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Our File No.: 69459
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VIA EMAIL comp-simplification_impact_assessment@ec.europa.eu

Unit A.2. – Merger Case Support and Policy
Directorate-General for Competition
European Commission
1049 Brussels
Belgium

Re: **Revision of the Merger Implementing Regulation and the Notice on Simplified Procedure**

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 Group provides general comments regarding the simplification of EU merger control.

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 *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”) of the International Competition Network (“ICN”).²

The Group’s work to date has included submissions to the Commission as well as to competition agencies and governments in more than twenty other jurisdictions (e.g., Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, Korea, Poland, Spain, the United Kingdom, the United States, and many others). The Group has previously provided several submissions to the Commission, including: (1) in 2003, in respect of the EC Merger Regulation (“ECMR”) amendments; (2) in 2004, on the Draft Form RS; (3) in June 2013, on the proposed draft revisions to the Simplified Procedure and Merger Implementing Regulation; (4) in September 2013, on the Commission’s initial consultation on non-controlling minority shareholdings and case referrals; (5) in October 2014, regarding the consultation aimed at more effective merger control; (6) in January 2017, regarding the procedural and jurisdictional aspects of EU merger control, (7) in September 2020,

¹ Accenture, BHP, Chevron, Cisco Systems, Danaher, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

² International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf>.

regarding the white paper on foreign subsidies, and (8) in June 2021, regarding the questionnaire on procedural aspects of merger control.

I. General Comments

The Group commends the Commission's ongoing effort to assess and improve the EU's merger control procedures, particularly with a view to (i) better target the merger review process, allowing the Commission to focus its investigations on the cases that merit a more detailed review, and (ii) reduce the administrative costs and burdens of the merger review process.

With these objectives in mind, the Group notes that case statistics show that only a small minority of the transactions notified to the Commission merit intervention.³ Consistent with the experience in most other jurisdictions around the world, the vast majority of the transactions subject to EU merger control do not raise serious competition concerns.⁴

Accordingly, the Group welcomes the Commission's efforts to improve its procedures in order to better target the merger review process at the relatively modest number of transactions that are likely to raise serious competitive concerns, while making greater use of the simplified procedure and other procedural improvements to reduce the time and cost of reviews for other transactions. As stated in the Recommended Practices:

Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.⁵

The Group believes that many of the proposed changes will simplify and streamline the EU merger control process. This in turn will reduce unnecessary burdens for filing parties and the Commission. Changes related to electronic notifications, greater use of tick boxes, and other process improvements should be uncontroversial and will be beneficial for merging parties and the Commission alike. This submission focusses on the initiatives in the Revised Notice on Simplified Procedure.

II. The Simplified Procedure

The Group commends the Commission for expanding the scope of cases that are eligible for the simplified procedure.

The proposed "flexibility clauses" appear to be a useful advance. The Group noted in its 2021 submission that it would be important for flexibility clauses to be structured in a clear and objective manner, in order to allow merging parties and Commission staff to

³ In 2020, 18 out of 352 cases (5%) merited intervention; in 2021, 14 out of 396 (<4%) cases merited intervention. DG Competition, 2020 Annual Activity Report, pages 6-7; 2021 Annual Activity Report, page 32.

⁴ See generally, Global Competition Review, Rating Enforcement, online: <https://globalcompetitionreview.com/survey/rating-enforcement/2021>

⁵ Recommended Practices, V.B. Comment 1.

determine quickly and without extensive debate whether such a clause applies in a specific situation. Most of the proposed clauses reflect such an approach.

The Group believes that there are three significant areas in which the proposed Notice will not fully realize the benefits available from simplification:

- (i) the treatment of vertical transactions in the revised Notice still appears to be relatively cautious, given how rarely the conditions for finding an SIEC involving vertical relationships are met in practice;
- (ii) the continuing requirement to address “all plausible markets” can be onerous for merging parties, and also requires Commission resources to complete assessments of scenarios that may have very low likelihood of leading towards an SIEC finding; and
- (iii) the lengthy list of conditions in Section II.C, if applied as written, could negate the availability of the simplified procedure in many cases where there is unlikely to be the basis for a phase two review, let alone a finding of an SIEC.

The Group notes that the revised Notice proposes to disallow a request for assessment of ancillary restrictions in cases which are proceeding under the simplified procedure. The Group respectfully disagrees with this approach, which it considers is unwarranted and could undermine some of the benefits of a simplified procedure. In practice, where a transaction is eligible for the simplified procedure, it is unlikely that any ancillary restrictions would be problematic. The Group encourages the Commission to consider a more flexible approach that would allow ancillary restriction issues to be dealt with in the simplified procedure, to the benefit of both merging parties and the Commission.

III. The “Super-simplified Procedure”

The Group appreciates the Commission’s identification of situations in which certain straightforward transactions may be dealt with on an even more streamlined basis than the simplified procedure. Here again, the Group urges the Commission to implement this pathway in a manner that encourages, rather than discourages, its use whenever it is apparent that the Commission’s ability to identify and remedy possible SIEC concerns would not be undermined.

The revised Notice anticipates that pre-notification expectations will be reduced in super-simplified procedure cases. The Group respectfully notes that the Commission’s expectations regarding merging party participation in pre-notification consultations are materially greater than for many other agencies. Reducing the extent of such expectations in super-simplified, as well as simplified, procedure cases would further contribute to the objectives of reducing burdens on merging parties and improving the utilization of scarce Commission resources.

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Thank you very much for conducting this further public consultation and for considering the Group's views. We would be pleased to respond to any questions or discuss this submission with Commission officials at your convenience.

Yours very truly,

A handwritten signature in black ink, appearing to be 'William S. Wu', written in a cursive style.

William S. Wu

cc: Members of the Merger Streamlining Group