

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTION OF  
ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE EUROPEAN  
COMMISSION'S EVALUATION OF PROCEDURAL AND JURISDICTIONAL  
ASPECTS OF EU MERGER CONTROL

*January 13, 2017*

*The views stated in this submission are presented only on behalf of the Section of Antitrust Law and Section of International Law of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the American Bar Association.*

The Sections of Antitrust Law and International Law (collectively, the “Sections”) of the American Bar Association (“ABA”) welcome the opportunity to provide comments to the European Commission (“Commission”) in its evaluation of procedural and jurisdictional aspects of EU merger control (the “Evaluation”). The Sections appreciate the Commission’s substantial thought and effort, reflected in the Evaluation, and offer these comments in the hope that they may further assist in the completion of any amendments of the European Union Merger Regulation (“EUMR”) and implementing regulations and notices.

The Sections’ comments reflect their members’ expertise and experience with competition law in the United States of America, as well as in the European Union and in numerous other jurisdictions worldwide.

### **Executive Summary**

The Sections offer comments on two core areas of the Evaluation, simplification and the functioning of the turnover-based jurisdictional merger notification thresholds in light of high-value transactions of target firms that have not yet generated substantial turnover, rather than a question-by-question examination of the specific issues raised. In addressing these areas, these comments also address the case referral mechanism set out in the EUMR.

With respect to simplification, the Sections note that while the reforms introduced in 2014 have benefitted the Commission and merging parties, a number of additional improvements could usefully be made. Following a discussion of the inefficiencies in the current system, these comments address potential improvements that could be made within the current simplified procedure framework. These include suggestions that the Commission: (i) provide enhanced guidance on “plausible alternative markets;” (ii) introduce an indicative time limit within which the Commission would notify parties of the need to move from the simplified to the standard merger notification procedure; and (iii) further amend the thresholds applicable to the simplified procedure. In addition, in response to specific questions in the Evaluation, the Sections support the Commission’s consideration of more significant procedural changes, such as the introduction of a new regime for certain transactions that qualify for the Simplified Procedure (an exemption, information notice, or self-assessment regime). The Sections believe that any or all of these measures, properly managed, would allow both the Commission and merging parties to use their resources more efficiently, while maintaining a high standard of review and enforcement.

Regarding the EUMR’s notification thresholds, the Sections are of the view that the existing national and supra-national merger control regimes coupled with the referral procedures function effectively to capture competitively significant transactions affecting the European Economic Area (“EEA”). The Sections see no evidence of an enforcement gap, and hence no need to introduce additional jurisdictional thresholds. Nonetheless, should the Commission decide to pursue additional thresholds, the Sections recommend that such thresholds incorporate local nexus requirements, and be based on clear and objective criteria— based, for example, on sales or assets – in line with international best practice. In particular, the Sections strongly advise against the introduction of a subjective jurisdictional test based on the likelihood of effects in the EEA. The Sections also advise against the introduction of sector-specific thresholds, in favor of a simple merger review regime that is uniformly applied across all sectors. Finally, the Sections suggest that if the Commission were to continue to explore approaches to capture certain innovation market transactions, given concerns of EEA impact, that it consider either: (i) introducing any new threshold as an additional referral standard, rather than as a separate notification threshold test, or (ii) expanding the European Competition Network’s (ECN’s) procedures to provide for consultation on merger cases under review at national level that may raise cross-border implications.

## I. SIMPLIFICATION

The Sections commend the Commission on the EUMR simplification measures that were implemented in 2014, and for its ongoing commitment to evaluating further potential simplifications.

The Simplification Package, which entered into force on January 1, 2014, has delivered significant benefits for the Commission and merging parties in cases that are unlikely to raise material competition concerns. The increase in the thresholds below which the EUMR’s simplified procedure (“simplified procedure”) can apply has undoubtedly reduced the burden on notifying parties and the Commission in relevant cases.

However, the Sections note that the simplified procedure still encompasses a number of inefficiencies. The Sections believe that additional improvements could be made that would reduce the burden on notifying parties further without affecting the standard of review or endangering the effectiveness of the Commission’s enforcement regime.

### A. Potential Improvements to the Current Simplified Procedure Framework

#### a. *Inefficiencies inherent in the current framework*

The Sections suggest that the simplified procedure entails two main sources of inefficiency: (i) the Commission’s requirement that notifying parties provide detailed information on “all relevant product and geographic markets, as well as plausible alternative relevant product and geographic markets;” and (ii) the Commission’s residual and unlimited discretion to oblige notifying parties to switch from the simplified to the standard procedure.

In some cases, these combined elements can and do result in information gathering and analytical requirements for notifying parties that, in practice, are similar to standard EUMR notification procedures. Typically, these combined elements affect cases involving a limited degree of competitive overlap or vertical relationship between the parties, rather than matters

in which there are no such links (as is often the case in private equity acquisitions). For the first group of horizontal and vertical cases, notifying parties must consider a significant number of product and geographic market definitions, and compile a large volume of requisite market share data, market information, and documentary materials – even if only a small portion of this information ultimately is included in the parties’ submissions to the Commission.<sup>1</sup>

This difficulty is exacerbated by the minimal guidance in the existing legislative materials on the meaning of the term “plausible alternative” market definitions, which advise the parties to refer to previous decisions and to industry reports.<sup>2</sup> While this approach is appropriate in many circumstances, there are a considerable number of cases that raise complex or innovative questions of market definition for which reference to previous cases or industry reports is either impossible or of limited practical value.

Moreover, once the parties’ submissions have been made (whether in draft or in final form), case teams enjoy considerable discretion in proposing alternative approaches to market definition and requesting additional data from the parties. In some instances, the information requested by case teams can be so detailed and broad-ranging as to negate the value in attempting to use the simplified procedure.<sup>3</sup>

For these reasons, and as implied by Question 4 of the Evaluation, in some rare cases, notifying parties elect to use the standard procedure, even though the simplified procedure might potentially be available to them.

In the Sections’ view, the concerns outlined above could be reduced either by making relatively limited amendments to the existing review framework, or through a more radical re-design of the simplified procedure.

*b. Potential avenues for improvement within the current framework*

As regards amendments to the existing framework, the Sections suggest that the Commission could provide clearer guidance on the meaning of “plausible alternative” markets, in order to reduce the likelihood of purely hypothetical analysis and disproportionate information requests. Such guidance would benefit both the notifying parties in preparing their submissions, and Commission case teams engaged in the review. For example, the Commission could consider clarifying that notifying parties are only required to identify alternative markets that have been adopted or posited by the Commission in prior decisions and to explain why they believe the alternative market is not appropriate in their case.

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<sup>1</sup> A similar concern exists regarding the referrals procedure. Form RS tends to front-load the analysis process, since information contained in Form RS, ultimately, is likely to inform (whether formally or informally) an authority’s review of a particular deal. This is particularly the case where the jurisdictions in question (most notably Spain and Portugal) have a market share test as part of their jurisdictional threshold. Thus, while the Form RS is, in theory, a first step in the review process, and one that should typically take place at the earliest possible stage, in reality notifying parties already must compile a significant volume of data and conduct substantial analysis before submitting Form RS.

<sup>2</sup> See Footnote 1 of the template Short Form CO, at Annex II to *Commission Regulation (EC) No. 802/2004* (OJ L 133, 30.4.2004, p.1) (the “Implementing Regulation”)

<sup>3</sup> This is particularly the case in situations in which the Commission may grant a waiver regarding certain sections of the Full Form CO.

Another potential measure – outside the scope of the Evaluation but offered for the Commission’s consideration by the Sections – would be the introduction of a non-binding time frame within which the Commission could require notifying parties to switch from the simplified to the standard procedure. At present there are no restrictions (other than the official merger review time periods) on when the Commission can require the parties to file a Full Form CO in place of a Short Form CO, even if the parties have engaged in pre-notification consultations. Establishing a suggested deadline would increase certainty for notifying parties, without losing helpful flexibility for both the Commission and the parties. Hence, the Sections would recommend that the Commission consider introducing an indicative timeline for this process as a suitably balanced approach. The Sections suggest that this might best be achieved in the context of an update to the existing Best Practice Guidelines.<sup>4</sup>

The Sections also believe that the scope of application of the simplified procedure could be extended in certain additional respects without risk of including transactions that potentially raise serious competition issues. While outside of the direct questions posed in the Evaluation, the Sections noted in their previous submission on the simplified procedure<sup>5</sup> that enforcement experience indicates that transactions resulting in a firm with 25% or even 30-35% of an affected market normally do not warrant extended inquiry.

With this in mind, the Sections suggest that the Commission consider extending the application of the simplified procedure to horizontal mergers where the parties have an aggregate market share below 30%, or at least below 25%. This would also align the simplified procedure with Recital 32 of the Merger Regulation providing that concentrations where the market share of the undertakings concerned does not exceed 25% are presumed to be compatible with the internal market.<sup>6</sup> In addition, the Commission may wish to consider the introduction of a share increment requirement, such as applying the simplified procedure to increases of less than a certain percentage.

Similarly, in the case of vertical mergers, the Sections consider that if one party holds a share of 30%, the other party should be required to hold a share of at least 15% in the relevant upstream or downstream market for competition issues to be considered sufficiently material that the transaction would merit a full review.

*c. Potential alternative approaches to simplification of the EU Merger Control Regime*

The Commission has proposed three more far-reaching changes in the Evaluation: exempting one or more categories of transactions from the obligation of prior notification and the

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<sup>4</sup> *DG Competition Best Practices on the conduct of EC merger control proceedings*, dated 20/01/2004

<sup>5</sup> See the Sections’ submission of June 19, 2013, in response to the Commission consultation on draft revisions to the Simplified Procedure and the EU Merger Implementing Regulation, at [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_simplified\\_20130619.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_simplified_20130619.authcheckdam.pdf).

<sup>6</sup> See also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) at section 18.

standstill obligation; introducing lighter information requirements for certain categories of cases by replacing the notification form with an initial short information notice; and a self-assessment regime.

The Sections see value in the Commission's proposal to exempt one or more categories of concentrations qualifying for the Simplified Procedure from the obligation of prior notification to the Commission and from the standstill obligation under the Merger Regulation. In the Sections' experience, subjecting certain categories of transactions to the simplified procedure has not substantially reduced the burdens on notifying parties as compared to the standard notification. The Sections would recommend exempting joint ventures and acquisitions of target companies that have "no or limited activities (actual or foreseen), turnover or assets in the EEA", but currently are notifiable because at least two undertakings concerned meet the EU turnover thresholds. Where the JV or target has no sales or assets in the EEA, there is no reasonably foreseeable competitive effect in the EEA and exempting these transactions from notification will avoid wasting resources both for the Commission and for businesses.

The Sections see potential value in replacing the notification form with an initial information notice, such as that mentioned in Question 8.2 of the Evaluation. Properly implemented, an initial information notice regime could considerably reduce both the administrative burden on the Commission and the information burden on notifying parties, with no material diminution to the Commission's ability to scrutinize mergers.

In the Sections' view, an information notice regime should provide the Commission with a meaningful understanding of the parties' operations, but should not require detailed analysis of antitrust market definition. Data requirements might, for example, be limited to providing basic information on the activities of the merging parties in affected segments.

An initial information notice regime could allow deals that clearly do not have a material likelihood of raising competition concerns (such as those with no or minimal horizontal or vertical competitive effects in the EEA), to be cleared without the need to provide detailed analysis and data. Conversely, deals falling within the simplified regime that might have a potentially material impact on competition within the EU would still be subject to current levels of scrutiny. The only difference would be that the requisite analysis would be at the Commission's instigation, rather than by default.

While the eventual outcome of any given case could be expected to be similar to that achieved under the current system, the Sections believe that an initial information notice regime may well enable a more efficient use of both the Commission's and the notifying parties' resources.

As regards a self-assessment system of the sort mentioned in Question 8.3 of the Evaluation, the Sections note that this is an interesting approach that has both certain attractions and limitations. In particular, it would be important for any self-assessment regime to strike an appropriate balance between administrative ease (for both regulator and notifying parties) on the one hand, and legal certainty on the other.

The interaction between a new European Union self-assessment regime and individual member state merger regimes also would require careful management. Since a self-assessment approach would not result in a binding Commission Decision, merging parties

would require clarity that they would not be required to seek separate clearance in Member States for concentrations having a European Union dimension that the parties decide, under the self-assessment regime, not to notify to the Commission but that otherwise met applicable Member States' jurisdictional thresholds. In addition, the role of Member States' national competition authorities in this process would need to be clarified, especially as concerns whether and when referral requests could be made, and whether and when Member States could make reasoned requests for the Commission to open an *ex officio* investigation.

In addition, the Commission would need to establish a clear deadline within which it could intervene *ex officio* in a matter. The Sections suggest that any such deadline be set according to clearly identifiable events (*e.g.*, within a certain period following announcement of a deal), and be of a reasonable duration that would not disproportionately restrict the parties' ability to implement the transaction.

Further, rules on the availability of interim measures and substantive remedies for a problematic transaction subject to the self-assessment, both pre- and post-completion, would be necessary. Moreover, clarity would be needed with regard to what remedies – if any – would be available to the Commission in the case of a merger that was completed under the self-assessment regime, without *ex officio* intervention within the prescribed time limits, and that was subsequently found to raise competition concerns.

The Sections note that, at this stage, it is difficult to provide detailed input on these high-level proposals. Accordingly, the Sections respectfully request that, if the Commission intends to pursue any of these simplification proposals further, it provide the opportunity to comment on a more detailed proposal.

## II. EFFECTIVENESS OF THE CURRENT NOTIFICATION THRESHOLDS AND THE EUROPEAN COMMISSION'S PROPOSED TRANSACTION VALUE THRESHOLD

One concern for any agency conducting pre-merger review is whether the system's notification requirements capture only competitively relevant transactions, *i.e.*, those likely to result in appreciable competitive effects in the jurisdiction. This is recognized as important in order to avoid the unnecessary expenditure of agency and party resources on the notification and review of transactions that have little or no competitive effect in the jurisdiction. The Sections commend the Commission for taking initial steps to examine whether a legal gap exists in the EUMR as a predicate to considering proposed revisions to the current merger review regime. As discussed below, the Sections believe that the Commission's and the EU Member States' merger regimes already capture competitively significant transactions with cross-border EEA effects, such that additional merger reporting thresholds are not required. However, if the Commission continues to explore an additional transaction value based threshold test, the Sections strongly recommend that the test include a clear, objective local nexus requirement.

The Sections believe that the Commission's proposed "likely to produce a measureable impact within the EEA" standard is not a clear, objectively-based local nexus standard, and that reporting thresholds that apply uniformly across sectors are preferable to industry- or sector- specific criteria. The Sections then note possible alternative approaches that the Commission may wish to explore, notably introducing any new threshold as an additional referral standard rather than as a separate notification threshold test, or considering expanding

the ECN's procedures to provide for consultation on merger cases under review at national level that may raise cross-border implications.

A. The European Merger Review System Does Not Appear to be Missing Competitively Significant Transactions

The introduction to Section IV.2 of the Evaluation asks whether the EUMR, with its reliance on turnover-based jurisdictional thresholds, is missing certain transactions “in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has considerable market potential for other reasons”<sup>7</sup> but may have low turnover in the EEA, including in the digital and pharmaceutical industries. Earlier in this introduction, the question is framed more broadly, suggesting that a new threshold may be necessary to capture “all transactions which can potentially have an impact in the internal market.”<sup>8</sup>

As is demonstrated by the recent *Microsoft/LinkedIn* transaction,<sup>9</sup> the EUMR's current turnover-based thresholds are capable of capturing and, in fact do capture, such high-value transactions in the digital economy. Moreover, to the extent that a transaction may fall below the EUMR's thresholds, *e.g.*, due to limited sales of the target, the referral system serves as an effective mechanism to bring relevant cross-border transactions into the Commission's merger review process. Both the \$19 billion *Facebook/WhatsApp* transaction and the \$3.1 billion *Google/DoubleClick* transactions are examples of this in the digital sector, as is the *Pfizer/Ferrosan Consumer Healthcare Business* merger in the pharmaceutical sector.<sup>10</sup>

The Sections are skeptical of the proposition that transactions that may raise appreciable competitive concerns across the EEA currently escape Commission review. The Sections further note that, even if the Commission's concern were to prove valid, because the Commission shares merger review jurisdiction with its Member States, only those transactions with truly scant relation to the EEA are not subject to merger review in Europe.<sup>11</sup> As originally contemplated, the EUMR's drafters chose to allow for an allocation of

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<sup>7</sup> Consultation questionnaire, 20.

<sup>8</sup> Consultation questionnaire, 3.

<sup>9</sup> See press release for Case M.8124 – Microsoft/LinkedIn, [http://europa.eu/rapid/press-release\\_IP-16-4284\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4284_en.htm).

<sup>10</sup> See *e.g.*, Case M.7217, Facebook/WhatsApp, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.297.01.0013.01.ENG&toc=OJ:C:2014:297:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.297.01.0013.01.ENG&toc=OJ:C:2014:297:TOC); Case M.4731 – Google/DoubleClick, [http://ec.europa.eu/competition/mergers/cases/decisions/m4731\\_20080311\\_20682\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf); and Case M.6162, Pfizer/Ferrosan Consumer Healthcare Business, [http://ec.europa.eu/competition/mergers/cases/decisions/m6162\\_20110609\\_20310\\_1841890\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6162_20110609_20310_1841890_EN.pdf).

<sup>11</sup> Indeed, it appears that the overall European merger review system currently catches a large number of transactions. By the Sections' estimate, it appears that last year, alone, the Commission and the Member States' competition authorities conducted 3,310 merger reviews. In comparison, the United States' federal antitrust agencies were notified of 1,801 transactions in fiscal year 2015, or about 45% fewer than in the European Union. In Japan, with an economy roughly one-quarter the size of the European Union, the competition agency received 296 merger notifications. See, GCR Rating Enforcement 2016, <http://globalcompetitionreview.com/edition/1000401/rating-enforcement-2016>; OECD Country Reviews of Competition Policy Frameworks, 2015; and Federal Trade Commission Bureau of Competition & Department of Justice Antitrust Division, Hart-Scott-Rodino Annual Report Fiscal Year 2015 (“HSR Report”), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf>.

jurisdiction between the Commission and the Member States. Member State merger control rules, which generally have much lower notification thresholds than the EUMR, are pre-empted only if EUMR thresholds are exceeded, or when a transaction is referred to the Commission.

In a limited number of instances, individual Member State agencies, rather than the Commission, may review certain high-value transactions involving targets with low turnovers. In the area of the digital economy, for example, the Sections can cite to two potentially relevant cases in which this occurred, the *Facebook/Instagram* and the *Google/Waze* transactions, both of which the UK competition authority reviewed. However, as the UK review of these transactions confirmed, neither transaction posed competitive concerns on any relevant market in the UK or, by extension, the EEA.<sup>12</sup> Thus, even these transactions did not raise EUMR enforcement gaps of potential concern, and it is unclear to the Sections how a Commission review of either transaction under the EUMR would have further advanced the Commission's merger enforcement goals.

The Sections have been unable to identify the existence of an enforcement gap in the EUMR. Moreover, given the structure of the European merger review system and its division of competencies, coupled with the relevance of transactions already subject and likely to continue to be subject to review by the Commission and the Member States,<sup>13</sup> the Sections suggest that no changes to the EUMR are necessary to capture additional transactions under the EUMR. Thus, in response to question 19 of the Evaluation, the Sections do not believe that the absence, in the EUMR, of a complementary jurisdictional threshold based on value of the transaction impairs the Commission's ability to review competitively significant transactions with a cross-border effect in the EEA.

Moreover, given the Commission's powers to enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union, coupled with its sector inquiry powers, the Sections do not see the need to subject high value transactions to *ex ante* mandatory merger notification and review. Indeed, the acquisition of a nascent technology company or pipeline pharmaceutical supplier may not portend any clear anti-competitive effects at the time the transaction would be reviewed under the proposed new threshold, precisely due to the emerging nature of the target. The Commission's competition enforcement authority, together with its sector inquiry powers, appear to provide a more suitable means for examining any potential anti-competitive effects arising from such transactions.<sup>14</sup>

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<sup>12</sup> In *Facebook/Instagram*, the UK Office of Fair Trading ("OFT") recognized that the relevant markets were likely "international." Office of Fair Trading, *Anticipated Acquisition by Facebook Inc of Instagram Inc*, ME/5525/12, ¶¶ 11-13 (Aug. 22, 2012). In *Google/Waze*, the OFT considered both an EEA-wide and national geographic scope, finding "no substantial concerns . . . on any reasonable frame of reference[.]" Office of Fair Trading, *Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited*, ME/6167/13, ¶¶ 23-25 (Dec. 17, 2013).

<sup>13</sup> We note that Germany and other European Union Member States are considering changes to their merger notification threshold tests that may allow for additional transactions to be subject to merger review. Thus, even if the UK were to leave the European Union merger review system, the Sections believe that the overall system will continue to capture competitively significant transactions with cross-border EEA effects.

<sup>14</sup> In fact, the Commission has already initiated inquiries into several of the sectors highlighted in the Evaluation (*i.e.*, pharmaceuticals and "digital" industries such as e-commerce, roaming, and new media (3G)). See, e.g., [http://ec.europa.eu/competition/antitrust/sector\\_inquiries.html](http://ec.europa.eu/competition/antitrust/sector_inquiries.html).

B. Any Size of Transaction Thresholds Proposed Should Ensure a Material Local Nexus Based on Clear, Objective, and Quantifiable Criteria

Whereas the Sections do not consider it necessary for the EU to add a transaction-value-based threshold to the EUMR, given the lack of an evident enforcement gap, if the Commission continues to explore such an additional threshold test, the Sections strongly support benchmarking any such threshold against international standards – particularly those established by the International Competition Network (“ICN”) and the Organization of Economic Cooperation and Development (“OECD”). Notably, the ICN Recommended Practices and the related OECD Recommendation recognize the need for merger threshold tests to contain a clear, objective local nexus requirement to ensure that only transactions with a material impact on the jurisdiction are subject to merger notification. The Sections consistently emphasize the importance of these principles.<sup>15</sup>

Given the Commission’s critical role as an international leader in advocating for and implementing the ICN Recommended Practices, it would be essential for any changes to the EUMR to conform to these international best practice documents. This is all the more important given that other jurisdictions model their laws and approaches on Commission precedents.<sup>16</sup>

The Sections recognize that a transaction value threshold, such as that suggested by the Commission, can be an appropriate merger notification threshold as it is based on objective and quantifiable information that is readily accessible to the parties. However, this test, in itself, “is unsuitable to determine whether a transaction will have an impact on a specific jurisdiction.”<sup>17</sup> Other jurisdictions, including the United States, that use a transaction value

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<sup>15</sup> See, e.g., Joint Comments of the American Bar Association Sections of Antitrust Law and International Law on the First Draft Bill of the German Ministry of Economics and Energy for the 9th Amendment of the Act Against Restraints of Competition (Aug. 15, 2016), [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20160815.auhcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20160815.auhcheckdam.pdf); Comments of the American Bar Association Section of Antitrust Law on the Draft Bill Amending the Competition Act Issued by the Republic of Chile (May 15, 2015), [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_20150515\\_chile.auhcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20150515_chile.auhcheckdam.pdf); Joint Comments of the American Bar Association Sections of Antitrust Law and International Law to the Superintendency of Industry and Commerce on the Draft Legislative Proposal of the Congress of Colombia Regarding the Enactment and Modification of Rules and Regulations Regarding the Protection of Competition (Oct. 21, 2015), [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20151021.auhcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20151021.auhcheckdam.pdf); Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the Israel Antitrust Authority’s Draft Revisions to the Israel Merger Control Regime (May 2015), [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_201505.auhcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_201505.auhcheckdam.pdf).

<sup>16</sup> The Sections note, for example, the explicit references made by the Antimonopoly Committee of Ukraine in its recent public consultation on draft Horizontal Merger Guidelines that those guidelines were modelled after the Commission’s own Horizontal Merger Guidelines. See <http://www.amc.gov.ua/amku/control/main/uk/publish/article/131660>.

<sup>17</sup> Background Paper by the Secretariat, Working Party No. 3 on Cooperation and Enforcement, OECD Competition Committee, Local Nexus and Jurisdictional Thresholds in Merger Control, (“OECD Background Paper”), at ¶ 53, DAF/COMP/WP3(2016)4 (Mar. 10, 2016), [https://one.oecd.org/document/DAF/COMP/WP3\(2016\)4/REV1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf).

criterion, couple it with additional tests and exemptions to ensure an appropriate local nexus.<sup>18</sup> A significant local nexus threshold is particularly important when the transaction value test is based on worldwide value, with the potential to capture a significant number of transactions.

The Sections commend the Commission for recognizing, in the Evaluation, the need for solutions to ensure that only transactions with a significant economic link with the EEA would be covered by the transaction value threshold. However, we believe that the Commission’s proposed inclusion of a clause stipulating that concentrations which meet the proposed deal-size threshold are notifiable only if they are likely to produce a measurable impact within the EEA does not meet international standards for a clear, objective local nexus requirement. Moreover, as noted below, the Sections believe that the Commission’s alternative proposal to develop industry-specific criteria to ensure a local nexus also raises considerable issues.

- a. *A clause requiring notification only if the transaction is likely to produce a measureable impact in the EEA does not meet the international standard for clear, objective local nexus requirements.*

As identified by the ICN and the OECD, merger control regimes that lack clear thresholds to ensure that notifiable transactions have a material impact on the reviewing jurisdiction impose considerable costs on parties and agencies.<sup>19</sup> These include the burden of interpreting unclear notification requirements and determining whether filing is required, the time and expense of notifying transactions that do not appreciably affect a jurisdiction, and expenditure of agencies’ resources to reviewing mergers that do not appreciably affect the jurisdiction. The Sections are concerned that the proposed general clause stipulating that “concentrations that meet the deal size threshold are only notifiable if *they are likely to* produce a measureable impact within the EEA” (*emphasis added*) would fail to meet the clear and objective threshold criteria, even if complemented by specific explanatory guidance. In particular, the Sections are concerned with the vagueness of a standard based on the subjective likeliness that the transaction will produce a measureable impact in the EEA. The standard could capture transactions with limited or speculative connections to the EEA and lead to over-notification by uncertain parties that seek to ensure compliance with the law.<sup>20</sup> By contrast, without a clear, objective standard, firms could under-report transactions based on good-faith evaluations of the impact their transactions will have on the relevant markets.

- b. *The Sections recommend uniform merger thresholds across sectors and markets*

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<sup>18</sup> *Id.* at ¶ 54.

<sup>19</sup> International Competition Network, Recommended Practices for Merger Notification Procedures (2002), <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>, (“ICN Recommended Practices”); OECD Background Paper, *supra* n.18, at ¶ 1. Thresholds that incorporate an appreciable domestic nexus benefit both parties and regulators by “limit[ing] the expenditure of public and private resources by avoiding notification and review of mergers that are unlikely to raise any competition concerns” and help prevent “unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.” OECD Background Paper, *supra* n.18, at ¶ 7. ICN Recommended Practices.

<sup>20</sup> When the failure to file includes significant penalties, parties are likely to err on the side of over-reporting. This imposes costs on regulators and parties alike.

The Commission also identifies the possibility of industry specific criteria as an option to ensure local nexus. Whereas commentators have provided possible examples of such criteria, including for the digital industries,<sup>21</sup> the Sections caution that it may be challenging to develop and apply such thresholds in a manner that would ensure that they meet international norms of objectivity and materiality. For example, if based on the number of users or active users, how would a “user” or “active user” be defined to apply to all relevant situations?

Separately, as the Sections have noted in prior comments to the Commission,<sup>22</sup> the Sections support the use of uniform thresholds across sectors and markets because this simplifies the application of a merger review regime. The Sections believe that the benefits of simplicity and uniformity typically outweigh any actual or perceived increase in accuracy that may result from market- or sector-specific thresholds. As one example, in relation to sector-specific tests, the Sections note that the Commission regularly leaves its definition of relevant product markets open,<sup>23</sup> so that market- or sector-specific thresholds could often be difficult to apply.

Instead, if the Commission looks to adopt a transaction value threshold for which it requires complementary local nexus tests, the Sections propose that the Commission consider developing such complementary tests on the basis of the parties’ sales and/or assets in the EEA. The ICN and OECD instruments recognize both sales and assets as objective criteria.<sup>24</sup> If an asset-based test were to be included in a threshold, the Sections would welcome explanatory guidance and the opportunity to provide further input on the valuation methodology. In making this suggestion, the Sections recognize that the Commission may choose to adopt sales or asset-based tests that are lower than those currently in place and may choose to adopt different sales or asset-based thresholds for the acquirer and the target entity.

### C. Additional Considerations to Ensure a Smooth and Cost-Effective System of EU Merger Control

As discussed in Part A, above, the Sections believe that the overall European merger review system already allows the Commission and Member States’ competition authorities to effectively review transactions that may be expected to have appreciable competitive effects within the EEA. This includes relevant innovation market transactions in the digital and

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<sup>21</sup> For example, the number of “users” or “active users” or the number of clicks or page views from IP addresses in the jurisdiction. *See e.g.*, Speaking notes of Jean-Yves Art, Associate General Counsel, Microsoft Corp., Working Party No. 3 on Cooperation and Enforcement, OECD Competition Committee, Roundtable on Local Nexus and Jurisdictional Thresholds in Merger Control, <http://www.slideshare.net/OECD-DAF/jurisdictional-nexus-in-merger-control-regimes-speaking-points-by-jeanyves-art-microsoft-june-2016-oecd-discussion>.

<sup>22</sup> *See* Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law, Response to Questionnaire Issued by the European Commission in Connection with its Report on Regulation 139/2004 (November 2008) at pages 6-7, responding to the following Commission question: “Are there any specific markets or economic sectors where, in your view, the turnover thresholds in Article 1(2) and (3) are not functioning the manner intended, namely to identify those concentrations which would most appropriately be the subject of merger control at the Community level?”.

<sup>23</sup> For a very recent example, see Case M.8046, TUI / Transat France, Commission decision of October 20, 2016, [http://ec.europa.eu/competition/mergers/cases/decisions/m8046\\_559\\_3.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m8046_559_3.pdf), at paras 27, 39, 55-56, 73, 77, and 81.

<sup>24</sup> *See, e.g.*, ICN Recommended Practices, *supra*. n.20, at ¶ II.B.2.

pharmaceutical sectors. If the Commission believes that, given concerns of EEA impact, it is appropriate to capture certain of these transactions more readily under the EUMR, the Commission might consider modifying the referral system to achieve this outcome. In this manner, the Commission could rely on the additional proposed thresholds, discussed above, to act as an alternative referral standard rather than as separate notification threshold tests. This would allow the Commission to address transactions of potential concern without capturing additional transactions that have little or no effect in Europe, allowing for a more effective and efficient approach to the perceived “enforcement gap.”

The Sections recognize that this would require significant change to the EUMR, and would raise potentially broader questions for the referral system. For example, should any such threshold be triggered if less than three member states review a transaction? Might the Commission be authorized to initiate referrals that meet the proposed transaction value test? While the implications of any such change would need to be explored, the Sections believe that a revision to the referral system aimed at addressing Commission concerns regarding EEA impact of certain high-value transactions involving targets with low turnover is preferable to a mandatory notification threshold test that will likely result in over-reporting.

Alternatively, the Commission might look to expand its ECN procedures to provide for consultation among the Commission and Member State authorities on merger cases under review at the national level that may raise cross-border implications. The ECN might consider promulgating guidance on how to assess transactions involving targets with limited turnover in the EEA. The ECN also might consider creating a mechanism to ensure that such transactions are brought to the Commission’s attention promptly and that the Commission has a chance to consult with the relevant Member State(s) reviewing the transactions. The EU Merger Working Group might be a natural place in which to establish such a mechanism.

## **Conclusion**

The Sections appreciate the opportunity to provide comments on the issues raised in the Evaluation and would be pleased to respond to any questions that the Commission may have regarding these comments.