share of supply test, recognizes that there can be different descriptions of goods or services to which the share of supply test is applied.¹³ This may be suitable as a jurisdictional test in the UK's merger control regime where notification is voluntary. It would be wholly inappropriate to base a mandatory notification regime on such thresholds that are lacking in objectively quantifiable criteria.

Furthermore, merger notification criteria based on market concentration or share of supply are inherently more prone to error, including for merging parties and their advisors who carefully assess the application of the notification thresholds in good faith. If the Treasury and ACCC were to adopt market concentration thresholds, the Group respectfully submits that no financial penalty should apply to any failure to notify where the notification obligation arises solely due to application of the market concentration thresholds.

In addition, the Group believes that the "market concentration administrative approach" suggested in the Consultation Paper is worthy of further exploration as an alternative to market concentration thresholds. Properly designed, an administrative approach has the potential of achieving a balance between minimizing compliance costs and uncertainty and preventing anti-competitive mergers in concentrated markets. The Group would welcome a further consultation on the design of such an approach.

¹² Recommended Practices II.E, Comment 1.

¹³ Competition and Market Authority, "Mergers: Guidance on the CMA's jurisdiction and guidance", para 4.59, online: <https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>.

4. Cumulative Turnover Thresholds

Regarding the turnover-based thresholds, the Consultation Paper proposes that all acquisitions within the previous three years within the same product or service markets (irrespective of geographic location) by the acquirer and acquirer group are to be aggregated for the purpose of assessing whether an acquisition meets the turnover thresholds, regardless of whether those acquisitions were themselves individually notifiable.¹⁴

When considering the acquirer group's turnover in applying the turnover threshold, any turnover generated by businesses acquired by the acquirer group in the past three years would be already included in the calculation. Therefore, it is unclear to the Group as to how the proposed cumulation of turnover is to be applied. The Group respectfully requests further clarification in this regard.

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Thank you for considering the Group's views. We would be pleased to respond to any questions or discuss this submission at your convenience.

Yours very truly,



William Wu

Copy to: Members of the Merger Streamlining Group

¹⁴ Consultation Paper, page 13.