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Reply to the Attention of: William Wu
Direct Line: +1.416.865.7187
Email Address: william.wu@mcmillan.ca
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Submitted Electronically via amendment@mycc.gov.my

Iskandar Ismail
Malaysia Competition Commission
Level 15, Menara SSM@Sentral
No. 7 Jalan Stesen Sentral 5,
Kuala Lumpur Sentral
50623 Kuala Lumpur, Malaysia

Dear Sir,

Re: Proposed Amendments to the Competition Act 2010

We write on behalf of the Merger Streamlining Group (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 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 Procedures* ("*Guiding Principles*") and the *Recommended Practices for Merger Notification and Review Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN").[2] As you know, the Malaysia Competition Commission (the "Commission") is a longstanding 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, Chile, China, European Union, India, Japan, Korea, Philippines, South Africa, the United Kingdom, the United States, Vietnam and many others).

The group commends the Commission for its commitment to improving the effectiveness of Malaysia's *Competition Act* and for consulting on the proposed approach for

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

introducing a merger control regime in Malaysia. As the Commission has observed, merger review is one of the pillars of most effective competition law regimes.

The Group notes that the international resources listed in the Consultation Document do not include those developed by the ICN. The Group encourages the Commission to consider the ICN's *Guiding Principles* and particularly the *Recommended Practices* as resources that reflect international best practices, and to design and implement Malaysia's new regime in accordance with such best practices. This submission focuses primarily on the application of the *Recommended Practices* to the Commission's proposals.

1. Voluntary versus Mandatory Notifications

Voluntary notification processes can focus merger reviews on the relatively rare transactions that give rise to serious competition concerns.[3] A well-designed system will create incentives for parties engaging in potentially problematic transactions to notify the competition authority voluntarily pre-closing, in order to avoid the risk of a disruptive investigation and possible dissolution, divestiture or other remedy being imposed post-closing. This also allows parties of non-problematic transactions, which are not expected to generate credible complaints from market participants, to avoid the time and cost of mandatory merger review proceedings. The competition authority benefits by being able to dedicate its enforcement resources almost entirely to transactions that raise competition concerns without needing to spend resources reviewing substantial numbers of notified transactions, the vast majority of which will ultimately be found to be non-problematic.

Several jurisdictions have operated very successful voluntary regimes. They include Singapore, Australia and the United Kingdom. The Group encourages the Commission to consider starting with a voluntary system for a trial period of 3-5 years, at which point it will be better placed to assess whether to make the significant further investment of resources needed to implement a mandatory notification regime.

Alternatively, if the Commission considers it desirable to ensure that it will automatically review larger transactions, the Group encourages the Commission to begin by setting mandatory notification thresholds at a relatively high level. This will minimize the burdens on private parties and use of Commission's scarce enforcement resources, while also allowing it to supplement the voluntarily-notified transactions with reviews of a modest number of transactions that involve sizeable sales and/or assets in Malaysia (see also the further comments below regarding nexus and thresholds). Over time, thresholds could be further adjusted to calibrate the proportion of mandatorily-notified mergers based on a cost-benefit analysis informed by the experience with the initial level of thresholds.

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[3] In virtually all merger control regimes, the proportion of transactions that require enforcement action or remedies is less than 10%: see the statistics provided by the countries included in Global Competition Review, *Rating Enforcement*, available online at <https://globalcompetitionreview.com/survey/rating-enforcement/2021> .

2. Material Local Nexus

The *Recommended Practices* emphasize the importance of ensuring that a material local nexus exists between domestic markets and the merger transactions subjected to a competition authority's jurisdiction, particularly in a mandatory notification and review regime. In this regard, the *Recommended Practices* state:

> *Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction.*[4]

The importance of this central tenet has grown steadily with the proliferation of international merger transactions in the two decades since the *Recommended Practices* were first developed.

While the Commission has a legitimate interest in reviewing transactions that may have significant effects on Malaysian markets and customers, it is also important to avoid expending the Commission's scarce resources and imposing significant burdens on private parties by requiring notifications from and reviewing mergers that are not likely to have significant local effects. Accordingly, the *Recommended Practices* state:

> *In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without a corresponding enforcement benefit. …*[5]

3. Design of Notification Thresholds

The Group highlights three particularly important considerations from the *Recommended Practices* for the Commission's consideration when it develops Malaysia's notification thresholds.

First, in line with the importance of local nexus from a jurisdictional and substantive standpoint, as discussed above, notification thresholds should focus on identifying transactions that have large potential effects on markets in Malaysia. While many jurisdictions have adopted thresholds that include worldwide turnover (or other non-local elements), there is no rational policy basis for such an approach. Indeed, it is likely to be counterproductive, because it will result in notifications of transactions involving parties that may have substantial sales outside Malaysia but may not have significant sales in Malaysia. For such transactions, parties and the Commission will expend resources on the notification and review of transactions that are unlikely to have significant competitive effects in Malaysia.

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[4] Recommended Practices, II.B.
[5] Recommended Practices, II.B., Comment 1.

In this regard, the *Recommended Practices* state:

> *… 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.*[6]

Second, it is very important for merging parties – and for competition authorities – to have clear, objective and relatively straightforward thresholds. This allows expeditious size-up of whether or not a proposed transaction is notifiable. Accordingly, the *Recommended Practices* state:

> *Notification thresholds should be clear and understandable.*[7]
>
> *Clarity and simplicity are essential features of well-functioning notification thresholds. Given the increasing number of multi-jurisdictional transactions and the growing number of jurisdictions with merger notification requirements, the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable "bright-line" tests.*[8]
>
> *Mandatory notification thresholds should be based on objectively quantifiable criteria.*[9]

In the Group's experience, thresholds based on financial statement information (e.g. sales in Malaysia and/or assets in Malaysia) meet the *Recommended Practices* criteria. By way of contrast, market shares are not objective or clear, and are not well-suited for use as notification thresholds. As the *Recommended Practices* state:

> *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*

[6] Recommended Practices, II.B., Comment 1.
[7] Recommended Practice II.D.
[8] Recommended Practice II.D., Comment 1.
[9] Recommended Practice II.E.

> *such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.*[10]

4. Review Timelines

Most merger transactions are time-sensitive. Reasonable and predictable timelines play a critical role in ensuring effective and efficient merger review processes. The Group has several suggestions related to review timelines arising from the Consultation Document and the Salient Points document.

First, the Group commends the Commission for proposing an initial "first phase" within which it would try to complete the reviews of non-problematic transactions and identify the sub-set of cases that need a more detailed assessment in a "second phase". The *Recommended Practices* support this approach:

> *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.* [11]

Second, it is common to have the first phase review period as well as the second phase review period each established by statute and connected to the suspensive period in which parties are precluded from closing. A suspensive period that expires at the end of the first phase encourages the competition authority to conduct the initial screening process efficiently and allows parties to proceed to implement transactions promptly, unless a decision is made to conduct a second phase review. The *Recommended Practices* encourage this approach:

> *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 competitive concerns or present concerns that can be readily identified and effectively addressed in the initial period to proceed with minimal delay.*[12]

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[10] Recommended Practice II.E., Comment 1.
[11] Recommended Practice IV.B., Comment 1.
[12] Recommended Practice IV.C., Comment 1.

The Group therefore encourages the Commission to incorporate a statutorily-defined first phase review period into the Malaysia regime.

Third, the Group encourages the Commission to reconsider the allocation of 40 working days of the total statutory timeline of 120 working days for the first phase review. In the Group's respectful review, 40 working days (which amounts to about 55-60 calendar days) is significantly longer than needed for a first phase of review. Many jurisdictions complete their first phase of review in a time period in the range of 30 calendar days. The *Recommended Practices* recommend:

> *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. … Initial review periods should expire within six weeks or less …*[13]

Fourth, the Group has concerns that the "stop-the-clock" provisions in the proposed regime are designed in a manner that will undermine the certainty and reasonableness of the prescribed review periods, because every information request will allow the review time periods to be extended. The Group recognizes that additional information beyond the contents of the notification will often be required from merging parties at various points in the investigation. Merging parties generally have incentives to respond promptly to information requests and facilitate timely progress by competition authority staff. Where this does not occur, a stop-the-clock power is appropriate. However, the Group respectfully recommends that the stop-the-clock power should not be automatic upon the issuance of an information request; such power should only be available where the merging parties have not responded to an information request within a reasonable period of time. The *Recommended Practices* state:

> *Some competition agencies have the power to issue requests for information that have the effect of interrupting or suspending the waiting period. To avoid unnecessary uncertainty, these agencies should identify the circumstances in which they will use this power*. [14]

Fifth, the Group agrees that it is useful to have a time period established for the assessment of commitments that may be proposed by the merging parties (during the first or second phase of a review) to remedy potential competition concerns. However, in the Group's respectful view, 60 working days is an excessive time period for such a review, particularly when it is structured as stopping the clock on the first or second phase review period. The Group recognizes that various steps may be needed to assess commitments appropriately, but respectfully suggests that a time limit in the range of 30 calendar days should be sufficient.

[13] Recommended Practice IV.A., Comment 2.
[14] Recommended Practice IV.C., Comment 3.

5. Voluntary Notifications

The Group also considers that there are two important timeline issues that should be addressed in respect of voluntary notifications.

First, it appears that the proposals do not specify timelines for voluntary notifications. This would create uncertainty for merging parties (and the Commission), and may undermine the use of the voluntary notification regime. The Group believes that it would be useful to apply the same time limits that exist for transactions that exceed the notification thresholds (as discussed above) to voluntary notifications. The Group does not see any impediments or disadvantages arising from such a parallel timing framework. In this regard, the *Recommended Practices* state the following regarding non-suspensive regimes, which apply with equal force with voluntarily notified transactions:

> *… many of the timing considerations applicable to suspensive jurisdictions also apply to review periods in non-suspensive jurisdictions. Therefore, initial review periods should be subject to definitive and readily ascertainable deadlines to facilitate clearance of transactions that do not present material competitive concerns with minimal delay, and extended review periods should be subject to determinable deadlines.*[15]
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> *… non-suspensive jurisdictions should consider conforming their initial review period to suspensive regimes.*[16]

Second, the proposals also do not appear to contain any limitation period on the post-closing review of a non-notifiable merger. This creates significant uncertainty for merging parties (and other parties in the markets in which they operate). As a practical matter, it should not take more than a few months after closing of a transaction for market participants to become aware that a merger has occurred and to decide whether they have concerns that would lead them to request an investigation by the Commission.

In addition, in situations where competitive concerns exist, it is desirable for the competition authority to promptly investigate and implement any remedy that is going to be imposed (and the likelihood of the remedy being effective will be higher). Once the parties' operations have been integrated, it may become very difficult — and possibly inefficient — to implement structural remedies. In this regard, the *Recommended Practices* recognize:

> *… the passage of time likely renders it more difficult for the competition agency to conduct its investigation and to obtain effective post-closing remedies.*[17]

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[15] Recommended Practice IV.D., Comment 1.
[16] Recommended Practice IV.A., Comment 2.
[17] Recommended Practice IV.A., Comment 2.

Since it is beneficial for all market participants and the Commission to ensure that any investigation and possible enforcement action is undertaken promptly, the Group encourages the Commission to propose a reasonable statutory limitation period for the commencement of any investigation of a non-notifiable merger (e.g. 6 months or a year, which are time frames used in various other jurisdictions).

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Thank you very much for consulting on the proposed amendments to Competition Act 2010 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 truly,

William Wu

cc: Members of the Merger Streamlining Group