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INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE – MERGER WORKING GROUP

SUBMISSION TO THE GERMAN FEDERAL CARTEL OFFICE IN RESPONSE TO ITS CONSULTATION ON GUIDANCE ON DOMESTIC EFFECTS IN MERGER CONTROL

February 17, 2014

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1. INTRODUCTION

This submission is made to the Federal Cartel Office ("**FCO**") on behalf of the Merger Working Group ("**Working Group**") of the Antitrust Committee of the International Bar Association ("**IBA**"). (The members of the Working Group are listed in Annex A to the submission.)

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including competition law matters. (Further information on the IBA is available at http://www.ibanet.org.)

The Working Group appreciates the opportunity to make this submission to the FCO and hopes to contribute constructively to the ongoing review of the proposed *Guidance on Domestic Effects in Merger Control* ("**Draft Guidance**"). The Working Group's comments draw on the vast experience of its members in merger control law and practice across the globe.

The Working Group welcomes the FCO's initiative to provide guidance on the assessment of what constitutes appreciable domestic effects sufficient for triggering the application of German law – in particular the *Act against Restraints of Competition* (“ARC”) including its merger control rules – to transactions amongst non-German enterprises. The Working Group welcomes the FCO’s willingness to provide updated guidance, in particular given the introduction of a second domestic turnover threshold in relation to notification requirements and the recent global proliferation of merger control regimes, and believes that the Draft Opinion contains some helpful guidance that illustrates the FCO's thinking on the subject matter. However, the Working Group believes that the Draft Guidance would benefit from greater consistency with international best practice, having regard to the nature of the particular transaction being contemplated and its actual effects on the structure of competition in Germany. Key areas which the Working Group comments on are as follows:

i. The distinction between turnover in Germany and appreciable effects on the structure of competition (refer to ICN Recommended Practices for Merger Notification Procedures IA);

ii. ICN Recommended Practices for Merger Notification Processes note that merger notification thresholds are a screen for transactions that are unlikely to result in appreciable competitive effects. The substantive competition assessment is based on an assessment of competition dynamics. The Working Group has a concern that this distinction has become blurred (refer to ICN Recommended Practices for Merger Notification Procedures IIA);

iii. While ICN Recommended Practices note that market shares and measures of market concentration can play an important role in merger analysis, they are not determinative of possible competition concerns. The Working Group has a concern that the FCO are seeking to use a notification threshold which is even one step further removed from market forces, to seek to make assessments of an impact on competition (refer to ICN Recommended Practices for Merger Notification Procedures IIB);

iv. The Working Group believes that the Draft Guidelines could be further improved by a focus on providing guidance on how the FCO assesses the impact of a transaction in Germany. This is particularly helpful for international companies and the Working Group would welcome an opportunity to assist the FCO in developing this guidance with the FCO.

The Working Group believes that, while well intended, the Draft Guidance could – by extending pre-merger control requirements to transactions that are not in fact able to appreciably affect structural conditions of competition in Germany – have the unintended consequence of creating additional transactions costs that would negatively affect parties to transactions that do not have a clear nexus to or impact Germany (and would cause an unnecessary drain on the FCO's enforcement resources). By applying an overly broad approach to what constitutes appreciable domestic effects, the FCO, recognized as one of the leading competition authorities in the world, could also inadvertently influence less experienced competition authorities around the world to adopt similar approaches when defining the scope of their own jurisdiction as it applies to multinational companies. Thus, the Draft Guidance not only misses an opportunity to more clearly align German administrative practice to the sensible standards advocated by the ICN, but also creates a risk that developing competition jurisdictions may follow this approach as well.

2. COMMENTS ON THE DRAFT GUIDANCE

2.1 Point of reference for assessing domestic effects

The Working Group believes that the FCO is right to distinguish (at paras. 6 *et seq.*) the turnover thresholds contained in Section 35 (1) ARC –which will trigger the notification requirement of transactions that are subject to the ARC – from the existence of domestic effects required by Section 130 (2) ARC – which determine the application of the law in the first place. The former are a formal tool to identify notification requirements in cases that are subject to the law, the latter requires a substantive assessment to determine the reach of the law in cases where the act to which the law is to be applied occurs abroad. The former requires a counting of turnover, whereas the latter requires an analysis of the impact of the transaction on the structure of competition in Germany.[1]

The Working Group also agrees that the determination of whether a transaction is likely to produce appreciable domestic effects sufficient to trigger the applicability of German merger control needs to focus on the impact which the transaction is likely to have on the structure of competition in Germany. Given the more complex nature of this

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1 The Working Group also believes that the absolute value of the turnover thresholds of Section 35 (1) ARC is much too low to appropriately determine an appreciably effect on competitive structures in Germany. Experience in other European jurisdictions shows that, to effectively remove relatively inconsequential transactions from the scope of the merger control rules, such thresholds must be much higher – even if the countries in question are much smaller than Germany. Thus, for example, each of at least two of the undertakings concerned must have had more than EUR 15 million turnover in Greece, more than EUR 30 million in the Netherlands, more than EUR 40 million in Belgium, more than EUR 50 million in France, or more than EUR 60 million in Spain to trigger merger control. It is already questionable whether general turnover figures can act as a meaningful indicator for the existence of sufficient effects for purposes of triggering national rules under generally accepted rules of public international law. However, even if such thresholds are considered, this small European sample shows that the second domestic German threshold would not meaningfully exclude transactions that do not give rise to appreciable effects in Germany. While the FCO cannot change these thresholds – this would need action by the legislator – it should at least not use them as a primary point of reference for assessing the potential effects of a transaction on the structure of competition in Germany for this reason alone.

assessment, turnover achieved in Germany is a poor indicator for the potential impact which a transaction can be expected to have on the structure of competition in Germany. It is acknowledged that for practical purposes the parties will be tempted to raise the jurisdictional issue in only few cases in which they meet the turnover thresholds. However, linking turnover and market impact together creates confusion about the analysis that actually needs to be conducted to determine the existence of effects in Germany sufficient to trigger the application of the law.

In particular, creating an irrefutable presumption of the existence of such effects where the turnover test is met – as the FCO seems to suggest in para. 12 – is conceptually flawed and inconsistent with international best practices, including the ICN's Recommended Practices. The Working Group thus believes that the reliance which the FCO proposes to place on turnover data would tend to obfuscate the real issue, namely the identification of likely effects on the structure of competition in Germany. Notwithstanding choosing the right starting point (*i.e.*, distinguishing turnover from effects on competition), the FCO misses an opportunity to provide analytical clarity and risks blurring the two concepts.

2.2. Specific Substantive Issues

a) When establishing whether the setting up of a joint venture will produce domestic effects, the FCO suggests that reference should be made to the **turnover** which the entity is likely to generate **in the next 3 to 5 years** (para. 13). We have noted that turnover is not a satisfactory indicator for the existence of domestic effects. However, the Working Group would also like to point out that under the ICN recommendations the effects on the structure of competition need to be present when the transaction is consummated (in this case, when the joint venture is set up), not at some more or less distant time in the future, which in the Working Group's view could be highly speculative.[2]

[2] It should be noted that while effects on the structure of competition may be immediate, the effects that can be felt by customers may take some – limited – time to materialise. The Working Group believes that it is the former effect that must be relevant for purposes of assessing the applicability of national rules, provided that the latter are sufficiently certain to materialize in the foreseeable future.

Section 130 (2) ARC contains a jurisdictional norm. In line with the effects doctrine established under public international law, the provision requires the existence of actual and current effects to be present for the application of the ARC. This is confirmed by the use of the present tense in the text of the provision itself. Thus, Section 130 (2) ARC, while it does require a substantive assessment, differs from the provision that governs the substantive review in Section 36 ARC. The former requires appreciable effects to be present at the time the act to which the law is applied occurs while the latter focuses on the effects the relevant transaction will produce in the foreseeable future. For this reason, the Working Group believes that the analysis of the existence of domestic effects also cannot be based on the expected future activities of (potentially reflected in the amount of turnover that might be generated by) the parties to the transaction.

Under these circumstances, the Working Group suggests that, should the FCO maintain its reliance on turnover, the text of the Guidelines should at least be adapted to focus on past turnover achieved by the parties. Preferably, though, the text should be adapted to focus on current market position of the parties and, in the case of the establishment of a joint venture, the activities of the parties contributed to the new entity as a determining factor for the existence of appreciable effects within the meaning of that provision.

b) The same considerations apply with regard to the evaluation of whether domestic effects can clearly be ruled out. In para. 15, the FCO suggests that this requires the joint venture to be neither an actual nor **potential competitor** in the German market.

The Working Group believes that, due to the general reference to the broad concept of potential competition, this position goes well beyond what is required by Section 130 (2) ARC. There may be cases where the acquisition of a joint venture (or setting up of a new venture, having regard to the activities that are contributed to the entity) that is not currently active in Germany may have a direct effect on the structure of competition in Germany. However, this will only be the case if the entity – albeit not having generated actual sales in the country – already exerts competitive pressure on other players active in Germany. This may, for example, be the case where the entity is active on a geographically neighbouring market, market entry would be easy and such market entry must be considered by other players as a competitive restraint in relation to their activities in Germany. In such a situation, even a potential competitor could arguably be considered to form part of the competitive landscape in Germany. However, in many, if not most, circumstances in which a joint venture is not active on the German market, it will not form part of the German market structure. Its acquisition in such cases will not produce domestic effects, or if such a transaction is regarded as producing effects in Germany, these would not appear to be sufficiently direct and appreciable to fulfil the requirements of Section 130 (2) ARC. Given the potentially speculative nature of such assessments the Working Group suggests that this aspect of the proposed Draft Guidance should be revised.

c) The explanations in para. 15 and para. 19 of the Draft Guidance focus on joint ventures, which will, at least initially, only be active on foreign markets but may eventually become active in Germany as well. They do not elaborate on the treatment of joint ventures that are designed to serve their parents only and therefore will never become active on any external market, either foreign or domestic. Given that German merger control purports to apply to non-full-function joint ventures of this kind as well, it would be useful for the FCO to provide guidance on how to assess the ability of such a transaction to produce domestic effects in Germany (in particular where the parents previously did not purchase the relevant goods in the market at all, but produced them internally for their own consumption). Should the analysis rely on the value (and geographic allocation) of internal sales or on the external sales generated by the parents? Arguably, the latter would appear rather inappropriate, in particular where the input value of the joint venture in relation to the value of the final product produced by the parents is small. The Working Group believes that the FCO should provide guidance on how it will treat such cases.

d) In para 16, the FCO suggests a further condition to the lack of domestic effects by requiring that neither parent company of the joint venture (or a group company associated with them) be an active or potential competitor in the same market as the joint venture or in a vertically related market. The Working Group believes that such a requirement conceptually goes beyond what needs to be shown to identify a clear lack of domestic effects.

Firstly, it seems rather doubtful that potential **spill-over effects** that a joint venture could give rise to in general could constitute sufficiently direct effects for purposes of triggering German merger control rules. Spill-over effects are a behavioural issue that can be addressed under Section 1 ARC / Article 101 TFEU. Such an investigation may be carried out contemporaneously where both structural rules (*i.e.*, the merger control regime) and behavioural rules apply side by side. However, even if there is merit in the FCO's approach not to clear transactions that are subject to merger control rules before behavioural issues have been resolved, is important to note that systematically the two are distinct.[3]

Section 130 (2) ARC is explicit in stating that the ARC applies to "*all restraints of competition having an effect within the scope of application of this Act*". The FCO in para. 8 of the Draft Guidance correctly points out that for purposes of the merger control rules, these 'restraints' are changes to the market structure. They are not the restraints captured by behavioural rules contained in Section 1 ARC. The two types of restraints are different and are dealt with under different sets of substantive and procedural rules. Thus, if the FCO believes that a transaction gives rise to sufficiently strong and direct spill-over effects to raise issues under Section 1 ARC, it can and should proceed with an investigation under this provision. It should also advise the parties of the need to carry out a self-assessment foreseen by Section 2 ARC and Article 101 (3) TFEU for non-domestic transactions that may lead to spill-over effects in Germany. However, it should not use such potential concerns as a pretext for also requiring the parties to file a merger control notification that is aimed to address different competition issues.

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[3] It should be noted that, unlike the European Merger Control Regulation in Article 2 (4) ECMR, the ARC does not foresee, let alone require, the FCO to conduct an assessment under Sections 1 and 2 ARC in the context of the merger control procedure. Thus, while both issues may be looked at together as a matter of administrative convenience, they are not formally linked.

The specific effects that give rise to the application of German merger control rules are different from the effects on competition generally captured under the heading of spill-over effects. Confusing the two leads to an extension of the scope of German merger control rules, which is not covered by the provision of Section 130 (2) ARC. The fact that it might be convenient for the FCO to obtain knowledge of the joint venture that may give rise to concerns under the behavioural rules by way of a pre-merger notification is no substitute for the fulfilment of the legal prerequisites for the application of the merger control provisions. The Working Group therefore suggests that the requirement to show a lack of spill-over effects between the parents of a proposed joint venture be deleted from the draft guidance that exclusively relates to merger control aspects of such transactions.

e) The FCO suggests in para. 17 of the Draft Guidance that - in the case of a joint venture – domestic effects on competition can only clearly be ruled out if its parents also are not active or potential competitors on any other market in Germany. The Working Group strongly believes that the activities of the parents in unrelated markets are irrelevant for assessing the effects which the creation of a joint venture may have on the structure of competition in Germany. In fact, the Working Group is not aware of any case anywhere where activities in unrelated markets were considered to give rise to potential spill-over effects. This requirement is also explicitly acknowledged by Article 2 (5) first indent of the ECMR. Thus, even if spill-over effects were considered sufficient to trigger German merger control, which the Working Group believes they should not, activities in such unrelated markets would not have a sufficiently direct relation to the transaction to give rise to appreciable domestic effects. The Working Group therefore suggests that this requirement be deleted from the Draft Guidance.

f) Should the FCO nevertheless decide to keep spill-over effects as a possible triggering event for the application of German merger control rules, the Working Group believes that Guidance should at least clarify that it would require two parent companies with currently competing activities in Germany to produce such effects. The existence of **only one player in the relevant market** will generally not be sufficient to create potential issues of *coordinating* competitive behaviour.

There may be exceptional circumstances where a second player, although not generating any actual sales in Germany in the relevant market, exercises a sufficiently strong restraint to appreciably influence competitive conditions in Germany in this market. However, the Working Group believes that these instances will be rare and that the fact that another player could theoretically enter the German market in itself is far from sufficient to trigger such appreciable effects on competition in Germany.

g) This leads to a more general observation relating to the description of the analytical framework for assessing cases that may or may not give rise to appreciable effects in Germany. The Working Group suggests that this section should be at the core of the Guidance from the FCO. The guidance is particularly relevant in those instances where a more detailed assessment is required.[4] The Draft Guidance provides a mere three paragraphs regarding this topic – two of which deal with the assessment of spill-over effects which concern behavioural issues and are irrelevant for purposes of the application of merger control rules as they are triggered by the existence of effects on the structure of competition. This leaves but a single paragraph of the Draft Guidance to deal with the issue that concerns most companies in need of analysing the jurisdictional reach of German merger control rules. This, it is suggested, is the area where parties really are in need of more detailed guidance.

The Working Group acknowledges that such an assessment will always be very specific to the facts of a particular case. However, it believes that parties would benefit from **further guidance regarding the relevant parameters** that need to be taken into consideration in this section. A more detailed description of the factors that play a role in the assessment would help parties to assess the applicability of German law to their transaction. Given the position of the FCO in

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4 The Working Group suggests that this may not only apply for cases outside the two categories of cases defined by the FCO in which German law apparently clearly applies or does not apply. It is suggested that there may be – very exceptional – cases in which the turnover thresholds of Section 35 (1) ARC are fulfilled, but where the transaction still lacks sufficient domestic structural effects to trigger German merger control rules. An example might be the acquisition of a foreign engineering business that has long ceased to do active business in Germany but had a one off sale of spare parts for one of its former projects that generated more than 5 million EUR. Arguably, these are likely to be very rare cases. However, the Draft Guidance so far fails to acknowledge their existence.

the context of the international competition community, reflected in its depth of experience as well as current leadership of the ICN, it is suggested that such guidance may also have an impact on the way other countries apply their laws. In this way, providing a sensible approach to the question of jurisdictional reach, the FCO would contribute to limiting regulatory involvement to cases that clearly, directly and appreciably impact local structures of competition.

Such an approach would also give the FCO an opportunity to address the decision of the Federal Supreme Court in *Organische Pigmente* in its historical context and avoid the appearance that the judgment set out a general rule that was applicable outside the legal and factual context it was taken in. The Working Group believes that this judgment, handed down nearly 35 years ago, must be understood in its historical context, which involved the law in relation to a *post-merger* notification requirement. Section 130 (2) ARC, as the FCO correctly points out, should be interpreted in the light of the aims of the relevant provision. The less burdensome nature of a *post-merger* notification requirement may well explain the willingness of the court to define the jurisdictional reach of the provision very broadly. The Working Group expects that a court might apply a more narrow reading of what constitutes appreciable domestic effects for purposes of the more burdensome pre-merger control regime. Also, it needs to be remembered that this decision was issued at a time when only a handful of jurisdictions applied effective merger control regimes. In this situation, there may have been an inclination to apply German merger control widely to capture foreign transactions that might otherwise not be assessed at all. However, the situation has significantly changed since then. Today, more than 100 jurisdictions apply merger control rules to transactions that have a direct and appreciable local effect. Thus, there is much less – if any – need to aggressively extend the reach of German merger control rules for fear that they might otherwise not be reviewed at all.

An expansive approach to the issue of jurisdiction is unwarranted in the global economy. It may be detrimental in adding to the burden created by the proliferation of merger control regimes, which affect not only the parties involved but also the demands on agency resources. Clearly, various elements identified by the Federal Supreme Court in 1979 – the parties' market share, the transfer of technology – continue to be relevant. However, the weight they are given may need to be adjusted to reflect the level of global merger control enforcement that we are seeing today. It would be helpful to understand other parameters that are considered important to the FCO that should be added to provide a comprehensive picture of what affects the local structure of competition. The Working Group therefore suggests that para. 19 of the Draft Guidance should be expanded with a view to delineating an appropriately balanced reach for German merger control rules – and thus, by way of example, positively influence other competition agencies to exercise an appropriate level of restraint in jurisdictional questions as well.

h) The Working Group suggests that these considerations also would apply if the FCO decided to maintain its position with regard to potential spill-over effects. This would be the case especially, but not exclusively, when assessing potential spill-over effects of a foreign joint venture on competitive activities of two or more of the parents in related (upstream or downstream) markets in Germany or where spill-over effects including related companies and concerning other markets are involved. Here, spill-over effects are much less likely than in those cases in which all direct participants are active on the same product market. The Draft Guidance note already contains some indications in this regard. However, a more detailed description of the analytical approach to the assessment in such instances would be helpful.

One of the parameters addressed by the FCO is the joint share of the parents on the relevant market. The Working Group finds it interesting to see that the FCO relies on such a criterion for jurisdictional purposes at a time when the legislator has moved the market share-based *de minimis* exemption from a jurisdictional sphere in Section 35 ARC to the substantive assessment in Section 36 ARC. However, the Working Group believes that the market share (or at least its approximate value) constitutes an important element of assessing the impact a transaction may have on the market. In particular the experience from the Block Exemption Regulations in the European context shows that such criteria can be effectively applied in the context of assessing market behaviour of the relevant parties. While it has been rightly noted in the ICN Recommended Practices that market share-based thresholds are unduly burdensome for use as general filing thresholds, it may be appropriate to use them as a form of safe harbour in the determination of the reach of national merger control rules in those rare cases in which filing requirements may need to be considered in more detail.

Furthermore, the Working Group suggests the Draft Guidance should clarify that the relevant market to determine the joint market shares is the economically relevant market (which may be a European or world-wide market) not just the domestic part of the market. The purpose of this assessment is to determine the likelihood of implicit coordination amongst the parents of a joint venture having regard to the possible incentives to do so, which is influenced by their market position. For this purpose, the economically relevant market – the market on which the parties compete – must provide the yardstick by which to measure such incentives and effects.

In this regard, the Working Group suggests that the FCO provide more detailed guidance on the factors that may be relevant in assessing the potential for spill-over effects.

The Working Group agrees that the market shares held by the parties may be one of these factors. However, it is suggested that the market shares which the parents must hold to make spill-over effects likely is much higher than the 10% suggested by the FCO in its Draft Guidance. For example, the European Commission found that a total market share of less than 25% in the relevant markets in which co-ordination could occur was an indication that coordination was unlikely.[5] It is suggested that the Draft Guidance be adapted in a way that would broadly harmonize the approaches under European and German rules.

The Working Group also notes the introduction of the concept of 'economic significance of a joint venture' as criterion for assessing the potential spill-over

[5] See decision of 22 June 1998, Case IV/JV.2 ENEL/FT/DT [para. 40: "*less than 15% on the EC market*"]; decision of 3 February 2000 in Case COMP/JV.36 TXU/Europe/EDF-London Investments. See also decision of 30 September 1999 Case IV/JV.22 Fujitsu/Siemens where the Commission considered a market share of between 20% and 40%, with the three biggest players in the market having a combined market share of 70% as being conducive to co-ordination.

effects in the Draft Guidance. The Working Group believes that such 'economic significance' should be quantified in relation to the parent companies in order to provide a safe harbour for instances where the joint venture lacks such significance. Since this assessment only becomes relevant in those instances in which potential spill-over effects between the parent companies (as only possible effects of the setting up of a joint venture in Germany) are looked at, it is suggested that a signficant ratio should be explicitly included in the Guidelines. It is difficult to see how the activities of the joint venture would have an economic significance for the parents that provides a sufficiently strong incentive for the coordination of their activities if the joint venture accounted for less than 10% of the turnover of the parent companies.

The Working Group also believes that an explanation of other factors that may be relevant in the identification of possible spill-over effects (or a lack of such effects) would be helpful. This might include details on the relevance of the homogenous or heterogeneous nature of the product and the innovative nature of competition,[6] the competitive nature of the market in question,[7] whether the market structure is conducive to co-ordination,[8] the existence of economically meaningful incentives for co-ordination[9], the potential scope of co-ordination,[10]

6 See European Commission, decision of 27 September 2002, in Case COMP/M.2874 Starcore LLC.

7 For example, due to unpredictable price trends or rapid technological development, or the exercise of counterweighing buying power; see for example decision of 30 September 1999 in Case IV/JV.22 Fujitsu/Siemens.

8 Factors such as high growth, low barriers to entry, supply far exceeds demand, excess capacity, emerging market with significant actual or potential competitors make co-ordination unlikely.

9 This might include an analysis of the relative size of the markets(s) in which co-ordination could occur compared to the joint ventures market(s) or vice versa; as well as the question of whether one party is not active on the other party's or joint venture's market to a noticeable degree. See for example decision of 15 September 1999 in Case IV/JV.11 @Home Benelux BV; decision of 28 February 2000 in Case COMP/JV.39 Bertelsmann/Planeta NEB; decision of 3 February 2000 in Case COMP/JV.30 BVI Television (Europe)/SPE Euromovies Investments/Europe Movieco Partners; decision of 21 March 2000 in Case COMP/JV.42 Asahi Glass/Mitsubishi/F2 Chemicals; and decision of 1 August 2003 in Case COMP/M.2141 Cementbouw/Enci/JV.

10 For example, because the parents have only minimal activities in European markets; effective co-ordination would involve third-parties whose incentives are not necessarily the same; withdrawal of a competitor of the joint venture thereby reducing the scope for co-ordination; see decision of 16 February 2004 in Case COMP/M.3334 Arcelor/ThyssenKrupp/Steel 24/7; and decision of 19 July 2004 in Case COMP/M.3333, Sony/BMG.

the possibility to access sensitive information,[11] the option of entering into competing joint venture arrangements,[12] the highly regulated nature of the relevant markets,[13] and overlaps (or lack thereof) in the distribution channels of the parties.[14] Finally, but very importantly, the FCO should explain the need to find a causal link between any potential co-ordination amongst the parties and the establishment of the joint venture.[15]

2.3. Specific Procedural Issues

a) The FCO in para. 10 suggests that, for purposes of establishing an appreciable domestic effect that triggers the application of the German merger control rules, a lower standard of proof is to be applied than when substantially intervening in a transaction. The Working Group believes that this is not the case. There is no reason whatsoever why a different standard of proof should apply to the establishment of jurisdiction than to the actual intervention in a particular case. It is acknowledged that different substantive requirements exist for the finding of jurisdiction and the justification of a substantive intervention in a case. However, no reason exists why a lower standard of proof should apply to the former than to the latter. The fact that the authority may find it inconvenient to spend resources on establishing its jurisdiction alone is not sufficient to change the requirements in this regard. The Working Group therefore suggests that this reference should be deleted from the Draft Guidance.

b) In para. 23 the FCO points out that it may be more convenient for parties , and the agency, to leave the question of jurisdiction open, file a brief notification, and quickly receive clearance for a transaction that does not raise any substantive competition concerns. As a practical matter, the FCO may well be right in its

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11 See, for example, decision of 16 May 2003 in Case COMP/M.3101 Accor/Hilton/SixContinents/JV; decision of 16 February 2004 in Case COMP/M.3334 Arcelor/ThyssenKrupp/Steel 24/7; and decision of 19 July 2004 in Case COMP/M.3333 Sony/BMG.

12 See, for example, decision of 3 February 2000 in Case COMP/JV.30 BVI Television (Europe)/SPE Euromovies Investments/Europe Movieco Partners.

13 See, for example, decision of 1 June 1999 in Case IV/JV.18 Chronopost/Correos.

14 See, for example decision, of 17 August 1999 in Case IV/JV.21 Skandia/Storebrand/Pohjola.

15 See, for example, decision of 21 March 2000 in Case Comp/JV.37 BSkyB/Kirch Pay TV; and decision of 19 July 2004 in Case COMP/M.3333 Sony/BMG.

assessment of the expenditure of public and private resources. In fact, many companies are likely to follow this suggestion in order to quickly deal with the matter – usually in less than the one month time period which the FCO cites in this section. The Working Group recognizes the practical and efficient approach taken by the FCO in respect of the information required for purposes of the notification. However, the Working Group also believes that the jurisdictional reach of German merger control rules should not be made subject to administrative convenience. The Draft Guidance is right to propose an explanation of the circumstances in which a filing may or may not be required. This is important as the FCO lacks the power to issue an unqualified decision in cases that fall into the latter category. In fact, contrary to what the Draft Guidance seems to suggest, the onus of showing that a transaction does produce sufficiently appreciable effects in Germany falls squarely on the FCO. If the authority fails to find sufficient proof for such effects, it must reject a notification on procedural grounds. Being prepared to take decisions in such cases would involve acting *ultra vires*. The Working Group suggests that this would be an unhelpful posture – not just in relation to the FCO's own adherence to legal rules, but also as an example in the international arena, which may encourage other agencies to cut procedural corners. It is therefore suggested that the relevant passage should be deleted from the Draft Guidance.

3. **CONCLUSION**

The Working Group commends the FCO for consulting stakeholders on the Draft Guidance. It believes that such an Opinion will provide useful guidance to parties to transactions that do not directly involve Germany enterprises. To maximise the effectiveness of such guidance, the Working Group encourages the FCO to reconsider some of the specific proposals discussed above that are inconsistent with internationally advocated approaches to the jurisdictional boundaries to competition law enforcement.

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ANNEX A - WORKING GROUP MEMBERS

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