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

European Commission
1049 Brussels
Belgium

Re: Public Consultation regarding White Paper on Foreign Subsidies

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 "White Paper on Leveling the Playing Field as Regards Foreign Subsidies" (the "White Paper"), which was released by the European Commission (the "Commission") for public consultation. In particular, the Group's comments focus on the proposals related to merger and acquisition ("M&A") transactions in Module 2 of the White Paper.

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] As you know, 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 other 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

[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*, available online at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf >.

shareholdings and case referrals; (5) in October 2014, regarding the consultation aimed at more effective merger control; and (6) in January 2017, regarding the procedural and jurisdictional aspects of EU merger control.

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

The Group's comments in this submission are focused exclusively on the White Paper's Module 2 proposal to establish a regime for *ex ante* notification and review of acquisitions of EU targets facilitated by foreign subsidies that may cause distortions to the EU internal market. The Group takes no position on the need or advisability for introducing a new regime for scrutinizing foreign-subsidised acquisitions or whether an *ex ante* notification regime is the most appropriate tool for such scrutiny, as they are policy choices beyond the MSG's focus on the streamlining of merger review processes. However, should the Commission decide to introduce such a regime, the Group encourages the Commission to consider international best practices in merger control processes, including those in the Recommended Practices, when designing and implementing such a regime. Accordingly, the Group's comments will respond to questions 2, 3, 4 and, 7 of the White Paper questionnaire for Module 2.

I. ***Question 2.*** ***Do you agree with the procedural set-up for Module 2, i.e. ex ante obligatory notification system, 2-step investigation procedure, the fact-finding tools of the competent authority, etc.?***

(a) 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;*[3]

- *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.*[4]

The Group believes that these general principles are equally relevant to the design of any regime for reviewing subsidisation issues related to M&A transactions.

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[3] Recommended Practice V.A

[4] Recommended Practice V.B

The White Paper suggests that the *ex ante* notification would consist of a short information notice, which likely will include 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 to keep the initial notification short and focused on basic information that would allow an expeditious decision to be made regarding the necessity for a more detailed Phase II investigation. However, it is not clear that information regarding potential alternative prospective acquirers of the EU target would be relevant, available or reliable for decision-making. In addition, depending on the definition adopted for "foreign subsidies" (which is addressed in response to Question 3 below), some of the information items contemplated for the notification may not be easily obtainable and may be burdensome for transacting parties to ascertain.

Recommendation: The Group recommends that the Commission publishes a draft notification form for public consultation.

(b) Standard for Triggering Phase II 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;*[5]

- *Given that the vast majority of notified transactions do not raise material competitive concerns, merger review systems should be designed to permit such 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.*[6]

The Group believes that these general principles are equally relevant to the design of any regime for reviewing subsidisation issues related to M&A transactions and that any such regime should focus on the most distortive cases that would significantly impact EU markets.

[5] Recommended Practice IV.B

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

The White Paper proposes a two-stage review process. The competent authority would review the notification during Phase I and determine whether it is appropriate to proceed to a Phase II investigation. The White Paper suggests that a Phase II investigation would be launched if the supervisory authority "*had sufficient evidence tending to show that the acquiring company could have benefitted from foreign subsidies facilitating the acquisition*".

A primary purpose of two-stage review processes is to screen out unproblematic transactions in the first phase, so that the 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 of M&A transactions.

Given the policy concern identified in Module 2, setting the standard for Phase II investigation as "*[having] sufficient evidence tending to show that the acquiring company could have benefitted from foreign subsidies facilitating the acquisition*" is incomplete. By failing to consider whether the acquisition may be expected to lead to distortions of the EU market, it would not adequately serve the screening purpose for the initial stage of the review process. Since Phase II investigations are likely to have significant resource and timing consequences for merging parties and for the competent authority, it would be important to employ a screening mechanism that effectively and efficiently identifies and excludes non-problematic transactions that would not raise concerns about distorting the EU internal market.

> **Recommendation**: The Group recommends that the competent authority should only initiate a Phase II investigation if it has evidence tending to show that an acquisition is likely to result in a distortion in the EU internal market, in addition to the existence of foreign subsidies that may have facilitated the acquisition.

(c) Review Timelines

The Recommended Practices state that:

- *Merger reviews should be completed within a reasonable period of time;*[7]
- *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;* [8]
- *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*

[7] Recommended Practice IV. A.

[8] Recommended Practice IV. A. Comment 2

> *present material 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.* [9]

The Group believes that these general principles are equally relevant to the design of any regime for reviewing subsidisation issues related to M&A transactions.

It is unclear how the proposed review process for foreign subsidisation would co-exist with the EU's existing merger control process. Many of the transactions that would be subjected to review for foreign subsidisation are also likely to be subject to review under the EU Merger Regulation. The Group believes that it would not be necessary or desirable for the duration of subsidisation reviews to take longer than merger reviews (*i.e.*, 25 business days for Phase I and 90 business days for Phase II). Such time periods should be adequate to allow the competent authority to make an initial Phase I decision, and if applicable a Phase II decision, within time frames that would not exceed the significant existing timelines applicable for transacting parties seeking EU regulatory clearance for M&A transactions.

> **Recommendation**: The Group recommends that the Phase I and Phase II review periods for the proposed Module 2 review process should not be longer than EU merger reviews (*i.e.*, 25 business days for Phase I and 90 business days for Phase II). The Group also recommends that the interfaces, if any, between the M&A subsidisation reviews and the EU Merger Regulation (and/or the EU Foreign Direct Investment Regulation) be fully specified when any more specific proposals are brought forward for consultation.

II. ***Question 3. Do you agree with the scope of Module 2 in terms of (a) definition of acquisition; (b) definition and thresholds of the EU target; (c) definition of potentially subsidised acquisition? As regards thresholds, please provide your views on appropriate thresholds.***

The definitions of "acquisition", "EU target", and "potentially subsidized acquisition", together with the applicable thresholds, will define the applicability of the proposed *ex ante* notification requirement and have a significant impact on the public and private resources utilised to address subsidisation issues.

The Recommended Practices state that:

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

- *Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws;*[10]

- *When defining what types of share acquisitions are within the scope of merger laws, jurisdictions may establish objective, numerical thresholds…*[11]

- *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;*[12]

- *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.*[13]

The Group believes that these general principles are equally relevant to the design of any regime for reviewing subsidisation issues related to M&A transactions. In addition to the Group's comments and recommendations below, the Group considers that it will be important for the Commission to publish guidelines to clarify how to it intends to apply these core elements of the proposed *ex ante* notification requirement in order to minimize uncertainty for parties considering M&A transactions and their advisors.

(a) Definition of "Acquisition"

The White Paper proposes that the Module 2 regime would capture both acquisitions of control of an EU target as well as acquisitions of significant but non-controlling minority rights or shareholdings; the latter might be specified in terms of acquisitions of a minimum percentage of shares or voting interest, or of "material influence", of the EU target.

The Group notes that the EU Merger Regulation does not apply to acquisitions of non-controlling minority shareholdings. Subjecting such transactions to review in respect of foreign subsidisation would involve a materially broader intervention in public and private capital markets than is currently the case under the merger control regime. Moreover, it is not at all clear from the White Paper whether, or how, foreign subsidisation of a non-controlling minority investor in an EU target could be expected to cause distortions in the EU internal market. Accordingly, the

[10] Recommended Practice I. B.

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

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

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

Group considers that the implementation of any regime for review of foreign subsidisation of M&A transactions should be limited to acquisitions of control, until the proposed regime is implemented successfully and demonstrates that it has benefits in excess of the resource implications for private parties and the competent authority.

To the extent that a proposed Module 2 regime would at some point be applied to acquisitions of non-controlling minority interests, such transactions should be defined using clearly ascertainable thresholds such as a minimum percentage of shares or voting interest (e.g. 25% or 33%) being acquired, rather than relying on concepts such as "material influence" which require subjective self-assessment by the parties.

> **Recommendation**: The Group recommends that the implementation of a regime for review of foreign subsidisation of M&A transactions should not extend to non-controlling acquisitions of minority shareholdings. However, if the proposed Module 2 regime would be applied to acquisitions of non-controlling minority interests, the Group recommends that such transactions should be defined using clearly ascertainable thresholds such as a minimum percentage of shares or voting interest (e.g. 25% or 33%) being acquired.

(b) Definition of "Potentially Subsidised Acquisition"

The White Paper proposes to define "potentially subsidised acquisitions" as "*planned acquisitions of an EU target where a party has received a financial contribution by any third country government*". The White Paper also defines "foreign subsidies" extremely broadly as "*a financial contribution by a government or any public body of a non-EU State, which confers a benefit to a recipient and which is limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries*". The White Paper acknowledges that foreign subsidies or financial contributions defined in this broad manner could take many different forms and include:

- *the transfer of funds or liabilities (capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness or rescheduling);*
- *foregone or not collected public revenue, such as preferential tax treatment or fiscal incentives such as tax credits;*
- *the provision of goods or services or the purchase of goods and services.*

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 preferential benefits that could not be obtained from non-governmental sources. For example, all loans from non-EU governments or state-owned banks might be considered to fall within 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 could be relevant for assessing any possible distortions to the EU internal market.

Similarly, all goods and services provided by governments or state enterprises might be considered to fall within this vast concept of foreign subsidies, but only goods and services provided by governmental sources at below market prices could be relevant for assessing distortions to the EU market.

> **Recommendation:** To ensure better alignment between the definition of "foreign subsidies" and the policy concern that Module 2 is aimed at 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 sources. 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.

(c) Notification Thresholds

The Recommended Practices state that:

- *Mandatory notification thresholds should be based on objectively quantifiable criteria;*[14]
- *Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction.*[15]
- *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.*[16]

The Group believes that these general principles are equally relevant to the design of any regime for reviewing subsidisation issues related to M&A transactions.

The White Paper suggests that the acquisitions subject to the proposed *ex ante* notification requirement may be determined based on two types thresholds. The first threshold would be defined qualitatively or quantitatively in reference to the EU target's activities (the "EU Target Threshold"); the second threshold would be defined in reference to the volume of financial

[14] Recommended Practice II. E.

[15] Recommended Practice II. B.

[16] Recommended Practice II. B. Comment 1

contribution received by the purchaser from non-EU countries (the "Financial Contribution Threshold").

(i) EU Target Threshold

The White Paper considers "*a qualitative threshold referring to all assets likely to generate a significant EU turnover in the future*" as a possible way to define the EU Target Threshold. This would require parties to M&A transactions and their advisors to make predictions about the EU target's indeterminate future activities and performance, including any plans the purchaser may have for the EU target post-acquisition that may or may not be implemented successfully. Such subjective determinations are not a reliable or administrable basis for establishing a threshold for a mandatory notification requirement.

Qualitative thresholds should be avoided where possible because they create uncertainty for both transaction parties and enforcement authorities. Notification thresholds under Module 2 should be easy to assess and unambiguous. Clear quantitative thresholds (e.g., turnover or asset value of the target) have proven to be most practicable.

> **Recommendation:** The Group recommends that the EU Target Threshold should be based on the EU target's actual asset value and/or turnover value in the EU, which are objectively quantifiable (e.g. using the most recent completed fiscal year end financial statements).

Furthermore, the Group believes that the "EU target" concept should be defined in a precise and administrable way. We note that proposed definition of "EU target" – "*any undertaking established in the EU*" – potentially has a wide scope. Therefore, it is important that the quantitative asset-based or turnover-based threshold should be set at an appropriate level of materiality so that the notification requirement would only capture acquisitions that that are most likely to raise concerns about about distorting the EU internal market. The White Paper's suggested 100 million euro threshold is not accompanied with any analysis of its connection with any level of distortive effect. A meaningful and well-designed threshold will ensure that the burdens on transacting parties as well as the competent authority that will only be imposed on a moderate number of transactions which have the potential to give rise to distortive effects.

> **Recommendation:** The Group recommends that the EU Target Threshold should be set using quantitative criteria at a meaningful level to ensure that only transactions 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 White Paper proposes that the relevant time period for the volume of financial contribution received from non-EU governments should be three years prior to notification and up until one year following the closing of the acquisition.

The future amount of any financial contribution up to one year after closing is not an objectively quantifiable criteria. The occurrence of any such contributions, as well as the

amounts, can be highly indeterminate and would not provide a predictable basis for M&A parties and their advisors, or the competent authority, to assess whether a transaction is notifiable. This is especially case given that closing date is often uncertain and unpredictable for transactions that are subject to pre-closing regulatory review processes like the proposed Module 2 regime. If future financial contributions are to be included in the Financial Contribution Threhold, they should be limited only to firm commitments for financial contributions that will be received within one year after the signing of the acquisition agreement.

> **Recommendation**: The Group recommends that the Financial Contribution Threshold should be defined only in reference to historical volumes of financial contribution received from non-EU governments. If future financial contributions are to be considered, they should be limited to only firm commitments for financial contributions that will be received within one year after the signing of the acquisition agreement.

The White Paper further indicates that foreign subsidies below a threshold of 200,000 euros over three years are presumed to not create distortions in the EU internal market, which could suggest that the Financial Contribution Threshold be set at 200,000 euros over the three years prior to notification of a potentially foreign-subsidised acquisition.

The Group observes that the EU state aid regime requires EU member states to notify the Commission when they provide aid in excess of 200,000 euros over three years to a single undertaking. This is a low threshold in the modern business environment. The Group believes that materially higher thresholds should be considered to ensure that transactions that are not likely to cause concerns about distorting the EU internal market are not caught by the notification requirement and that Module 2 will focus on the most significant distortive cases.

In addition, 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. If a purchaser receives subsidies from multiple non-EU governments, the separate subsidies may not be distortive and no basis has been provided for expecting that distortions would arise in respect of cumulative small subsidies from more than one foreign government. Instead, the proposed notification requirement should not be triggered unless the purchaser receives subsidies in excess of the Financial Contribution Threshold from at least one non-EU government. This would be consistent with the application of the EU state aid notification regime.

> **Recommendation:** The Group recommends that the Commission consider adopting a Financial Contribution Threshold that is materially higher than 200,000 euros from each individual non-EU government in order to ensure that any review regime focuses on transactions that have important distortive effects on the EU internal market.

III. ***Question 4. Do you consider that Module 2 should include a notification obligation for all acquisitions of EU targets or only for potentially subsidised acquisitions?***

As already noted, the Group believes that the notification requirement should apply only to the transactions that are most likely to raise concerns about distorting the EU internal market. It is important that the notification requirement should apply only to foreign subsidised acquisitions that are likely to distort the EU internal market in order to minimise unnecessary disruption of capital markets, burdens on M&A parties and resource implications for the competent authority.

IV. ***Question 7. Do you agree that the enforcement responsibility under Module 2 should be for the Commission?***

In view of the objective of focusing on distortions to the EU internal market, the Commission would appear to be the most obvious choice of competent authority. Such an institutional design would hopefully also promote a more coherent interface with the existing merger review regimes.

> **Recommendation:** Based on the information currently available regarding the proposal to regulate foreign-subsidised M&A transactions that may distort the EU internal market, the Group agrees that the Commission should be the sole competent authority for applying such a regime.

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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