Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 706 7329
www.microsoft.com

Microsoft

19 September 2024

Competition Taskforce
The Treasury
CompetitionTaskforce@treasury.gov.au

Dear Competition Taskforce,

Microsoft appreciates the opportunity to provide our views on the *Reforming mergers and acquisitions – notification thresholds consultation paper* (the **Consultation Paper**).

We support the Competition Taskforce's goal of designing targeted, risk-based notification thresholds that ensure expedited review of notified mergers that do not raise competition concerns in Australia. However, we consider that the proposals for notification thresholds and related requirements set out in the Consultation Paper introduce uncertainty into what will be a new mandatory and suspensory regime. In particular, we view certain of the proposed changes as inconsistent with best practices of other international regimes, carrying the risk of discouraging legitimate business activity which would otherwise benefit the broader Australian economy.

Microsoft offers the following feedback and recommendations on the proposed notification thresholds, based on our global experience and perspectives:

clear, objective, and stable notification thresholds are an important feature of a well-functioning mandatory and suspensory merger regime, providing necessary certainty and predictability for businesses across the economy

to avoid over-capture of mergers with no material impact in Australian markets, monetary thresholds should be set by reference to both the buyer and seller's Australian turnover instead of global transaction value, and

penalties for failure to notify should be both effective and proportionate to incentivise compliance without creating undue business risk.

1. Clear and objective notification thresholds are critical

As noted in our earlier submission to the exposure draft and explanatory memorandum for the *Treasury Laws Amendment Bill 2024: Acquisitions* (the **Merger Reform Bill**), clear and objective notification thresholds are critical to a well-functioning mandatory and suspensory merger regime. As such, Microsoft remains concerned by the uncertainty introduced by Consultation Paper's proposal to use market share-based notification thresholds.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 706 7329
www.microsoft.com

Microsoft

Market share-based notification thresholds lack clarity, which is indispensable in a mandatory and suspensory regime. Markets can be defined differently between different enforcement agencies, even in the context of the same deal, which in turn impacts what share a party possesses. Further, these market definitions may not align with the way the businesses involved in the transaction view a market, or the way data about a market is tracked. A priori calculations of market shares are intrinsically uncertain. Businesses making commercial decisions about future mergers and acquisitions must be able to make a clear assessment of whether they are required to notify a transaction to the ACCC. And such a clear assessment can only be made by reference to clear, unambiguous monetary or control thresholds.

As stated in the ACCC's current Merger Guidelines, market share calculations 'depends critically on market definition'.[1] And market definition, in turn, requires the ACCC to undertake complex competitive analyses of both the product and geographic dimensions of substitution.[2] Notably, 'current evidence from market participants will often be critical' to the ACCC's market definition assessments.[3] Yet this kind of broad-ranging and often competitively-sensitive evidence from third-party market participants – including competitors, customers, and potential entrants – is not necessarily available to merger parties themselves. Not only that, even provided with all possible information from third parties across a relevant market, reasonable minds can still differ on a market's product and geographic boundaries. This is especially true in the dynamic global technology markets in which Microsoft operates. Indeed, in Microsoft's experience, different enforcement agencies can define different markets involving the same products, even in the context of a single deal.

Given these considerable difficulties, it is not surprising that market share-based notification thresholds generally do not feature in other jurisdictions with mandatory and suspensory merger regimes. For example, the United States, European Union, Canada, Brazil, Turkey, Mexico, China, Russia, India, Japan, and South Korea all have mandatory and suspensory merger regimes and rely solely on an objectively-assessable notification threshold – that is, a threshold based on turnover, value of assets, voting interests, or a combination of these.

Additional ambiguity is introduced by the proposal for the monetary thresholds to include a market definition element, where 'all acquisitions within the previous three years within the same product or service market/s (irrespective of geographic location) by the acquirer and acquirer corporate group are proposed to be aggregated for the purposes of assessing whether an acquisition meets the monetary turnover threshold'.[4] It is not clear that this proposal is necessary as the turnover of past target companies would already be included in the current turnover of the acquirer.

Microsoft notes that the Consultation Paper briefly outlines a potential 'notification waiver' process to provide parties with certainty as to whether notification thresholds are met. The utility of a waiver in mitigating some of the uncertainty outlined above will depend on the

[1] ACCC, Revised Merger Guidelines 2008, updated 2017, p6.
[2] ACCC, Revised Merger Guidelines 2008, updated 2017, p13-17.
[3] ACCC, Revised Merger Guidelines 2008, updated 2017, p14.
[4] Consultation Paper, p13.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 706 7329
www.microsoft.com

Microsoft

timing and information requirements of applying for a waiver. Microsoft looks forward to consulting further on these aspects of the waiver process.

Recommendation: we recommend the Taskforce reconsider the proposal to introduce market share based notification thresholds in favour of clear and objective monetary or asset value-based thresholds consistent with the mandatory and suspensory regimes of international counterparts.

For similar reasons, Microsoft remains concerned by the proposal to allow additional 'targeted notification requirements' to be set at the discretion of a Treasury Minister.[5] With little detail in the Consultation Paper regarding procedural safeguards to ensure transparency and accountability of Ministerial decision-making, this proposal introduces yet more complexity and uncertainty into the implementation of an economy-wide overhaul of merger laws.

Lack of certainty and predictability as to the first step of assessing whether a merger is notifiable, combined with the serious proposed consequences of failure to notify resulting in a transaction being voided (as discussed further below), significantly raises the transaction costs of undertaking any merger and increases inefficiency in the broader economy. As a result, these proposals are likely to disincentivise mergers in Australia regardless of competitive or economic impact, including the overwhelming majority of mergers that are acknowledged by the Government and ACCC alike as beneficial to society and the economy.

Recommendation: we recommend limiting Ministerial discretion to introduce additional targeted notification requirements to preserve the clarity and stability of a new mandatory and suspensory merger regime.

2. Setting out a meaningful Australian nexus

The Consultation Paper outline monetary thresholds for notification that include reference solely to global transaction value – AUD200 million under the first limb or AUD50 million under the second limb.[6] These monetary thresholds are likely to result in considerable over-capture of global transactions that do not have a material impact in Australian markets.

To meet the Taskforce's objective of risk-based notification thresholds that are appropriately targeted to mergers that are more likely to raise competition concerns *in Australia*, monetary thresholds should be targeted by reference to *Australian revenue or turnover*, not global transaction size. Moreover, the turnover of the target and acquirer should be separately considered to avoid undermining the Taskforce's preferred risk-based approach to capture less economically significant acquisitions that are made by any acquirer with a large enough turnover in Australia.

The Consultation Paper sets out a jurisdictional nexus based on 'a material connection to Australia, for example, being registered or located in Australia, supplying goods or services to

[5] Consultation Paper, p25-26.
[6] Consultation Paper, p16.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 706 7329
www.microsoft.com

Microsoft

Australian customers, or generating revenue in Australia'.[7] There is no further definition or clarification of what constitutes a 'material connection to Australia', which can easily result in an interpretation that ultimately does not impose any meaningful requirement for a notifiable merger to materially impact an Australian market.

In online and technology markets, it would not be unusual for goods and services to be supplied to Australian customers travelling overseas without having any connection to an Australian market or even being released in Australia. As such, Microsoft urges the Taskforce to require notifiable mergers to have a material nexus to Australia in the form of a reasonable Australian turnover threshold for the target company.

Recommendation: we recommend that monetary thresholds should not be set by reference to global transaction value to avoid over-capture of transactions with no material impact in Australian markets. Australian turnover thresholds should be set separately for the buyer and seller(s) in a proposed transaction.

3. Implementing effective and proportionate penalties

Microsoft supports the implementation of effective penalties to incentivise compliance with a mandatory and suspensory regime. The consequences of non-compliance for merger parties should be significant enough to deter wilful contravention of the requirements without being so extreme as to excessively punish genuine misunderstanding or misinterpretation of notification rules, particularly where notification thresholds and requirements are not based on clear-cut, objective criteria (as discussed above).

For a balanced approach, Microsoft urges Treasury to consider clearly distinguishing between penalties for failure to file with those remedies traditionally related to gun-jumping violations. Whilst a strong disincentive for non-compliance may be helpful, an overly high penalty for an inadvertent error, such as an automatic determination that a completed transaction is null and void in law without the benefit of due process, may not support the Treasury's ultimate objective in creating an efficient mandatory merger clearance regime consistent with other regimes overseas. In other jurisdictions with a mandatory and suspensory merger regime such as the EU and Canada, failure to notify (with or without gun-jumping conduct) results in a financial penalty and/or notification.[8]

In our view, a flat monetary penalty for wilful failure to notify and subsequent completion without clearance strikes the appropriate balance between effective deterrence for violating mandatory filing requirements and encouraging pro-competitive merger activity. If the transaction has not closed, the merger parties should also be required to notify the transaction.

Recommendation: Merger parties who fail to notify a notifiable transaction should be required to notify the transaction to the ACCC if the transaction has not yet closed. A flat monetary

[7] Consultation Paper, p18.
[8] See, e.g., Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Article 7.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 706 7329
www.microsoft.com

Microsoft

penalty is appropriate where parties fail to notify a notifiable transaction and the transaction has closed.

Microsoft is grateful for the opportunity to provide our views on the Consultation Paper. We would welcome the opportunity to further discuss our observations and comments if that would be helpful.

Sincerely,

Liz Fitch
Head of Government Affairs
Microsoft Australia and New Zealand