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Written Statement

of the Federal Ministry of Economics and Technology and the Bundeskartellamt (German Competition Authority)

on the Consultation Paper published by DG Competition on possible improvements to some aspects of the EC Merger Regulation (ECMR)

('Towards more effective EU merger control')

Berlin/Bonn, 17 September 2013

The Federal Ministry of Economics and Technology and the Bundeskartellamt welcome the opportunity to submit an opinion on the Consultation Paper on possible improvements to the ECMR ('Towards more effective EU merger control'). The Commission's paper proposes to extend EC merger control to non-controlling minority shareholdings, the improvement of the existing referral mechanisms, and changes with regard to other issues of a more technical nature. The following is a general response to the Consultation Paper. Answers to the specific questions listed in the Consultation Paper are provided in the annex.

I. CONTROL OF ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS (STRUCTURAL LINKS) BY THE EUROPEAN COMMISSION (COMMISSION) UNDER THE ECMR

1. Is a new European instrument necessary? How should it be designed in order to be effective? And how should it fit into the context of existing national instruments?

According to economic theory, non-controlling minority interests can have significant adverse effects on competition – just like other structural links that allow for more influence, in particular the acquisition of control. For this reason, German merger control, since it was first introduced in 1973, has always allowed for review of non-controlling minority interests. The case practice built up in Germany over many years confirms that merger control of non-controlling minority interests is necessary in the interest of safeguarding competition and ultimately in the interest of consumers. Therefore, in principle, extending the Commission's mandate to include the review of non-controlling minority interests seems appropriate, provided that the following criteria are met:

- The new system **must afford the same level of protection for competition** as the existing national rules. This is an indispensable precondition for Germany if it is to accept a European instrument for the control of non-controlling minority interests to be exercised by the Commission. Most importantly, the standstill obligation has to be applicable, i.e. minority acquisitions must only be allowed to be implemented after a competition authority was able to assess (within an appropriate amount of time) the effect of the transaction on competition. (For more details, cf. 2. a)). Moreover, any and all minority interests that are subject to review under existing German law must remain subject to merger control – by either the Commission or the National Competition Authorities. This includes that an actual review takes place at either level. At the same time, European merger control must not result in a disproportionate burden being placed on the companies concerned.[1]

[1] Cf. ICN: Recommended Practices for Merger Notification Procedures, 2003-2006, hereinafter "ICN Recommendation"), V.B. "Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that don't present material competitive concerns."; OECD: Council Recommendation on Merger Review, 2005, hereinafter "OECD Recommendation"), A.1.2. "Member countries should, without limiting the effectiveness of merger re-

- The general requirements for merger control to be both **effective** and **efficient** and to be carried out **within a predictable time frame** must also apply to the review of non-controlling minority interests.[2]
- There must be **conclusive evidence of enforcement gaps in competition law**, and the new instrument must be capable of **eliminating** these. Such gaps might exist in those Member States that do not, at present, have any means of reviewing non-controlling minority interests in the context of their national merger control regimes. The description of the status quo, which is given in the Consultation Paper (Annex II. in particular), does not provide any information on this issue. Instead, it is based on experiences from EU and non-EU countries, whose merger control regimes allow for the review of non-controlling minority interests. As several Member States, including Germany, already have a regulatory framework in place, evidence of an 'enforcement gap' is needed in order to justify transferring the competence of review to the Commission. Just as in the case of concentrations with a Community dimension that involve an acquisition of control, an EU instrument could have an added-value, if a centralised appraisal were to deliver a uniform assessment of such concentrations as well as save costs and be less cumbersome. However, there have only been very few cases of non-controlling minority interests requiring multi-jurisdictional notifications.

A new EU instrument that is designed around these principles as well as the ICN Recommended Practices for Merger Notification Procedures (2003-2006) and the OECD Council Recommendation on Merger Review (2005) could enable the Commission to exercise effective merger control of minority stakes in the interest of averting competitive harm in the European Union.

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view, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties."

[2] Cf. ICN Recommendation, VI.A. "Merger investigations should be conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process."; OECD Recommendation, A.1.1. "Merger review should be effective, efficient, and timely."

2. Conclusions on the options presented in the Consultation Paper:

Notification system combined with standstill obligation (option 1) or system where the Commission has discretion to conduct ex-post review (option 2), with the subcategories of a system based on self-assessment by the companies or a transparency system

a) Since 1973, Germany has built extensive case practice on merger review of non-controlling minority interests. Based on our experience, we hold that the following is absolutely crucial for a European instrument in this area: the **principle of mandatory ex-ante notification** must also apply for non-controlling minority interests, and it must be **tied to a standstill obligation**. It is not necessarily easier to remove a minority interest than it is to dissolve a concentration between undertakings that has resulted in an acquisition of control. In any case, it has to be considered that, in the absence of a standstill obligation, non-controlling minority interests, too, can have permanent adverse effects on competition (e.g. lower competitive pressure, higher prices, lower quality) that will take effect as soon as the acquisition takes place and will last until the concentration has been prohibited by a final judgement so the structural link can be dissolved. This process can take a considerable amount of time to complete. In Germany, it would not be unusual to take three years for a final judgement to be delivered. Even once a final judgement has been delivered, the specific measures imposed to achieve dissolution can be challenged, causing the limited measures of ex-post revision taken to be delayed even further.
For that reason and based on the practical experience gained in Germany, several amendments to the German merger control regime for minority interests were adopted[3]. Initially, the system of ex-post notification applied to both acquisitions of control and acquisitions of non-controlling minority interests. This regime was replaced with an ex-ante notification system which, at first, only applied to some of the transactions that were covered by German merger control, dependent on the turnover of the companies involved in the transaction. It applied to the acquisition of control as well as to acquisition of minority shareholdings of 25%. The one and only exemption from the rule of mandatory ex-ante notification (and from the standstill obli-

[3] German contribution to the OECD Roundtable of June 2013 (“Definition of Transaction for the purpose of merger control review”), DAF/COMP/WP3/WD(2013)5.

gation) concerned the acquisition of competitively significant influence. This exception was abolished very soon after its introduction, i.e. the ex-ante notification system (with a stand-still obligation) was extended also to the acquisition of a competitively significant influence.
These changes to the German merger control rules successfully eliminated certain deficiencies that existed in early procedural practice, and have since allowed for better, more effective merger control, including with regard to non-controlling minority interests.

b) As for the **second option** mentioned in the Consultation Paper as an alternative to the notification system; namely that of granting the Commission discretion as to which cases it wants to review, there is a **fundamental reason** why Germany does **not** consider it an effective means of protecting competition: neither sub-option (self-assessment system / transparency system) provides for mandatory ex-ante notification combined with a standstill obligation. Even if voluntary ex-ante notification were to be combined with a standstill obligation (a possibility that, according to the proposal, could be combined with either of the two systems), the result would not be effective in closing the 'protection gap', as the standstill obligation would only apply to companies that decide to submit a voluntary ex-ante notification. Having found voluntary ex-ante notification to be ineffective, Germany introduced a system of mandatory ex-ante notification as standard practice. (Voluntary notification was available for some time, for concentrations that were at that time covered by mandatory ex-post notification.) The European merger control rules should take the experiences in Germany on this issue into account.

c) Unlike the transparency system, the **system based on self-assessment** even does without mandatory ex-post notification. It would therefore, in addition, lead to a serious **information gap** that would render effective merger review impossible where non-controlling minority interests are concerned.

d) Germany therefore has a **clear preference for option 1 (notification system)**. The exact requirements to be fulfilled as part of the prior notification obligation should correspond to the potential adverse effects of non-controlling minority interests on competition. The procedure itself could be designed to be less cumbersome than the

present EU procedure which applies to the acquisition of control. It has to be ensured that the burden placed on companies and the administrative burden placed on the Commission is kept at a reasonable level, without calling into question the effectiveness of the review. Ways of achieving this could notably include designing the system **without pre-notification contacts** (cf. Annex question I.3.), as well as perhaps requesting a **smaller amount of information** as part of the notification.[4] It may also be worthwhile to design a procedure that foresees an **automatic clearance when the deadline is passed**, i.e. without the need for a formal decision.

A notification system also has the advantage of quickly giving companies **legal certainty** as to whether a transaction resulting in a non-controlling minority interest is permissible. To ensure legal certainty and equal treatment, there should be set criteria used by the Commission to decide whether or not it is to initiate proceedings to review a particular acquisition of a minority stake, and whether a simplified or an in-depth review is to be opened. Germany is of the opinion that the easiest way of achieving this would be to examine any transactions resulting in a minority interest that is considered relevant as if it were an acquisition of control.

e) By **defining** criteria for what constitutes a relevant **non-controlling minority interest**, i.e. one that will be subject to review, it would be possible to avoid an unmanageable case-load for the Commission. These criteria should focus on those common categories of cases where adverse effects on competition cannot be automatically excluded. Based on our experience in Germany, we hold that this should only apply to non-controlling minority interests that would provide the acquirer with a competitively significant influence over the target company. First and foremost, this applies only to concentrations between:

- actual or potential competitors
- suppliers on upstream and downstream markets
- suppliers on neighbouring product markets.

At European level, there is no need for merger review with regard to non-controlling minority interests that do not fall into any of these categories. Should any competition issues arise in cases outside these categories they could be reviewed at national

[4] Cf. ICN Recommendation, V. A. “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”; OECD Recommendation, A.1.3 “Member countries should […] set reasonable information requirements”).

level; particularly in Germany (acquisition of at least 25% of the shares or voting rights), in the UK, and in Austria.

f) As in the case of mergers that result in an acquisition of control, only full-function joint ventures should be subject to an appraisal of the effects they have in terms of co-ordination of competitive behaviour (as is required pursuant to Article 2(4) ECMR).

g) In the interest of maintaining the existing level of protection afforded by the national merger regulations where non-controlling minority interests are concerned, it is vital to ensure that any notification scheme to be introduced at European level **does not create any 'surveillance gaps'**. If the Commission is awarded discretion to waive its right to review, safeguards will have to be put in place to allow for the cases in question to be reviewed at national level. To that effect, it might be possible to consider introducing dedicated (and possibly automatic) **referral mechanisms** (cf. Annex, question I.6.). Moreover, the existing referral mechanism should also become applicable to any notification system for structural links.

h) Concerning the self-assessment and the transparency systems under which reviews would take place at the Commission's discretion (and both of which Germany rejects), a standstill obligation would have to apply. The stand-still obligation would cover the entire period up to the deadline for making a request for referral. Where such a request is submitted, the standstill obligation would have to continue to apply until the Commission has taken a decision with regard to the referral. Upon referral, national competition law would apply.

i) The National Competition Authorities (NCAs) will not be able to exercise their right to request referral in an effective way unless they receive the **information** submitted by the companies **at an early stage**. The substantive requirements for a request for referral must correspond to the potentially limited amount of information that can be derived from the data that has to be submitted prior to an initial review of a non-controlling minority interest. Under a system that does not require ex-ante notification, the **substantive requirements for referral** would have to be lower ("impact on competition" rather than "threatens to affect significantly competition"). Referrals

could be effected without formal decision where the Commission does not, within a specified period, veto a Member State's request for referral.

II. SIMPLIFICATION OF THE REFERRAL SCHEME

We would **welcome** a simplification of the provisions governing the referral of merger cases from the national level to the European level (Article 4(5); Article 22 ECMR). **Referrals** going in the other direction, i.e. from the Commission **to the NCAs** (Article 4(4), Article 9 ECMR) should be **simplified in the same way.**
It is vital for the NCAs that they receive information at an early stage. If necessary, a legal basis should be created so that basic information pertaining to specific cases, including information obtained as part of a pre-notification procedure, can be passed on to the competent NCAs. Above all, this would be in the interest of speeding up proceedings, something that companies have repeatedly been calling for.

1. Referrals pursuant to Article 4(5) ECMR (pre-notification referrals of concentrations that do not have a Community dimension)

The Consultation Paper lists some proposals for simplifying the procedure for pre-notification referrals that are requested by the merging parties (Article 4(5) ECMR). Referrals under Article 4(5) apply to cases in which the concentration qualifies for review under the national competition laws of at least three Member States. Under the proposal, the two-stage procedure is to be replaced with a single-stage procedure. The first stage of the referral procedure (which has its own pre-notification procedure and includes forwarding the Form RS to the NCAs) would be abolished. Concentrations could be notified directly to the Commission, which would pass the information on to the Member States. The latter would retain their right to veto, and, just like under the existing rules, would not be required to provide any reasons for exercising their veto right.

The Consultation Paper proposes a single-stage procedure for referrals pursuant to Article 4(5) ECMR, to speed up these referrals. We support this change. However, as soon as the Commission enters into pre-notification discussions with the companies in question, it should **immediately inform** the relevant Member States, respectively the competent NCAs. Moreover, the Commission should forward the first draft of the notification to the competent NCAs so as to ensure that they receive sufficient information in order to decide whether or not to veto the referral and that they receive it as

early as possible. If necessary, the ECMR should be amended to create a legal basis for the transmission of information.

If the NCAs, respectively the Member States that would normally be in charge of reviewing the concentration in question were informed at an early stage, this would also make it possible for them to take a decision as to whether or not to veto a referral within less than the current period of 15 working days. In this case it would therefore be acceptable to shorten this period to ten working days.

2. Referrals pursuant to Article 22 ECMR (referrals of concentrations that do not have a Community dimension upon the request of one or more Member States)

The Consultation Paper lays out changes to referrals that are made upon the request of one or more Member States (Article 22 ECMR). We **welcome** and **support** these changes, which are designed to simplify the procedure and to allow for entire cases to be handed over to the Commission by way of a single referral.

This would eliminate the following problems that have occurred under the existing rules:

- Because of the strictness of the criteria that have to be met before Member States can join a request for referral, there have been cases were different requests for referral pertaining to the same case have been treated differently, leading to a situation where parts of the case were dealt with by the Commission and others by a Member State / an NCA (**split referrals**)**.** In these cases, the Commission accepted some of the requests for referral, but not all of them. In future, following the filing of a request for referral, the Commission is to take charge of the case across the European Union – provided that none of the Member States in which the concentration would normally be notifiable (or, under a system of voluntary notification, could be notified), vetoes the referral. The Commission should also be in charge of a case if a Member State does not join the request for referral. This is acceptable. However, it is indispensable for the Member States in which a concentration would be notifiable to have a right to veto, as is provided for in the Consultation Paper.

Referrals would still be possible if one of the Member States has already taken a decision on the case. The Commission’s jurisdiction would then be limited to the effects

of the concentration on the territory of the remaining Member States. In the interest of legal certainty, the decision that was taken at national level should remain in effect.

- The rules regarding the right to veto, as laid out in the Consultation Paper, would **significantly facilitate** the **procedure** governing cases where several Member States file requests for referrals. Once the first request for referral has been filed, all that would be required for it to be joined by other Member States is that these Member States do not veto the referral. There would no longer be a general requirement for every Member State to substantiate its request for referral by stating the adverse effects on competition on its territory. The Commission would no longer have to prepare separate decisions in response to the requests for referral filed by each Member State.

- The new provision, which explicitly **restricts** the right to file a **request for referral** to those Member States in which the concentration could be reviewed under national merger control rules, seems appropriate. If a national legislature has decided not to make certain types of concentrations, e.g. non-controlling minority interests, subject to its merger control rules, it is consistent that this Member State should not have the power to trigger the European Commission's jurisdiction in such a case by requesting a referral.

3. Referrals pursuant to Article 4(4) (pre-notification referrals of concentrations that have a Community dimension, i.e. referrals to the competent national authority upon the request of the merging parties)

Requests for referral to a NCA pursuant to Article 4(4) ECMR should be simplified in the same way as requests for referral pursuant to Article 4(5) ECMR. The same reason as set out in response to the proposed changes of Article 4(5) applies vice versa. It seems sensible to move to a single-stage procedure, which provides for notification directly to the competent NCA uno actu as a national filing and as a request for referral. Under the new procedure, the parties to the concentration (or the NCA) would inform the Commission by way of forwarding the notification. The Commission would then forward the notification (or another suitable document) to all the other Member States.

The notification (or the other documents) would have to include information that would allow the particular Member State (designated by the merging parties), the

Commission, and the other Member States to assess whether or not the requested referral makes sense. This would have to include information on the activities of the parties to the concentration in the other Member States affected by the concentration. The Commission would retain its right to veto.

The substantive requirements for referrals pursuant to Article 4(4) ECMR should be lowered so as to facilitate these requests for referral. The existing criterion ("the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market") constitutes a significant obstacle, which leads to a lack of legal certainty and probably has a chilling effect, i.e. it may prevent companies from filing a request for referral. The criterion could be amended to the effect that "the concentration affects competition, particularly in one Member State".

4. Referrals pursuant to Article 9 ECMR (referrals to the competent authorities of the Member States)

As for referrals from the Commission to the NCAs pursuant to Article 9 ECMR, these procedures should also be simplified. Similar to the proposal with regard to Article 4(4) ECMR, here too, the substantive requirements for referral should be lowered. The relevant criterion here could be that "the concentration affects competition, particularly in one Member State".

III. OTHER POINTS FOR DISCUSSION/TECHNICAL IMPROVEMENTS

1. Foreign-to-foreign mergers

From a German perspective, it would make sense to change the Commission's current practice vis-à-vis foreign-to-foreign mergers in the way that the consultation paper appears to suggest between the lines. Under the Commission's current practice every structural link between companies that constitutes a concentration and exceeds the relevant turnover thresholds is notifiable – even it has no effects within the European Union.

As far as the national level is concerned, the Bundeskartellamt has decided against adopting the Commission's current practice. Instead it continues to apply the domes-

tic effects clause pursuant to Article 130(2) of the German Competition Act[5] as a separate test in addition to the domestic turnover thresholds. The Bundeskartellamt intends to publish a guidance document that explains this approach by setting out different categories of cases which either clearly do not have any effects on Germany or have obvious effects.

A public consultation of the draft guidance document will be conducted in the near future.

2. Additional points in response to part three of the Consultation Paper

a) It would make sense to provide for **an exchange of information** between the Commission and the NCAs in cases of referral, as this could help prevent information being requested twice, and thereby spare companies and NCAs alike unnecessary costs and efforts.

b) We do not have any concerns about extending the **notifiability for stock exchange transactions. A notification should be possible** when the acquirer can prove his good faith intention.

c) It is debatable whether it should be possible for the Commission, upon the prohibition of a concentration, to enforce the **dissolution** of partially implemented transactions, if the implemented parts do not themselves constitute a concentration (i.e. currently an acquisition of control). On the one hand, a similarly limited transaction would not be notifiable if it were carried out after the prohibition. This argues against an extension of the Commission's powers. On the other hand, Art. 8(4) ECMR provides that, upon the prohibition of a notifiable concentration the situation prevailing prior to the implementation of the concentration must be restored. This also applies to partial acquisitions. It would therefore seem consistent to allow for the reversal of partial acquisitions that would not be notifiable if they were an independent transaction.

d) It is understandable that the Commission wants to preclude situations where parties involved in a merger control procedure would publicise or pass on non-public information about other companies. Use of such information should be restricted to the exercise of procedural rights during the merger control procedure.

[5] Gesetz gegen Wettbewerbsbeschränkungen (GWB).

3. Additional proposals concerning the amendment of the ECMR (not listed in the Consultation Paper)

We propose an amendment of Article 9 ECMR to the effect that the Commission, where it decides not to grant a referral requested by a Member State, but rather takes charge of the case in question itself, would be required to state its grounds for rejecting the referral request. These reasons could be provided as part of the decision of the merger case, or as a separate referral decision.

Annex
Answers to the specific questions asked by the Commission

I. Questions asked by the Commission in the chapter on structural links

1. In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?

In principle, yes; provided that there is conclusive evidence of a gap in the protection of effective competition within the territory of the European Union and provided that this gap can be eliminated by the new instrument (See above, general response, I.1.)

2. Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?

Yes.

3. Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:
- the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,
- the administrative burden on the parties to a transaction,
- the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;
- the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;
- the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

The most appropriate instrument for merger review – including a review of non-controlling minority interests – is a mandatory ex-ante notification system, combined with a standstill obligation (for detailed reasons see general response, I.2. a) and d)).
The Consultation Paper underestimates the difficulties and complications that would arise from ex-post review of implemented transactions and from the need to dissolve concentrations – even 'mere' non-controlling minority interests – after they have been implemented (see above, I.2. a)).
The burden placed on merging parties could be reduced by limiting the scope of the notification system to non-controlling minority interests that have significant potential of distorting competition (see above, general response I.2.e)). Additionally, the burden placed on companies could also be reduced considerably if the amount of information that has to be submitted as part of the notification could be reduced, and if the system could operate without a pre-notification procedure (see above, general response I.1. d)). Moreover, it would be less of a burden for both the merging parties and the Commission if a formal clearance decision were not necessary in the case of non-controlling minority interests (automatic approval after expiry of the time limits).

4. In order to specify the information to be provided under the transparency system

- What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?

- What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered)?

We do not consider a transparency system a suitable instrument (see above, Annex to question I.2. a) and b)). Under a notification system, it might be possible to reduce the amount of information to be submitted by the merging parties involved in acquiring minority shareholdings.

5. For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.

In terms of the costs incurred by the acquirer of a structural link, it does not matter whether specific information has to be made available as part of a notification procedure or under a transparency system. The cost will depend on how much information has to be provided. It could prove possible to substantially reduce the amount of information to be provided in notifications of non-controlling minority interests compared to what is required in the case of acquisitions of control. What matters is that all of the information that is indispensable for merger control review is made available. This is a burden for merging parties, but it is necessary.

6. Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?

In principle, we consider the turnover thresholds an appropriate criterion for delineating the Member States' and the Commission's jurisdiction. However, this is subject to the proviso that the new system affords the same level of protection for competition as the existing national rules. First and foremost, this means that we need a notification system combined with a standstill obligation. In any other case, it would be unacceptable to remove these cases from the area of competence of the Member States.

Any notification system for non-controlling minority interests should make use of the existing referral system. Any transparency system (which Germany rejects) would have to provide for a simple and swift referral procedure. For this reason, it would make sense to use a procedure under which there is no need for formal referral decisions. In such a referral system, the Commission should simply have a veto right. Individual cases would then be deemed to have been referred by the Commission upon the expiry of the relevant time limit unless the Commission either exercises its

right to veto or takes charge of the concentration itself (i.e. requests a notification) within a specified time-limit.

7. Regarding the Commission's powers to examine structural links in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?

Germany's experience with its definitions of a concentration, namely with the "competitively significant influence" (Article 37(1) No. 4 German Competition Act) and the "acquisition of capital or voting rights" (Article 37(1) No. 3 German Competition Act) was positive. In the interest of limiting the number of cases to be reviewed under a new European merger control instrument, the relevant definition of a notifiable non-controlling minority interest could be modelled on the German "competitively significant influence". This would have the advantage of focussing the review on potentially problematic concentrations (structural links with competitors, suppliers and customers, as well as with companies operating on neighbouring markets). Moreover, thresholds should be set in terms of the minimum influence that an acquirer can exercise over the target company. There is comprehensive practice and case law on this issue in Germany, at the level of the competition authority and the courts. The UK uses a comparable concept, namely that of "material influence", which means that UK case law could be useful as well. At European level, a safe-harbour level for acquisitions of capital or voting rights could be set at ten per cent. In Germany, we have found that there are only very few individual cases where concentrations formed by acquisitions of less than ten per cent of capital or voting rights have met the criterion of competitively significant influence. The risk of circumvention that would arise at European level is acceptable, given that the national merger control rules would continue to apply.

In order to facilitate the introduction of a new definition of what constitutes a non-controlling minority interest that leads to competitively significant influence at European level, the Commission could issue a Notice dedicated to explaining the concept of this new definition, or it could amend the Consolidated Jurisdictional Notice to this effect.[6]

[6] Cf. ICN Recommendation, VIII.C. "Competition agencies should promote transparency by making information about the current state of merger control law, policy, and practice readily available to the

8. In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.

In Germany's view, neither a self-assessment system nor a transparency system is a viable alternative. Germany used to have a system based on ex-post notification combined with optional, voluntary ex-ante notification (Article 24a German Competition Act in its pre-1998 version). This approach did not work well in practice. Therefore it was replaced by a system for a preventive control of concentrations, based on mandatory ex-ante notification.

9. Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?

In Germany's view, neither a self-assessment system nor a transparency system is a viable alternative. Our former ex-post notification system – which was abolished because of its deficiencies – provided for a limitation period of one year, after which it was no longer possible to intervene against a concentration that had been notified.[7] If merging parties made use of the option of voluntary ex-ante notification, the (much shorter) deadlines of the notification procedure applied. If a similar system were to be introduced at European level, any limitation period for an intervention should only apply if the merging parties have made available all the necessary information concerning the non-controlling minority interest, and if this information is complete and cor-

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public"; OECD Recommendation, A.2. "Member States should ensure that the rules, policies and practices […] are transparent and publicly available".

[7] Cf. ICN Recommendation, IV.A. "Merger reviews should be completed within a reasonable period of time"; OECD Recommendation, A.1.3. "The review of mergers should be conducted […] within a reasonable and determinable time frame".

rect. In Germany there have been various cases of acquisitions in which the parties involved deliberately concealed or disguised the actual shareholding structures.

II. Answers to the Commission's specific questions listed in the chapter on referrals

1. Do you consider that the suggestions would make the referral system overall less time-consuming and cumbersome?

Yes (see above, general response II.1. and 2.). However, the procedure for referrals going the other way, i.e. from the Commission to the NCAs pursuant to Article 4(4) and Article 9 (ECMR), should also be simplified (see above, general response, II.3. and II.4.).

2. Regarding the suggestion on Article 4 (5) referrals:
a) Do you support the idea to be able to directly notify to the Commission without preceding Form RS?

Yes (see above, II.1).

b) Please try to estimate savings in (a) time and (b) costs resulting from the elimination of the Form RS procedure in a typical case.

The amendment proposed would be likely to speed up the procedure at the Commission by three to four months.

c) For transactions to be notified in at least three Member States, would you consider that you will use the referral according to Article 4 (5) under the suggested system more often than under the current system - or that you will advise your clients to use it more often?

We would expect Article 4(5) to be used even more frequently. However, there are cases of multiple notifications where the Commission is not the best-placed authority. We would therefore not expect to see an end to multiple notifications.

d) Do you consider that the 15 working days consultation period could be shortened in order to limit the duration of uncertainty as to whether or not a case will remain in the competences of the Member States?

Given that the pre-notification procedure often takes several months, the 15-day consultation period does not have any relevant effect on the overall length of proceedings.

However, if the NCAs were to receive information early on in the process, i.e. during the pre-notification procedure (and especially upon the submission of a draft notification) (cf. general response, II.1), they would be in a position to decide more quickly as to whether or not to request a referral. This would make it possible to shorten the consultation period to ten working days.

e) Do you consider it useful if contacts between the Commission and the competent Member States could take place already during a possible pre-notification phase, in order to enable the Member States to assess the referral?

Yes, indeed, this would be very helpful (see above, annex relating to question II. d). A good time for the Commission to contact the competent Member States would be upon receipt of the case allocation request from the parties involved in the concentration.

f) Do you agree that a broad information exchange between the Commission and the Member State which includes the information gathered in the market investigation should be made possible? Should the results of the Commission's market investigation be accessible to NCAs also following a veto of a Member State?

Yes, this could help avoid unnecessary duplication of administrative work (e.g. prevent cases where an NCA has to address the same questions to a company, which it has already answered in response to questionnaires received from the Commission).

III. Answers to the Commission's specific questions listed in the chapter on other aspects

1. How could the jurisdictional rules of the Merger Regulation be modified in order to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not have to be notified to the Commission? Please take into account the need for jurisdictional rules to be clear and easy to apply.

See above, general response, III.1. It would make sense not to require notification in cases that do not have any effects on markets, which cover the whole or parts of the EU. This would also be in line with the Bundeskartellamt's interpretation of Article 130(2) German Competition Act.

2. Would you recommend any other amendments to the Merger Regulation? Please elaborate.

See above, general response, III.3. We propose an amendment to the effect that the Commission would have to state its grounds for rejecting requests for referral (pursuant to Art 9 ECMR) in the cases where it decides to open an in-depth investigation.