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VIA EMAIL to COMP-FOREIGN-SUBSIDIES@ec.europa.eu

European Commission
1049 Brussels
Belgium

Re: Public Consultation regarding the Proposed Regulation on Foreign Subsidies Distorting the Internal Market

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 writes to provide input on the "Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market" (the "**Regulation**"), which was released by the European Commission (the "**Commission**") for public consultation on May 5, 2021. In particular, the Group's comments focus on the proposals related to concentrations in Chapter 3 of the Regulation.

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 Commission is a longstanding member of the ICN and the former co-chair of the ICN's Mergers Working Group.

The Group's work to date has included submissions to competition agencies and governments in more than twenty jurisdictions (*e.g.*, Australia, Brazil, Canada, Chile, China, France, Germany, India, Italy, Japan, Korea, Poland, Russia, Spain, the European Union, 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;

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

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*.

(6) in January 2017, regarding the procedural and jurisdictional aspects of EU merger control; (7) in September 2020, regarding the White Paper on Foreign Subsidies (the "**White Paper**") that preceded the development of the Regulation; and (8) in June 2021, regarding simplified procedures for merger control.

The Group appreciates the opportunity to participate in this public consultation conducted by the Commission on the Regulation. The Group is submitting these comments in a spirit of constructive engagement, based on its members' very substantial experience in completing multinational merger transactions.

The Group's comments focus on the proposal to establish a regime for *ex ante* notification and review of concentrations affected by foreign subsidies that may cause distortions to the EU internal market. The Group encourages the Commission to adopt international best practices in merger control processes, including those in the Recommended Practices, when designing and implementing such a regime.

The Group commends the Commission for significant efforts made to adapt the White Paper concepts in directions that are harmonious with the review of the competitive effects of concentrations under the EU Merger Regulation.[3] The Group's comments focus on the definition of notifiable transactions, the proposed "call-in" power, the design of notification thresholds, the standard for triggering in-depth investigations, review timelines, and the future development of the information requirements for notifications.

I. Definition of Notifiable Transactions

The Recommended Practices state that:

- *Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws;*[4]

- *When defining what types of share acquisitions are within the scope of merger laws, jurisdictions may establish objective, numerical thresholds…*[5]

- *Jurisdictions should seek to clearly define in what circumstances asset acquisitions are considered sufficiently material to merit inclusion within the scope of their merger laws. The definition should screen out asset acquisitions that are unlikely to affect competition;*[6]

[3] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EU Merger Regulation).

[4] Recommended Practice I.B.

[5] Recommended Practice I.B. Comment 1.

[6] Recommended Practice I.B. Comment 2.

- *Jurisdictions may also rely on broader concepts, such as the acquisition of "control" or of a "competitively significant influence" to determine what transactions are within the scope of their merger laws. If so, they should seek to maximize legal certainty and predictability, in particular through a consistent and transparent decision making practice, and the use of guidelines or informal guidance.*[7]

The Group believes that these general principles are also relevant to the design of a regime for reviewing concentrations in relation to foreign subsidies.

The Group supports the use of concepts for the definition of concentrations and control that are harmonious with the EU Merger Regulation.[8] Its comments focus on the distinctive requirement to identify potential foreign subsidised concentrations.

The Regulation defines a "foreign subsidy" extremely broadly: it is "*deemed to exist where a third country provides a benefit to an undertaking engaging in economic activity in the internal market, and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries*".[9]

The Regulation indicates that foreign subsidies defined in this broad manner could include many different forms of financial contributions including:

> *"(i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;*
>
> *(ii) the foregoing or revenue that is otherwise due; or*
>
> *(iii) the provision of goods or services or the purchase of goods and services."*[10]

It is not entirely clear whether this definition of "foreign subsidies" is meant to capture all financial contributions received from non-EU governments, or only those financial contributions that confer benefits that could not be obtained from non-governmental sources. For example:

- All loans from non-EU governments or state-owned banks appear to be captured by this expansive definition of foreign subsidies, even though only loans from such governmental sources at below-market rates or on preferential terms not available in the market would potentially be relevant for assessing distortions to the EU internal market.

[7] Recommended Practice I.B. Comment 3.

[8] Regulation, articles 18 and 20.

[9] Regulation, article 2(1).

[10] Regulation, article 2(2)(a).

- All goods and services purchased by an undertaking from foreign governments or state enterprises would appear to be captured by this definition, even though only those goods and services provided by governmental sources at below-market prices would potentially be relevant for assessing distortions to the EU internal market.

- All goods and services supplied to a foreign government would appear to be captured by this definition, even though transactions at market prices in the ordinary course of business do not confer any benefit that would distort the internal EU market.

The uncertainty about these issues is exacerbated by the use of the phrase "*which confers a benefit*" in article 2(1), but the omission of this important qualifier in the definition of "*financial contribution*" in article 2(2) and in the references to foreign subsidies and financial contributions throughout chapter 3 of the Regulation.[11]

The inclusion of transactions with foreign governmental entities would add significant burdens for private parties (as well as increased resource requirements for review by the Commission). These burdens would be incompatible with the proportionality requirement, since there is no realistic prospect that transactions at market rates could be found to be distortive of the EU internal market.

> **Recommendation**: To ensure better alignment between the definition of "foreign subsidies" and the policy concern that the Regulation is addressing, the Group recommends that the definition of "foreign subsidies" should be clarified so that it only captures financial contributions that confer preferential benefits that are more advantageous than what are available from market-based transactions. In addition, the Commission should provide clarity on the types of financial contributions that are regarded as conferring such preferential benefits and the use of market-based or other benchmarks that can be used to determine whether benefits have been obtained.

II. Discretion to Review Non-Notifiable Transactions

The Regulation contemplates that the Commission would be given a virtually unlimited power to "call in" any concentration transaction *"at any time prior to its implementation where the Commission suspects that the undertakings concerned may have benefitted from foreign subsidies in the three years prior to the concentration."* [12]

This proposed power has no materiality, nexus or other constraints. It is not necessary or proportional. It would have serious negative effects on legal certainty and the efficient operation of the capital markets, and would incentivize tactical behaviour by alternative bidders, competitors and other parties. Moreover, chapter 2 of the Regulation already contains residual general investigative powers, with more clearly specified procedures, that could be used – if needed on a

[11] In particular, Regulation, articles 17, 19(5), 22 and 24(3).

[12] Regulation, article 19(5).

very exceptional basis – in the event that the *ex ante* notification regime proves inadequate to allow the Commission to identify and remedy a materially distortive foreign subsidised concentration.

Recommendation: The Group recommends that the "call-in" power in article 19(5) be removed from the Regulation.

III. Notification Thresholds

The Recommended Practices state that:

- *Mandatory notification thresholds should be based on objectively quantifiable criteria;*[13]
- *Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction.*[14]
- *Merger notification thresholds should therefore incorporate a material nexus requirement. A material nexus to the reviewing jurisdiction is present when a proposed transaction has a significant and direct economic connection to the jurisdiction. 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.*[15]

The Group believes that these general principles are also relevant to the design of a regime for reviewing concentrations in relation to foreign subsidies.

The Regulation indicates that the concentrations subject to the proposed *ex ante* notification requirement will be determined based on two types of thresholds, one related to turnover of any undertaking established in the EU (the "**EU Turnover Threshold**"), and the second defined by reference to financial contributions received by the parties to the concentration from governmental sources in non-EU countries (the "**Financial Contribution Threshold**").[16]

(i) EU Turnover Threshold

The EU Turnover Threshold is defined by reference to at least one undertaking being established in the EU and generating at least EUR 500 million of EU turnover.[17] The Group commends the Commission for structuring this threshold based on a material level of objectively measurable turnover in the EU.

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[13] Recommended Practice II.E.

[14] Recommended Practice II.B.

[15] Recommended Practice II.B. Comment 1.

[16] Regulation, articles 18(3)(b) and 18(4)(b).

[17] Regulation, articles 18(3)(a) and 18(4)(a).

However, the Group is concerned that the "EU target" concept, which was an important element of the White Paper proposals, appears to have been lost. It is important that the notification requirement should only capture concentrations that that are most likely to raise concerns about distorting the EU internal market:

- For transactions involving a *"merger of two or more previously independent undertakings"*[18], it may be relevant to consider that any of the parties could trigger the application of the notification threshold.

- For acquisition transactions, on the other hand, the policy concern relates to foreign-subsidised acquisitions of an EU target. As drafted, the EU Turnover Threshold could be met by any single party to an acquisition transaction, including the acquirer or the acquiree. [19] As a result, notifications to the Commission will potentially be required in relation to foreign transactions by EU companies. Moreover, notifications may be required when there is not a foreign subsidised acquisition of an EU target company. The nexus deficiency will result in unnecessary burdens for private parties and resource demands on the Commission in relation to transactions that would not distort the EU internal market.

Recommendation: In acquisition transactions (article 18(1)(b)), the Group recommends that the EU Turnover Threshold should be structured so that the requirement of an EU-established undertaking with the prescribed level of turnover applies to the acquire, or at least that there is a substantial local nexus requirement for the acquiree. This will help to ensure that only transactions involving foreign subsidised acquirers that are likely to result in a distortion in the EU internal market are subject to the proposed *ex ante* notification requirement.

(ii) Financial Contribution Threshold

The Group commends the Commission for taking into account comments from the White Paper consultation when developing a threshold related to subsidy amounts that are intended to be objectively defined and material in relation to the policy concern of EU internal market distortion. However, the Group is concerned about two aspects of the aggregation provisions incorporated into this threshold.

The Regulation proposes to aggregate subsidies for all parties to a concentration. This is a significant expansion of the original White Paper proposals that focused on subsidized foreign acquirers of EU targets. That concept was closely linked and proportional to the objectives of the proposed new regulatory instruments. However, there is no clear rationale for considering the existing foreign subsidies already being received by an EU target undertaking, particularly having regard to the explicit legal basis for Chapter 3 of the Regulation:

[18] Regulation, article 18(1)(a).

[19] Regulation, article 18(1)(b).

> *"Distortions on the integral market by foreign subsidies in concentrations*
>
> *In a concentration, the assessment whether there is a distortion on the internal market within the meaning of Articles 3 and 4 shall be limited to the concentration at stake[….]*[20]
>
> **Recommendation**: In acquisition transactions, (article 18(1)(b)), the Group recommends that the Financial Contribution Threshold be applied only to acquirer, and should not aggregate any financial contributions received by acquiree.

The Regulation also indicates that foreign subsidies will be assessed by aggregating across countries.[21] The Group notes that a clear and compelling rationale provided for aggregating subsidies from multiple countries has not been provided. To the contrary, the objectives, terms and effects of such subsidies would not be expected to be coordinated or related.

If an acquirer undertaking has received subsidies from multiple non-EU governments, the Group believes that the presumption that subsidies below the Financial Contribution Threshold do not create distortions in the EU internal market should be applied to the volume of subsidies received from each non-EU government, rather than to the total volume of subsidies received from non-EU governments. (Alternatively, the Commission could consider applying the general materiality EUR 5 million indicator in article 3(2),[22] so that parties are only required to identify subsidy amounts from individual countries exceeding this level as part of the aggregation process. Such a change would reduce the burden of applying this threshold and improve the proportionality of the notification regime.)

> **Recommendation:** The Group recommends that the notification requirement should not be triggered unless the applicable undertaking(s) (see above) received subsidies in excess of the Financial Contribution Threshold from governmental sources in a single non-EU jurisdiction.

IV. Standard for Triggering In-Depth Investigation

The Recommended Practices state that:

- *Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns;*[23]

- *Given that the vast majority of notified transactions do not raise material competitive concerns, merger review systems should be designed to permit such*

[20] Regulation, article 17 [emphasis added].

[21] Regulation, article 22.

[22] Regulation, article 3(2), states that: "*A foreign subsidy is unlikely to distort the internal market if its total amount is below EUR 5 million over any consecutive period of three fiscal years*".

[23] Recommended Practice IV.B.

> *transactions to proceed expeditiously. Many jurisdictions achieve this objective by employing review procedures that allow such non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period (and in some cases an abbreviated notification form), and subjecting only transactions that raise material competitive concerns to more extended review periods.*[24]

The Group believes that these general principles are also relevant to the design of a regime for reviewing concentrations in relation to foreign subsidies, and that any such regime should focus on the most distortive cases that would significantly impact the EU internal market.

Articles 23-24 and 8-9 of the Regulation envision a two-stage review process. A primary purpose of two-stage review regimes is to screen out unproblematic transactions in the first phase, so that the reviewing agency can concentrate limited resources on in-depth investigations of a small sub-set of transactions that raise significant concerns. The Group supports the proposal to use a two-phase review process for any regime to review foreign subsidisation related to concentrations.

The standard for commencing an in-depth investigation of foreign subsidisation under Article 8(2) is whether "*the Commission, based on the preliminary review, considers that there are sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market.*" Since in-depth investigations are likely to have significant resource and timing consequences for the parties to potentially time-sensitive concentration transactions, as well as for the Commission, it will be important to ensure that the *"sufficient indications"* discretion is applied in a manner that effectively and efficiently identifies non-problematic transactions that would not raise concerns about distortions of the EU internal market.

V. Review Timelines

The Recommended Practices state that:

- *Merger reviews should be completed within a reasonable period of time;*[25]
- *Suspensive jurisdictions need to have timely review periods because parties are barred from proceeding with the transaction during the pendency of the agency's review;*[26]
- *In suspensive jurisdictions, the parties' ability to lawfully consummate notified transactions depends upon the expiration of applicable waiting periods. Accordingly, initial waiting periods should be subject to definitive and readily ascertainable deadlines to permit transactions that do not present material*

[24] Recommended Practice IV.B, Comment 1.

[25] Recommended Practice IV.A.

[26] Recommended Practice IV.A. Comment 2

> *competitive concerns or present concerns that can be readily identified and effectively addressed in the initial period to proceed with minimal delay. While certain transactions will require more extended reviews, waiting periods associated with such reviews also should expire within determinable time frames.*[27]

The Group believes that these general principles are also relevant to the design of a regime for reviewing concentrations in relation to foreign subsidies.

Many of the transactions that would be subject to review under the Regulation are also likely to be subject to review under the EU Merger Regulation. The Group commends the Commission's proposal to use similar first and second phase timelines for both regimes.[28] This allows parties to align the timing of parallel reviews, which may facilitate more expeditious completion of non-problematic transactions.

The Group notes that pre-filing consultation in respect of filings under the EU Merger Regulation is considerably more frequent and lengthier than in merger control systems in most other jurisdictions. The Group believes that a similar practice of extensive pre-filing consultation would not be necessary or desirable in respect of filings under the Regulation, which should generally be shorter and much more straightforward than the Form CO (see further comments below).

VI. Information Requirements for *Ex Ante* Notification

The Recommended Practices state that:

- *Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation;*[29]

- *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.*[30]

The Group believes that these general principles are also relevant to the design of a regime for reviewing concentrations in relation to foreign subsidies.

The proposed notification thresholds have the potential to trigger notification requirements for a large number of transactions. The time, cost and resource burdens for private parties – and

[27] Recommended Practice IV.C. Comment 1.

[28] Regulations, article 23.

[29] Recommended Practice V.A.

[30] Recommended Practice V.B.

the Commission – can be minimized by keeping the initial notification short and focused on information that would allow an expeditious decision to be made regarding the need for an in-depth investigation.

The White Paper accepted this principle and suggested that the *ex ante* notification requirement would consist of a short information notice, which would likely focus on information relating to financing of the transaction, the sources of financing for the purchaser and financial contributions received by the purchaser from non-EU governments in the past three years, as well as any information on alternative prospective acquirers of the EU target.

The Group supports the proposal for a short and focused information notice. However, it encourages the Commission to reconsider the suggestion that information regarding potential alternative prospective acquirers of the EU target be provided; such information would not appear to be relevant, available or reliable for decision-making regarding the distortive effects of a specific notified concentration. In addition, the Group encourages the Commission to design the notice in a manner that allows it to apply the *"sufficient indications"* test for in-depth investigations in a manner that will effectively and efficiently screen out the vast majority of concentrations during the initial review period (see discussion above).

> **Recommendation**: The Group encourages the Commission to publish a draft notification form for public consultation in order to ensure that the burdens related to filings and the burdens arising from unwarranted in-depth investigations are minimized.

* * *

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

Yours very truly,

A. Neil Campbell William S. Wu

Copy to: Members of the Merger Streamlining Group