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VIA EMAIL to Inlandsauswirkungen@bundeskartellamt.bund.de

Andreas Mundt
President
Bundeskartellamt
Kaiser-Friedrich-Str. 16
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Germany

Dear President Mundt:

Re: Consultation on Draft Guidance on Domestic Effects in Merger Control

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 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 the current Steering Group Chair of the ICN, I know that you are familiar with the important role that the *Recommended Practices* are playing in promoting improvements in merger review processes, to the benefit of both competition agencies and the private sector.

The Group's work projects have included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the US Antitrust Modernization Commission, and to competition agencies in twenty other jurisdictions (including the United Kingdom, Russia, Brazil, India, China, Japan, Portugal, Spain, Italy, and Germany, in relation to the addition of the second domestic turnover threshold in 2006) to promote reforms consistent with the *Recommended Practices*.

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[1] The current members of the MSG include BHP Billiton, Bombardier, Chevron, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf>.

The Group appreciates the opportunity to provide these comments to the BKartA in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions. We applaud the decision to prepare and consult on the draft "Guidance on Domestic Effects in Merger Control" ("*Draft Guidance*") and the BKartA's objective of endeavouring to screen out those transactions unlikely to result in appreciable competitive effects in Germany. However, the Group is concerned that some of the presumptions regarding domestic effects and spill-overs may, in practice, create unnecessary transaction costs for both the parties concerned and the BKartA itself, which are compounded in this case by the relatively low turnover thresholds which are currently employed in Germany.

I. <u>Presumption Of Domestic Effects If Low Turnover Thresholds Are Exceeded</u>

The Group recognizes that the legislated turnover thresholds are beyond the scope of this consultation, but believes it is important to briefly discuss the thresholds because of their inter-relationship with domestic effects. The German merger control regime requires notification of a transaction where: (i) the aggregate worldwide turnover of the parties exceeds €500 million; and (ii) the domestic turnover of at least one party exceeds €25 million and that of another party exceeds €5 million.[3] Paragraph 12 of the *Draft Guidance* states that mergers which exceed these turnover thresholds will always have sufficient domestic effects to warrant review. The *Draft Guidance* also asserts that sufficient domestic effects will exist where a target company or a joint venture has domestic turnover (or is expected to achieve turnover in the foreseeable future) of at least €5 million.

The Group questions whether mergers and joint ventures will always have material domestic effects in light of the low turnover thresholds. The *Recommended Practices* advise that a jurisdiction "should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory."[4] The "local nexus" threshold should be sufficiently high so that transactions which are unlikely to have a potentially material effect on the domestic economy do not require notification.[5] As we noted at the time that the €5 million domestic turnover threshold was introduced, the Group believes that although this threshold was a useful step forward, it is too low to be considered material or create a sufficient "local nexus" given Germany's position as the 4th-largest economy in the world. Many other jurisdictions with much smaller economies employ higher notification thresholds.[6] It is notable that Germany received 1,100 merger notifications in 2011, far above most other jurisdictions.[7]

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[3] *Act Against Restraints of Competition*, s. 35(1).

[4] *Recommended Practice* I.B, Comment 1.

[5] *Recommended Practice* I.B, Comment 1 and *Recommended Practice* I.C, Comment 2.

[6] For example, France requires notification where at least two of the parties to the transaction each have local turnover in excess of €50 million; Sweden requires notification where each of two parties to the transaction have local turnover in excess of approximately €21 million; Belgium requires notification where at least two of the parties to the transaction each have local turnover exceeding €40 million; Ireland requires notification where at least two parties carry on business in Ireland and at least two parties each have turnover exceeding €40 million, and one of the parties has local turnover exceeding €40 million; Italy requires notification where the combined domestic turnover of all parties exceeds $468

The extension of the presumption of domestic effects to joint ventures expected to have more than €5 million of German turnover in the future is also problematic because of the uncertainty inherent in such a test. The *Recommended Practices* note the importance of objectively quantifiable notification thresholds.[8] Future turnover is difficult to determine with certainty and would be based heavily on estimates, subjective judgment, and assumptions about factors beyond the control of the parties. The uncertainty presented by reliance on future turnover also creates legal uncertainty in the application of merger notification rules.

The Group agrees with the BKartA's stated goal "to avoid the need for mergers without significant effects in Germany to be notified and reviewed by the Bundeskartellamt."[9] The Group is concerned that a presumption of domestic effects tied to low jurisdictional thresholds such as those employed in Germany will fail to screen out transactions that are unlikely to have material local effects. This would impose unnecessary transaction costs on merging parties and expend the BKartA's scarce resources on matters that are unlikely to warrant enforcement action.

II. <u>Limited Situations In Which Domestic Effects Can Be Ruled Out</u>

The *Draft Guidance* contemplates a limited range of cases in which domestic effects can be ruled out. The Group believes that the *Draft Guidance* could broaden this category in a manner which would make more efficient use of the BKartA's enforcement resources while reducing unnecessary burdens on private parties.

In particular, the Group agrees that domestic effects can be ruled out where a joint venture is only active abroad and the parent companies are not active in the same market domestically as the joint venture, nor in an upstream or downstream market.[10] However, the

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million or the acquiree has domestic turnover exceeding €47 million; the Netherlands requires notification where the aggregate worldwide turnover of the parties exceeds €113.45 million and at least two parties each have domestic turnover exceeding €30 million. There are also numerous examples outside Europe: Canada requires notification where the acquiree has assets in Canada or turnover in/from Canada in excess of C$82 million (threshold increased annually); South Korea requires notification where one party to the merger has turnover or assets exceeding KRW 20 billion (approximately €135 million) and another party has local assets or turnover exceeding KRW 20 billion (approximately €13.5 million); Brazil requires notification where one party has turnover exceeding BRL 750 million (approximately €228 million) and another party has local turnover exceeding BRL 75 million (approximately €22.8 million); Mexico requires notification where the value of the acquiree exceeds approximately US$91 million, or the acquiree has local turnover or assets exceeding approximately US$91 million, or where the joint sales of the parties exceeds approximately US$245 million and the domestic assets acquired exceed approximately US$42 million.

[7] *Global Competition Review*, "Rating Enforcement: The Annual Ranking of the World's Leading Competition Authorities", 15:5 (June 2012), at 65.

[8] *Recommended Practice* II.B, Comment 1.

[9] *See* Bundeskartellamt, News Release, "Foreign-to-Foreign Mergers – More legal certainty for companies", (5 December 2013), available online at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/05_12_2013_Inlandsauswirkungen.html;jsessionid=7FA48F5FF6776FCC9DF1D7DDC4CCC5DF.1_cid378?nn=3591568>. *See also Recommended Practice* I.B, Comment 1.

[10] Paragraph 16 of the *Draft Guidance*.

Draft Guidance narrows this exemption by also requiring that the parent companies not be actual or potential competitors in any other relevant product market as there may be spill-over effects (discussed in more detail below). It is unclear how the parent entities' current involvement in other unrelated domestic markets (without any size thresholds) is likely to have an appreciable "direct influence on the conditions for competition" in Germany. It is even less clear why the possibility that they could be potential future competitors is an indicator of material domestic effects arising from a joint venture. The Group therefore encourages the BKartA to consider removing this requirement from the *Draft Guidance*. When combining the narrow exemption with the low turnover thresholds discussed above, and the broad scope of spill-over effects addressed below, in practice very few joint ventures will clearly fall outside the jurisdiction of German merger control.

III. <u>Broad Reach Of The Spill-Over Effects</u>

The *Draft Guidance* contemplates case by case assessment of all other scenarios that do not fall under the presumptions discussed in Parts I and II above. The Group believes that the guidance document would benefit from further tailoring and clarification. The provisions regarding spill-over effects are expansive in scope and place an unduly heavy burden on merging parties at the initial, non-substantive, merger notification stage, which is inconsistent with the *Recommended Practices.*[11]

Paragraph 19 of the *Draft Guidance* indicates that a joint venture achieving less than €5 million in local turnover does not necessarily have "marginal" business activity in Germany. Paragraph 20 adds that domestic effects can exist even where a joint venture has marginal activity in Germany if there are spill-over effects from the parents' activities. Key to the determination of whether such spill-over effects exist is whether the joint venture is of "economic significance" to the parent companies or plays a "strategic role".[12] This concept of spill-over effects is potentially very broad in scope. The terms "economic significance" and "strategic role" are not defined. Many joint ventures could arguably be of economic or strategic significance to the parent companies, depending on how broadly or narrowly these concepts are interpreted. In practice, it may be difficult for companies and their advisors to be confident that these provisions are inapplicable and that a joint venture does not have spill-over based domestic effects.

The *Draft Guidance* also explains that spill-over effects are possible if the joint venture acts as a hinge and facilitates (implicit) coordination between the parent companies. By considering this element in the domestic merger effects assessment, the BKartA makes the initial notification requirement broader and more complex than is warranted. To the extent that the

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[11] *See Recommended Practice* V.B: "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."

[12] Paragraphs 19–21 of the *Draft Guidance.*

BKartA believes the parent companies may be involved in coordinated behaviour, it has the ability to investigate such conduct under section 1 of the *Act Against Restraints of Competition.*[13]

Regardless of whether the general approach to spill-over effects is narrowed as suggested above, the Group encourages the BKartA to define, provide examples of, or quantify the requisite level of economic or strategic significance (with appropriate safe harbours for *de minimis* activities). In addition, it would be helpful to refine the spill-over considerations that may be relevant to the domestic effects assessment through concrete examples and/or a list of relevant factors.

* * *

The BKartA recognizes[14] that an assessment of whether a transaction will have domestic effects can sometimes be more complex than an assessment of any anti-competitive effects — a result the Group believes may be amplified by the *Draft Guidance*. In some cases, "it is possible to determine quickly on the basis of a notification that competition problems can be immediately excluded" without having to fully examine the domestic effects.[15] However, while this approach is practical, it would still require the parties to notify the BKartA of such mergers. This would be inconsistent with both the *Recommended Practices* and the authority's own stated goal of avoiding notifications where transactions are unlikely to have significant competitive effects in Germany.

Thank you for considering the Group's views. We hope that the *Draft Guidance* can be finalized expeditiously as it will play a helpful role in focusing merger review on cases with competitive significance. We would be pleased to discuss this submission with you or your colleagues further at your convenience.

Yours very truly,

Neil Campbell

A. Neil Campbell

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group

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[13] *Act Against Restraints of Competition,* s. 1.

[14] Paragraph 3 of the *Draft Guidance.*

[15] Paragraph 3 of the *Draft Guidance.*