

EU MERGER CONTROL PROCEDURAL & JURISDICTIONAL ASPECTS

REPLY TO THE EUROPEAN COMMISSION CONSULTATION

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- (1) We welcome the opportunity to provide comments to the European Commission in its evaluation of procedural and jurisdictional aspects of EU merger control.¹
- (2) Hogan Lovells is a multinational legal practice which has around 2,500 lawyers working out of more than 45 offices in every continent. Hogan Lovells' Antitrust, Competition and Economic Regulation team has more than 130 lawyers spanning 18 countries, and is one of the largest competition law practices in the world.²
- (3) The comments in this Reply are based on our expertise and experience in advising on the application of merger control for global, European and national transactions. We advise on a regular basis in multi-jurisdictional deals where we assess the applicable rules in over 120 merger regimes around the world. In particular, we advise on a regular basis on the merger control rules at European Union level as well as in the Member States where we have offices (Belgium, France, Germany, Hungary, Italy, Poland, Spain and the United Kingdom). The comments contained in this Reply do not necessarily reflect the views of our clients.

1. A NEW JURISDICTIONAL THRESHOLD

- (4) We respond here to section IV.2 of the Commission questionnaire (questions 14 to 22), which concerns the issue of the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control, as set out in Article 1 of the EU Merger Regulation, which determine which transactions are reviewed, in principle, by the Commission. In short, we consider that the Commission's consultation materials and the questionnaire do not demonstrate that any perceived gap actually exists or that it is significant.

1.1 Perceived legal gap

- (5) The Commission consultation raises the question of whether the current jurisdictional thresholds capture all merger deals which can "*potentially*" have an impact on the

¹ The consultation web page is *available at*:
http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

The Commission questionnaire of 29 questions is *available at*:
http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf.

² Further information regarding Hogan Lovells practice area can be found on our website, *available at*:
www.hoganlovells.com.

European internal market. The current EU thresholds are based on the turnover of the companies concerned. The issue is whether the acquisition of companies with low turnover – but with future market potential – that would not fall within the current EU merger control regime could still create competitive concerns in Europe.

- (6) The Commission seems to fear not being able to review acquisitions of so-called disruptive innovators,³ especially in industries where a business may start generating revenues only years after it has entered the market.⁴
- (7) In the case of Digital markets, the business model usually involves the ownership of data and user relationships being monetized only subsequently. The Commission's concern is that the accumulation of market power may occur at the time of the merger, but pass underneath the radar of EU merger control.
- (8) Recent developments in the digital world have attracted growing attention from competition authorities, including the Commission,⁵ to "big data".⁶ EU national authorities have been particularly focused on big data, and in 2016 the French and the German agencies issued a joint report on 'Competition Law and Data' arguing that "*competition may be stifled if established undertakings have a proven ability to buy out competitively significant new entrants with a turnover, asset-base or market share too low to trigger merger control*".⁷ Germany has already proposed a far reaching reform of its merger notification thresholds to allow jurisdiction based on the size of the transaction.⁸

³ Disruptive innovation is said to take place outside the value network of established companies and to introduce a different package of attributes from the one mainstream that customers historically value. See the OECD Global Forum on Competition, Disruptive innovation and competition policy enforcement, Note by Alexandre de Streeck and Pierre Larouche, 2015, *available at* <http://www.oecd.org/competition/globalforum/disruptive-innovations-competition-law-enforcement.htm>.

⁴ To use the words of Commissioner Vestager: "*the issue seems to be that it's not always turnover that makes a company an attractive merger partner. Sometimes, what matters are its assets. That could be a customer base or even a set of data. In the pharmaceutical sector, it might be a new drug that's been developed but not yet approved for sale. Or a company might be valuable simply because of its ability to innovate. A merger that involves this sort of company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. So by looking only at turnover, we might be missing some important deals that we ought to review*" (speech of 10 March 2016 on "Refining the EU Merger Control System", *available at* https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en).

⁵ Commissioner Vestager has stated that "*data could be an important factor in how a merger affects competition. A company might even buy up a rival just to get hold of its data, even though it hasn't yet managed to turn that data into money. We are therefore exploring whether we need to start looking at mergers with valuable data involved, even though the company that owns it doesn't have a large turnover*" (speech of 29 September 2016 on "Big Data and Competition", *available at* http://ec.europa.eu/commission/2014-2019/vestager/announcements/big-data-and-competition_en).

⁶ As the Commission explains on its Digital Single Market website, "*data has become a key asset for the economy and our societies similar to the classic categories of human and financial resources. Whether it is geographical information, statistics, weather data, research data, transport data, energy consumption data, or health data, the need to make sense of 'Big data' is leading to innovations in technology, development of new tools and new skills*", *available at* <https://ec.europa.eu/digital-single-market/en/big-data>.

⁷ *Autorité de la concurrence and Bundeskartellamt, "Competition Law and Data", 10 May 2016, available at*

- (9) In the Pharmaceutical sector, it might be a new drug that has been developed but not yet approved for sale. The Commission fears that, by looking only at turnover, they might be missing some important deals that they ought to review. Innovation rivalry is a particularly important competitive factor in this sector, and R&D is structured in such a way that it is possible at an early stage to identify the competing upcoming products.⁹
- (10) More generally, in recent years there has been a growing focus by the Commission on innovation and related theories of harm.¹⁰ The Commission takes into account the innovation potential of the merging companies, regardless of the current market position of the companies (for example, potential competitors or companies that are developing pipeline products).¹¹ The Commission has justified its focus on such theories of harm by referring to cases in the pharmaceutical sector – and also in other industries.¹²

1.2 **We believe that a new jurisdictional threshold should not be introduced**

- (11) We believe that the jurisdictional thresholds of the EU Merger Regulation should not be amended to incorporate a complementary threshold based on the value of the transaction ("deal size threshold").
- (12) The founding treaties of 1957 did not originally provide for a merger control system. The Commission began to advocate its introduction in the 1960s and was able to achieve it at the end of the 1980s.¹³ After a little more than 25 years, European merger control has grown (through six Commissioners, four major reforms, eight Notices, two Guidelines, five Best Practices Guidelines, around 6,000 phase I decisions, 200 phase II decisions, 25 prohibition decisions and 70 appeals) to be universally recognized as a mature system that works very well.
- (13) Since the first Merger Regulation of 1989, the European Union has not changed its turnover-based thresholds to expand its jurisdiction (whereas it has changed the substantive test to assess mergers due to the intervention of the Court of Justice in the

<http://www.autoritedelaconurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> and
http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html.

⁸ On 1 July 2016 the German Federal Ministry of Economics made this proposal among other amendments to the Act against Restraint of Competition (9th amendment).

⁹ Commission Guidelines on Horizontal Co-operation Agreements, paragraph 120.

¹⁰ In its recent 'Competition Policy brief on EU merger control and innovation', the Commission has clarified that it puts the competitive harm caused by reduction of innovation on an equal footing with increased prices and reduced output (issue 2016/1, 11 April 2016, available at http://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf).

¹¹ Commission Guidelines on Horizontal Mergers, paragraphs 20b, 38 and 59. See also the Commission Guidelines on Horizontal Co-operation Agreements, paragraph 119.

¹² The Commission's focus on innovation started in the pharmaceutical sector but it is now expanding to other sectors, including the digital one for understandable reasons, but also others such as manufacturing (see the *General Electric / Alstom* case of 2015).

¹³ "The Historical Foundations of EU Competition Law", edited by Kiran Klaus Patel and Heike Schweitzer, Oxford University Press, 2013.

early 2000s). For the reasons set out below, we do not see a need for change at this point, and we are concerned about the adverse consequences that may result if the reform contemplated by the Commission were pursued.

(a) **There are no real 'missed' cases**

- (14) The Commission consultation and questionnaire lists the following examples to illustrate the perceived legal gap:
- a. for the digital world, the *Facebook/WhatsApp* transaction, which in any case was reviewed by the Commission thanks to the referral system, and which was ultimately cleared without conditions in phase I; and
 - b. for the pharmaceutical sector, the *AbbVie/Pharmacyclis* deal of 2014, which involved two U.S. companies and was filed with the U.S. Federal Trade Commission which did not intervene, supposedly because the assets of the merging companies were complementary.¹⁴
- (15) We are not aware of any competitively significant transactions that had cross-border effects in Europe which could not be reviewed by the Commission. The EU Merger Regulation captured the recent important transactions in the digital economy and pharmaceutical sector such as *Google/DoubleClick* or *Pfizer/Ferrosan Consumer Healthcare Business*.
- (16) The referral mechanism acts as a safety net allowing the upward transfer to the Commission in suitable cases, either at the request of the notifying parties, or by the national competition authorities in consultation with the Commission. According to Article 4(5) of the Merger Regulation, the *parties* may ask for referral of a case from the level of Member States to the Commission before it is notified, if the case is notifiable under the national merger control laws in *at least three Member States*. Also, according to Article 22 of the Merger Regulation, *national competition authorities, even a single one*, may request the referral of a case to the Commission after notification.
- (17) The Article 4(5) referral is indeed the mechanism that allowed the Commission to review the *Facebook/WhatsApp* transaction which was referred up to the Commission by three Member States. Thus the *Facebook/WhatsApp* deal should not be seen as a reason to amend the thresholds, but as evidence that the current system works.
- (18) We believe that the Commission's fear of 'missing out' is particularly unfounded in a system where the competence to review mergers is shared between the Commission and the Member States authorities. It might be noted that, historically, national merger control

¹⁴ <http://globalcompetitionreview.com/article/1061759/wachtell-wilson-sonsini-advising-on-usd21-billion-cancer-drug-deal>

actually preceded EU-wide merger review (Germany and France having introduced their merger control systems in 1973 and 1977 respectively).

- (19) While the EU has put in place a system of merger control by which concentrations having an EU dimension are assessed by the Commission in a single procedure (the 'one stop shop' principle), Member States competition authorities remain competent players within the EU system. For example, in 2012 the UK's Competition and Markets Authority reviewed the *Facebook/Instagram* transaction.
- (20) In the last decade, we have witnessed a trend by which the Member State authorities have become ever more important enforcers of EU law (following the Modernization Regulation of 2004, and also through the 2016 consultation to 'Empower the national competition authorities to be more effective enforcers'). The European Competition Network or ECN already provides for mechanisms by which the Commission and other interested authorities are consulted where a transaction with cross-border effects in Europe is not caught by EU merger control. These mechanisms include the European Competition Authorities Notice system¹⁵ and the cooperation amongst those authorities,¹⁶ recently through the ECN merger working group.¹⁷

(b) There is actually no legal gap

- (21) We believe that the acquisition of low-turnover targets for high prices does not raise any competitive concerns at all in the vast majority of cases. The *Facebook/WhatsApp* deal was eventually cleared without conditions. An unlikely or exceptional case should not be a reason to expand the jurisdiction of the Commission for the following reasons.
- (22) First, the fact that a company is willing to pay a high purchase price for the acquisition of the a low-turnover target may just be the sign that the merging parties' activities are complementary rather than overlapping, thus not raising any competitive concerns.
- (23) Second, the Commission fears that it is missing the acquisitions of low-turnover targets that are 'potential' competitors. However, the Commission Notice on Market clarifies that

¹⁵ An ECA Notice is a notice which is distributed to all other ECAs by the first NCA to be notified of a multi-jurisdictional merger. See the ECA procedures guide on the exchange of information between members on multijurisdictional mergers, 2001, *available at*: http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

¹⁶ Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November 2011, *available at*: http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf: "*these Best Practices are without prejudice to the existing guidance on the system of reattribution of cases between the Member States and the Commission (see the Commission's referral notice and ECA's Principles on the application of Art. 4(5) and 22 of Regulation 139/2004). Nevertheless, the enhanced cooperation recommended in these Best Practices may also facilitate the smooth functioning of the reattribution mechanisms set out in Regulation (EC) 139/2004*".

¹⁷ The ECN merger working group established in Brussels in 2010, consists of representatives of the European Commission and the national authorities, *available at*: <http://ec.europa.eu/competition/ecn/mergers.html>.

"potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry". And the Commission takes into account the innovation potential of the merging companies only when specific conditions occur, for example when the entry is possibly without incurring significant investments,¹⁸ which a low-turnover target cannot do (by definition), absent the acquisition.

(24) Third, many targets in the digital space do not live up to their initial value, as the Commission itself recognizes on its Digital Single Market website.¹⁹ And, more generally, market power on digital markets can be vulnerable to displacement by innovative products (see the displacement of Yahoo, Lycos or AltaVista by Google and of MySpace by Facebook within a few years).²⁰ The *Facebook/WhatsApp* clearance decision concludes that "*consumer communications apps are a fast moving sector, where customers' switching costs and barriers to entry/expansion are low. In this market any leading market position even if assisted by network effects is unlikely to be incontestable*".²¹

(25) As for the pharmaceutical sector, it is hard to justify the introduction of a deal size threshold just because a low-turnover target may have the potential to become a blockbuster drug seller. While it is true that pharmaceutical R&D allows the identification at an early stage of the pipeline products, the possibility that an acquired target may have large future success is possible also in other sectors. Moreover, the reasoning that the low-turnover target has data that may carry market power does not hold for the pharmaceutical sector. Indeed, the pharmaceutical sector is not assessed in depth in the joint French and German report on big data that has been the starting stone for the current German proposal to introduce a new deal size threshold.

(c) **Challenges of a deal size threshold: non-objective criterion, disproportionate number of notifications, and industry-related discrimination**

(26) It would be extremely complex to establish an appropriate deal size threshold.

(27) First, difficult technical questions on how to calculate value are raised in the many deals which do not involve a straightforward transaction involving cash consideration. Value

¹⁸ Commission Guidelines on Horizontal Mergers, paragraphs 20b, 38 and 59. See also the Commission Guidelines on Horizontal Co-operation Agreements, paragraph 119.

¹⁹ <https://ec.europa.eu/digital-single-market/en/news/startup-europe-summit-showcasing-and-connecting-eu-startups>.

²⁰ The joint French and German report on 'Competition Law and Data' clarifies that this argument of dynamic competition should be assessed on a "*case by case basis*" (pages 29-30). This is exactly what we argue when we say (further below in this Reply) that the Commission can use its antitrust tool-box (e.g., an abuse of dominance investigation) instead of broadening the scope of its merger review.

²¹ For all other cases, see: *Autorité de la concurrence* and *Budeskartellamt*, "Competition Law and Data", 10 May 2016, page 33 and ff.

can be difficult to assess where the consideration includes non-cash elements. This is our experience already in jurisdictions where notifying parties are required to insert a deal-size value in the notification form. Should the deal size become an actual jurisdictional threshold, we believe that legal certainty would be jeopardised as businesses would be unsure whether they have to notify or not. Businesses may also try to manipulate the calculation of the purchase price to avoid notification to the Commission – or indeed to game the "one stop shop" by diverting a case from a national competition authority perceived as difficult to the Commission.

- (28) The price may also fluctuate between signing and closing (recent reported examples include the *ABI Inbev/SabMiller* deal and the *Facebook/WhatsApp* transaction). Where consideration involves securities, the value may fluctuate (when the securities are traded) or not be readily available (where they are not frequently traded).
- (29) It is also hard to see how transaction values can be practically assessed for the establishment of joint ventures, where the notifying parties contribute assets in return for shareholdings. In the joint venture context, "deal value" really is an inappropriate concept, and we would urge the Commission – in any event – to consider excluding joint venture from whatever final proposals it may make.
- (30) Second, the applicable value criterion would have diverging impact in different industries. Setting a deal size threshold is likely to increase the burden for notifying parties in some sectors, while allowing those in other sectors to escape notification. Some parties might feel that this implies discriminatory or unfair treatment and use this argument in possible appeals before the Court of Justice.
- (31) Indeed, it is unclear which sectors should be addressed by any deal size threshold:
- a. in the present consultation the Commission refers to the digital and the pharmaceuticals sectors;
 - b. in a separate consultation on big data (for its Digital Single Market objective) the Commission indicates that the issue of access to machine-generated data is relevant in several sectors, such as transport, energy markets, smart living environments, and the health and care sector;²²
 - c. in their recent report on big data, the French and the German authorities refer to digital, energy, telecommunications, insurance, banking and transport;²³

²² See the Commission public consultation on "Building the European data economy", available at <https://ec.europa.eu/digital-single-market/en/news/public-consultation-building-european-data-economy>.

²³ *Autorité de la concurrence* and *Budeskartellamt*, "Competition Law and Data", 10 May 2016, page 1.

d. in the 1990s in *Tetra Pak I* the break-through innovation was considered to occur in the aseptic packaging of UHT-treated milk, to which the acquired technology related (incidentally, in this case the Commission was of course able to address the acquisition of an innovator through an abuse of dominance investigation).²⁴

(d) **Scenario with a deal size threshold: reduced legal certainty, setting a bad precedent, and chilling effect on businesses and economy**

(32) Should this proposed reform go through, we believe that there would be a negative impact for business and the European economy in general for the following reasons.

(33) First, we believe that legal certainty should be a guiding and fundamental principle for any reform of the EU Merger Regulation. Indeed, the Merger Regulation refers to that principle several times (as do the ICN's 'Recommended Practices for Merger Notification'). Legal certainty as a central requirement for the rule of law has been protected since the very beginning of the integration process of Europe. Commissioner Vestager herself stated in relation to the present consultation: "*whatever we decide in the end, it has to meet one fundamental principle: there should be no doubt whether you need to notify a particular merger. So whatever test we choose has to be easy to apply, and has to give a definitive answer*".²⁵

(34) We believe that the introduction of a deal size threshold could lead to significant legal uncertainty. Any general clause such as "*concentrations that meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA*" (see question 21 of the Commission questionnaire) would be extremely complex to apply even if complemented with explanatory guidance, and especially in markets that are not clearly defined in Commission precedents.

(35) Second, the Commission acts as an international leader in advocating and implementing ICN Recommended Practices. The ICN's 'Recommended Practices for Merger Notification' emphasise 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. By adopting a deal size threshold the Commission would risk not abiding by this recommendation.

(36) Bad reform in the EU would risk contaminating other jurisdictions which seek to emulate the Commission. In particular, national authorities within Europe and across the world might well view this as a prompt to review insignificant deals in markets that are by definition global such as the digital economy and the pharmaceutical sector.

²⁴ Judgment of 10 July 1990, *Tetra Pak*, T-51/89, ECLI:EU:T:1990:41.

²⁵ Speech of 10 March 2016 on "Refining the EU Merger Control System", available at: https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en.

(37) In general, we believe that the introduction of a deal size threshold may have a chilling effect on businesses' willingness to invest in Europe and ultimately affect the European economy. There is a high risk that the reform could lead to the EU Merger Regulation becoming overly burdensome and intrusive.

(e) **Merger control is not the right forum to address any possible legal gaps**

(38) We do not believe that the Commission should use merger control to examine deals of this type at all. First, the antitrust "sweep-up" toolbox remains. The Commission has powers to enforce Articles 101 and 102 of the TFEU, as well as extensive sector inquiry powers. These powers allow the Commission to examine and keep in check anti-competitive outcomes arising from transactions. The Court of Justice has held in *Continental Can*²⁶ that the acquisition of a competitor by a dominant company may constitute an abuse within the meaning of Article 102 since this may reinforce the acquirer's dominant position (subsequent to the adoption of the Merger Regulation, the EU Courts have reaffirmed that it may be an abuse for a dominant company to acquire a competitor).²⁷

(39) The joint French and German report on 'Competition Law and Data' lays out several theories of harm for possible abuse of a dominant position investigations in the digital sector.²⁸ This *ex-post* review is particularly suited to the gap cases that the Commission is considering in the digital and pharmaceutical sectors, where there may be no anti-competitive effects at the time of the transaction due to the emerging market potential of the target.

(40) Second, there are other laws that may address any possible gaps. For example, privacy laws and consumer protection tools may offer alternative solutions. The Commission has confirmed that privacy-related concerns as such do not fall within the scope of EU competition law (though they can be taken into account in the competition assessment to the extent that they affect consumers' decisions).²⁹

(41) Most recently, on 10 January 2017, the Commission adopted a Communication on 'Building a European data economy' addressing issues relating to the free flow of data, including the legal issue of access to such data: "*the use of existing general contract law and competition law instruments available in the Union might be a sufficient response. In addition, voluntary or umbrella agreements covering certain sectors might be envisaged.*"

²⁶ Judgment of 21 February 1973, *Europemballage and Continental Can*, 6/72, ECLI:EU:C:1973:22.

²⁷ Judgments of 21 September 2005, *EDP*, T-87/05, ECLI:EU:T:2005:333, and of 14 December 2005, *General Electric*, T-210/01, ECLI:EU:T:2005:456.

²⁸ *Autorité de la concurrence* and *Budeskartellamt*, "Competition Law and Data", 10 May 2016, page 17 and ff.

²⁹ Commission decision of 6 December 2016 in Microsoft/LinkedIn case, press release available at: http://europa.eu/rapid/press-release_IP-16-4284_en.htm

Nevertheless, where the negotiation power of the different market participants is unequal, market-based solutions alone might not be sufficient to ensure fair and innovation-friendly results, facilitate easy access for new market entrants and avoid lock-in situations".³⁰ Therefore the EU is addressing the issue of possible foreclosure of access to big data in other fora.

- (42) Third, the Commission's review of extra-EU deals on a regular basis might not be without risk. Of course, a degree of extraterritoriality is an inevitable feature of EU merger control. However, this should not give *carte blanche* to the Commission to review any deals around the world in the digital and pharmaceutical sectors. The extraterritorial reach of EU merger control must comply with public international law.³¹ Moreover, in practical terms, the Commission may struggle to obtain information (located outside the EU) or enforce its negative decisions (where assets are located out of the EU) if it seeks to assert extraterritorial jurisdiction without a general acceptance of the legitimacy of that jurisdiction.³²

(f) **What other jurisdictions are doing should be taken into consideration**

- (43) What other jurisdictions are doing should be taken into consideration, while keeping in mind the Commission's leading role in the global antitrust arena and the specific features of the EU merger control system.
- (44) First, other jurisdictions with deal size thresholds have safety nets:
- a. The U.S. system exempts acquisitions of non-US shares or assets where the target does not have significant turnover or assets in the US (currently about US\$ 78 million).
 - b. In Canada the deal size transaction test applies only to the specific case of 'combination'.
 - c. In Mexico where a "price paid" test is used, the deal size threshold may apply only if there is a specific allocation of the purchase price to that jurisdiction. This decreases any risk that insignificant deals are caught by this threshold.

³⁰ See the Commission public consultation on 'Building the European data economy', available at: <https://ec.europa.eu/digital-single-market/en/news/public-consultation-building-european-data-economy>. See also the Commission Staff Working Document on the free flow of data and emerging issues of the European data economy: "(EU) competition law aims at ensuring a fair functioning of markets. While access to commercially-held data has not been at the heart of relevant case-law, conclusions can be drawn from case law on refusals to deal (to licence)".

³¹ Judgment of 25 March 1999, *Gencor*, T-102/96, ECLI:EU:T:1999:65, paragraph 90.

³² See OECD, *Cross-Border Merger Control: Challenges for Developing and Emerging Economies*, 2011, pages 46-7, available at: <http://www.oecd.org/competition/mergers/50114086.pdf>.

- (45) Second, there is not yet any practical experience with the current proposal in Germany to introduce a deal size. The current proposal suggests that when only one of the two domestic thresholds is met (that is, when one of the two involved companies has generated € 25 million in Germany in the previous financial year but the other party has not met the threshold of € 5 million turnover in Germany), a notification is still required if the price for the target exceeds € 400 million and the target company is active on a large scale (*"in erheblichem Umfang"*) in Germany, with reference to the place of the designated use. In this context, one has to consider:
- a. while turnover-based thresholds provide for clarity, the proposed German rules will be open to varying interpretations; and
 - b. the specifics of the German notification system, which is characterized by significantly lower burdens on the parties in terms of the provision of information and documents, resulting in short filings and fast procedures.
- (46) Third, EU merger control has the specific features of a dual system, in which both the Commission and Member States are competent authorities, unlike in the U.S. In addition, the Commission has a leading role with respect to international cooperation between competition authorities, and many regulators in emerging competition law jurisdictions closely monitor developments at the EU level. A decision by the Commission to introduce a new deal size threshold is very likely to affect businesses and other agencies globally, as this reform is replicated in merger control regimes across the world. The Commission has a real responsibility to consider the impact of its actions in this respect.

1.3 **Alternative solutions if the Commission is minded to create a new deal size threshold**

- (47) If the Commission is minded to introduce an additional deal size threshold test, we would have the following comments.
- (48) First, the deal size threshold would have to be set very high, so that the reform does not have a disproportionate impact on the number of notifications. We believe that a possible point of reference could be the (final) purchase price in the *Facebook/WhatsApp* deal (which has been the case supporting this consultation): over €20 billion.
- (49) Second, any transaction value threshold would have to be twinned with a complementary local nexus test. As noted above, any extraterritorial reach of the EU merger control should be dealt with carefully. The ICN's 'Recommended Practices For Merger Notification' state clearly the importance of a local nexus test: "*merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of 'local nexus' required, such as material sales or assets levels within the territory of the*

jurisdiction concerned".³³ We suggest that this local nexus test is based on the parties' turnover in Europe. These turnover thresholds should be as high as possible for the reasons outlined above.

- (50) Third, introducing a condition that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple would be extremely complex. Valuations vary across industries, and there is a risk that there would be notification requirements for some sectors and not for others, again in detriment to legal certainty and equal treatment.
- (51) Fourthly, we would urge the Commission to consider only bright-line tests, especially in view of the fact the EU Merger Regulation is a mandatory notification system. We would not, for example, recommend that the local nexus test involve a 'share of supply' test, as is applied in the United Kingdom.³⁴ If such a test were contemplated, it should be introduced only into a non-suspensory system where notification is voluntary.
- (52) Lastly, we do not believe that the Commission should retain residual jurisdiction for transactions that do not meet the applicable jurisdictional thresholds.³⁵ We understand that the current revised draft of the ICN's 'Recommended Practices for Merger Notification' clarifies that jurisdictions may retain the ability to review transactions that do not meet the mandatory notification thresholds only when there is a material nexus to the jurisdiction.³⁶ This is to address the desire of the parties to the transaction for certainty.

2. 'FURTHER' SIMPLIFICATION

- (53) We respond here to section IV.1 of the Commission's questionnaire (questions 1 to 13), which seeks comment on the simplification measures that were implemented in 2014,³⁷ and on whether any further simplifications could be made.

³³ ICN recommended practices for merger notification procedures, September 2002, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>. These Practices are currently under review and the new version will be issued in May 2007 at the ICN annual meeting in Porto, Portugal.

³⁴ The UK's Competition and Markets Authority has jurisdiction to investigate a merger whereby the combined enterprise will supply or acquire 25 per cent or more of any goods or services in the United Kingdom.

³⁵ Some jurisdictions outside of Europe have residual jurisdiction. See the OECD paper 'Local Nexus And Jurisdictional Thresholds In Merger Control' -- Annex to the Background Paper by the Secretariat, June 2016, *available at*: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En).

³⁶ We understand that in the current draft the ICN also recommends in any case steps such as restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction or authorizing the parties to submit voluntary notifications to the competition authority. The revised Recommend Practices will be issued in May 2007 at the next ICN annual meeting.

³⁷ Commission Notice on a simplified procedure for treatment of certain concentrations, *available at*: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214(02)&from=EN).

(54) The consultation shows the Commission's recognition of the importance of cutting red tape, and we welcome this. We recognize that the simplification package introduced by the Commission in 2014 has delivered significant benefits for merging parties in transactions that do not raise material competition concerns. The expansion of the categories of cases that may benefit from the simplified procedure, and in particular the raising of the thresholds (20%/30% for horizontal and vertical overlaps/links respectively) has led to a reduction of the burden for notifying parties. This burden reduction is demonstrated by the statistical increase in simplified procedure cases.

2.1 Short Form CO requirements could be further simplified

(55) We believe that the Short Form CO requirements are generally not too burdensome, but that there is room for some small improvements. First, the requirement to submit detailed information regarding "*all relevant product and geographic markets, as well as plausible alternative relevant product and geographic markets*" can require extensive information gathering. We consider that it would be helpful if the Commission could provide more extensive guidance regarding the meaning of "*plausible alternative*" markets, and how it approaches this exercise in practice when considering Short Form notifications.

(56) Second, the Commission currently retains a residual and unlimited discretion to withdraw the benefit of the simplified procedure and to oblige notifying parties to use the standard procedure instead of the simplified procedure. We believe that it would be helpful for notifying parties if a time limit could be introduced within which the Commission could require notifying parties to switch from the simplified to the standard procedure.

(57) Lastly, we recommend that the Commission review the extent to which the requirement to produce internal documents could be reduced. The current obligation to provide certain internal documentation (as set out in Section 5.3. of the new Short Form CO)³⁸ is overly burdensome for the review of transactions that are unlikely to raise any competition concerns.

2.2 Simplified procedure should not include self-assessment

(58) We believe that a self-assessment system should not be introduced. Our clients welcome the legal certainty of a clearance decision. The risk of Commission intervention after implementation of the transaction would make the EU merger control regime worse, not better.

³⁸ The Short Form CO reads: "*The following information needs to be provided in cases where the transaction gives rise to one or more reportable markets in the EEA: copies of all presentations prepared by or for or received by any members of the board of management, or the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing the notified concentration*".

- (59) Should the Commission be minded to introduce a self-assessment system, it should nonetheless respect the one stop shop principle, which requires that transactions having an EU dimension should be reviewed exclusively at the EU level, in compliance with the principle of subsidiarity set forth in primary laws such as the EU Treaty. Thus, any such system should exclude the possibility of review at Member State level for transactions within the scope of that system, regardless of whether or not the Commission decides to intervene.
- (60) Finally, should the Commission be minded to introduce a lighter information requirement such as a short information notice (for example based on the current format of the case allocation request form), a short deadline should be introduced for the Commission to decide whether to intervene. This would accord with what we understand the current draft of the ICN's 'Recommended Practices for Merger Notification' to recommend to those countries that have residual jurisdiction of any kind.³⁹ Such a deadline would reflect considerations of legal certainty.

2.3 **Extra-EEA JVs should not be subject to the Commission review**

- (61) Under the current EU Merger Regulation, the jurisdictional thresholds can be met in the case of a joint venture solely on the basis of the EU turnover of two parents, even if the joint venture itself has no turnover or assets in the EU. Whilst the Commission allows these transactions to be reviewed under the simplified procedure, we still consider that this leads to unnecessary burden and costs, both for parties and the Commission.
- (62) We note that ICN's 'Recommended Practices for Merger Notification' state that: "*jurisdiction should be asserted only with respect to those jurisdictions that have an appropriate nexus with the jurisdiction concerned*". The ICN recommends that "*each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory [...] [and] should therefore incorporate appropriate standards of materiality as to the level of 'local nexus' required, such as material sales or assets levels within the territory of the jurisdiction concerned*". We understand that the current revised text of the draft ICN 'Recommended Practices' will address specifically the material nexus in the case of joint venture, namely that even if the joint venture parents have significant activities in the jurisdiction, the proposed joint venture is unlikely to have a material nexus to the jurisdiction unless the proposed joint venture will have significant assets in or sales in or into the reviewing jurisdiction.³⁹
- (63) Our desired outcome would therefore be the exclusion of joint ventures without an appropriate nexus to the EEA from merger review by all authorities within the EEA.

³⁹ The ICN Recommended Practices of 2012 are currently under review and the new version will be issued in May 2007 at the ICN annual meeting.

- (64) In this context, as we have previously stated,⁴⁰ we would welcome the amendment of Article 1 of the EU Merger Regulation so that a full-function joint venture, located and operating outside the EU and without any effects on European markets, falls outside the Commission's competence, even if the turnover thresholds are met by the parents. Such result could be obtained directly by amending the Regulation.
- (65) The result might also be obtained indirectly: the Commission may consider the revision or adjustment of the EU concept of 'undertaking concerned'. In certain other jurisdictions, for example in Asia, the JV is considered a target (conferrals by the parents to the joint venture being considered as falling within the target's turnover) that must have a material nexus to the relevant territory.
- (66) We request that the Commission encourages the Member States to adopt a consistent approach with that of the EU on the treatment of joint ventures with no effect on national Member States. Indeed, more generally, we recommend that the EU encourages Member State to bring their rules up-to-date with the EU system in the assessment of joint ventures as concentrations.⁴¹
- (67) However, it would be a poor outcome if Europe did not move together on this issue, with the effect that the exclusion of extra-EEA joint ventures from Commission review meant that parties faced increased burdens as a result of a need to make multiple filings of such transactions at Member State level. If consensus cannot be achieved to ensure that national laws do not catch joint ventures excluded from the EU Merger Regulation, then we would propose an alternative solution. Specifically, in that eventuality we would recommend that extra-EEA joint ventures should continue to fall within the scope of the EU Merger Regulation (thus excluding national competence) but should benefit from a group exemption from notification adopted by the Commission under powers to be introduced into the Merger Regulation.

3. REFERRAL MECHANISMS

- (68) We respond here to section IV.3 of the Commission's questionnaire (questions 23 to 25), which seeks comments on certain previous proposals made by the Commission in 2014,⁴² aimed at making case referrals between Member States and the Commission more business-friendly and effective.

⁴⁰ Hogan Lovells' Response to the Commission's proposal to simplify certain procedures for notifying mergers under the EU Merger Regulation, dated 3 October 2014.

⁴¹ For example certain Member States (e.g., Italy) still provide that a full function joint venture constitutes a concentration only if it is non-cooperative (so: concentrative), like the Commission did before its reform in the mid-1990s.

⁴² Commission White Paper on 'Towards more effective EU merger control', 9 July 2014, *available at*: http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf.

3.1 Pre-notification referral to the Commission (Article 4(5)) should not involve a two-form procedure and should be vetoed only under limited circumstances

(69) In the case of post-notification referral from three or more Member States to the Commission under Article 4(5) of the Member Regulation, first, we agree with the Commission proposal (in the 2014 White Paper and now again in the consultation questionnaire) that the two-step procedure should be abolished, as the Form RS to obtain the referral is burdensome and duplicates much of the work required under the regular notification format of the Form CO.

(70) Second, we also encourage the Commission to review the veto system under Article 4(5). The current system, under which a single Member State can veto the referral within fifteen working days from the notification, has a disproportionate adverse impact on the timelines and expectations of the merging parties. In particular:

- a. a veto should be possible only if endorsed by a majority (or at least a significant minority) of Member States;
- b. the deadline of 15 working days should be shortened; and
- c. if a referral is vetoed, the national authorities should accept the Form CO as sufficient notification under their national rules.

3.2 Post-notification referral to the Commission (Article 22) should at least include safeguards

(71) Article 22 was introduced in 1989 as the so-called 'Dutch clause'. It was intended mainly to give Member States that, at the time, did not have national merger control laws (such as The Netherlands) a legal basis to ensure that potentially anticompetitive mergers could be reviewed. Since then all Member States (except Luxembourg, which however is considering it)⁴³ have introduced merger control systems.

(72) Thus Article 22 has lost its original purpose and could be removed without adverse policy consequences. Our primary recommendation would be to do exactly that.

(73) However, should the Commission be minded to keep Article 22, then safeguards should be introduced into the referral system.

(74) First, we largely agree with the Commission proposal of 2014, now repeated in their consultation questionnaire, to expand the Commission's jurisdiction to the entire EEA if the Commission accepts a referral request under Article 22 (currently the Commission only obtains jurisdiction in those Member States that join the referral request), and for the

⁴³ On 31 October 2016 the Luxembourg Competition Council said in a French-language press release that a Luxembourgish working group has proposed introducing merger control with a voluntary notification regime.

Commission's jurisdiction to be renounced for the entire EEA if one or several Member States oppose the referral request. Our concern is to avoid the fragmentation of enforcement that Article 22 can produce today, with parallel merger investigations at the EU and at the Member State level. For instance, in the recent *Sara Lee-Air Fresheners* case, the parties went through seven national notification procedures in addition to the EU procedure which covered five referring Member States.⁴⁴

- (75) However, we do not believe that jurisdiction should be expanded to national markets in Member States in which filings are not triggered under national law. Such an expansion would mean that notifying parties have to provide information, and the Commission has to investigate, markets in Member States for which there is no national jurisdiction to review the transaction – and without the EU thresholds being met either. In conclusion, if the Commission accepts a referral request under Article 22, then its jurisdiction should cover the entire EEA to avoid parallel EU and Member State enforcement. But its review should be limited to worldwide and EEA-wide markets, together with national markets where the national law provides for jurisdiction. We appreciate that this might imply a degree of complexity, but it would be less complex than the current situation. And our primary recommendation is, in any event, to repeal Article 22 entirely.
- (76) Second, if Article 22 is retained then the timeframe should be shortened. Currently, the national competition authority has 15 working days to refer the case, starting from notification or knowledge, and other national authorities have 15 working days to join; the Commission has ten days to accept the referral; and a further 25 working days to investigate (plus possible pre-notification discussions). We believe that these periods should be shortened, in light of the European Competition Network mechanisms and modern electronic communications.

3.3 We agree that pre-notification referral to one Member State (Article 4(4)) should not require a statement that the deal may 'significantly affect competition'

- (77) For the pre-notification (by the parties) referral from the Commission to one Member State under Article 4(4) of the Merger Regulation, we agree with the Commission's proposal of 2014, now repeated in their consultation questionnaire, to remove the requirement that the parties have to assert that the transaction may "*significantly affect competition in a*

⁴⁴ Germany and subsequently Belgium, Spain, Portugal, Hungary, and the UK submitted an Article 22 referral to the Commission. The stated goal of the German authority in this case was to consolidate review at the EU level. However, Cyprus had already cleared the transaction at the time of the first request and the Commission insisted that each referring national authority showed that the transaction threatened to significantly affect competition. As there was no such potential threat for instance in Hungary, the Commission rejected the referral from Hungary. The transaction was also reviewed at the national level in Austria, Bulgaria, Italy, Poland, and Slovakia. The referrals significantly impacted the review timeline and forced the parties to deal with the parallel review in the EU and at Member State level. The German Federal Cartel Office noted in its 2009/2010 report that the goal of unifying jurisdiction at the EU level had not been accomplished and therefore Article 22 should be reviewed.

market" in order for a case to qualify for a referral. It should be sufficient to show that the economic focus of the transaction is in a distinct national market.

- (78) We agree with the Commission that removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

4. **TECHNICAL ASPECTS**

- (79) We respond here to section IV.4 of the Commission's questionnaire (questions 26 to 29), which seeks comments on certain previous proposals made by the Commission in its 2014 White Paper aimed at reforming certain aspects of the procedural and investigative framework for the assessment of mergers.

4.1 **Merger investigation timelines should be more flexible**

- (80) We welcome the initiative to introduce additional flexibility into the Phase II timeline, and we would welcome the same for the Phase I timeline. Each case is different: some cases may involve parallel substantive and remedies discussions (see the *GE/Alstom* case) while others may be assisted by discussions aimed at immediately fixing any possible concerns (see the *Holcim/Lafarge* or *AB Inbev/SabMiller* cases).
- (81) For phase II, we agree with the Commission that it would be helpful to remove the current distinction between remedies presented before or after working day 55, for the purposes of the extension of the procedure by 15 working days. We also consider that the absolute deadline to submit remedies (65 working days from the phase II opening) should be abolished. In some cases, remedies offered even later in the process can be helpful.
- (82) By the same token, in phase I the offer of commitments before working day 20 currently leads to an extension by 10 working days. In our view, this extension should not be automatic.

4.2 **Further shortcomings of the EU merger control system**

(a) **Pre-notification discussions have become too long**

- (83) In our experience, there is a tendency for the pre-notification procedure to be too long. While we recognise that some flexibility needs to be retained, we believe that the best practice guidelines should be modified with the aim of encouraging shorter pre-notification periods, unless waived by the notifying parties.
- (84) Currently the Commission Best Practice Guidelines simply state that "*pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification*", and that "*in more complex cases a more extended pre-notification period*

may be appropriate and in the interest of the notifying parties".⁴⁵ We recommend that the Guidelines be amended to provide for specific indicative timeframes for pre-notification for different categories of case (e.g. simplified procedure cases, normal procedure cases without affected markets, normal procedure cases with affected markets etc.).

(b) **Stop-the-clock should be more transparent**

(85) The Commission has been using "stop-the-clock" extensively. An assessment of the decisions in the last years shows that almost one third of all phase II cases include a stop-the-clock, and the average duration of these stop-the-clocks is almost 30 days.

(86) In our experience, the parties often find out about the stop-the-clock only when it is too late, and in practical terms the stop-the-clock has "retroactive" effect (because it covers all days from the date when the request for information was issued). We would encourage the Commission to amend its Best Practice Guidelines to include more transparency, by means of a requirement that the case team inform the parties that it is considering the adoption of a stop-the-clock decision.

(c) **Target's role in the system should be clarified**

(87) We would welcome clarity on the role of the target in merger control proceedings and in particular on its rights of defence. For example, in practice the Commission often sends requests for information to both the buyer as notifying party and to the target; and yet in its final decisions such requests tend to be mentioned simply as "RFI to the notifying party" – even if for those requests that were handled directly by the target. This inconsistency creates uncertainty as to the actual procedural rights of those involved.

(88) The Commission Best Practices could recognize that the target has rights of defence, including the right of access to the file, which extend beyond the rights of interested third parties. It should then address requests to the target in that formal capacity.

(89) But if the Commission is minded not to recognize such rights of defence, then it should make clear that requests for information to the target are not mandatory and cannot trigger a stop-the-clock as against the buyer (the notifying party). Such clarification would be particularly useful in the context of a hostile bid acquisition.

⁴⁵ Best Practices on the conduct of EC Merger Control Proceedings, 20 January 2014, *available at* <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>.