

**COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS  
OF ANTITRUST LAW AND INTERNATIONAL LAW REGARDING THE  
FRENCH COMPETITION AUTHORITY’S CONSULTATION ON  
MODERNIZING AND SIMPLIFYING THE FRENCH MERGER  
CONTROL LAW**

*The views stated in these Comments are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

November 30, 2017

The American Bar Association Sections of Antitrust Law and International Law (“Sections”) appreciate the opportunity to submit these comments on the French Competition Authority’s (“Authority”) consultation dated October 20, 2017, concerning the modernization and simplification of France’s merger control law (the “Consultation”). These comments reflect the Sections’ collective experience and expertise with respect to the application of antitrust and merger review laws in the United States, the European Union, France, and other jurisdictions and with important related international best practice, notably the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures<sup>1</sup> (“ICN Recommended Practices”) and the Organization of Economic Cooperation and Development’s Recommendation on Merger Review<sup>2</sup> (“OECD Recommendation”).

The Sections offer comments on the three topics discussed in the Consultation: (i) merger notification thresholds; (ii) the simplification of merger filing procedures; and (iii) the role of trustees in merger control.

**I. MERGER NOTIFICATION THRESHOLDS**

Although the Consultation poses several questions concerning the adequacy of the existing French merger notification thresholds, the Consultation does not indicate whether the Authority believes that it is reviewing too many transactions that do not pose competition concerns, or failing to review transactions that do raise competition concerns. The Consultation also does not identify whether there are particular types of transactions or sectors of the economy in which the Authority believes more transaction reviews are warranted. The Consultation does observe that over 96% of its decisions between 2013 and 2016 have been unconditional clearances, which is a rate similar

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<sup>1</sup> International Competition Network, Recommended Practices for Merger Notification Procedures (2002), as amended (2017), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf>.

<sup>2</sup> OECD, Council Recommendation on Merger Review (2005), <http://www.oecd.org/daf/competition/mergers/40537528.pdf>.

to that of the European Commission, as well as the United States.<sup>3</sup>

### **A. Changes to Current Turnover Thresholds**

The Sections observe that the current thresholds appear to be generally in line with those of many other EU member states, taking into account the relative size of the French economy. The Sections understand that the Authority reviewed 230 transactions in 2016,<sup>4</sup> which is about double the number observed in the sample countries reviewed in the Consultation, other than Germany. Many of these transactions (53%), however, were in the retail sector,<sup>5</sup> which is subject to lower turnover thresholds.

The Sections do not have specific views on whether the thresholds are currently too high or low. To the extent that the Authority believes that the current thresholds are failing to capture transactions it believes necessary to review, there are methods for doing so other than simply lowering the turnover thresholds, some of which are discussed below.

### **B. Varying Thresholds by Sector of Activity**

The Consultation asks whether thresholds should be varied depending on the sector of activity. The Sections note that there is a well-established and well-understood lower threshold for transactions in the retail sector, which was introduced to capture the potential impact of smaller retail transactions on smaller local markets. The Consultation does not identify any other distinct segments of the economy in which different thresholds may lead to notification of transactions that raise competition concerns and are currently not subject to notification.

The Sections recommend against introducing additional complexity into the notification assessment by imposing different rules for different sectors of the economy. To do so would only increase legal costs on parties in determining whether their transaction meets the varying thresholds without a clear benefit in terms of notification of potentially problematic transactions.

### **C. Market Share Thresholds**

The Consultation asks whether the Authority should consider introducing thresholds other than those relating to turnover. In particular, the Consultation asks whether a market share threshold should be reintroduced, although it notes that this would raise the problem of having to define the relevant market *ex ante*.

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<sup>3</sup> Federal Trade Commission Bureau of Competition & Department of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2016, Appendix A (reporting for FY 2016, of the 1,832 transactions notified, 1,102 transactions (60%) were granted early termination, and another 676 transactions (37%) were cleared after the Agencies allowed the waiting period to expire without issuing a Second Request. Settlements, restructurings, or withdrawals after challenge occurred in only 47 transactions (2.7%)), *available at* [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014\\_fy\\_2016\\_hsr\\_report\\_final\\_october\\_2017.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2016_hsr_report_final_october_2017.pdf).

<sup>4</sup> Authority's Annual Report 2016, p.14.

<sup>5</sup> Authority's Annual Report 2016, p.15.

The Sections note that international best practices recommend that mandatory notification thresholds should be based on objectively quantifiable criteria, such as assets and sales or turnover.<sup>6</sup> In particular, market share-based tests and other criteria that are inherently subjective and potentially fact-intensive are not appropriate for making the initial determination as to whether a transaction must be notified.<sup>7</sup> For these reasons, the Sections recommend against the reintroduction of a market-share based filing threshold or using non-merger tools (e.g., abuse of a dominant position or coordinated effects that may result from the acquisition of a minority shareholding) as a basis for expanding merger review.<sup>8</sup>

#### **D. Transaction Value Thresholds**

The Consultation indicates that the Authority is exploring the introduction of an alternative notification threshold along the lines recently introduced in Germany and Austria and under consideration by the European Commission, based on transaction value with a local nexus requirement.

The Sections recognize that a transaction-value threshold can be an appropriate merger notification threshold, as it is based on objective and quantifiable information that is readily accessible to the parties. However, a transaction-value criterion must be coupled with additional tests and exemptions to ensure an appropriate local nexus.<sup>9</sup> A significant local nexus threshold is particularly important when the transaction-value test is based on worldwide value and thus is likely to capture a significant number of transactions.

The Consultation does not provide details on the proposed local nexus requirement, other than to say that the transaction-value threshold would apply only if the target were “active to a considerable extent” in France. The Sections strongly recommend that, if a transaction-value threshold is introduced, the local nexus test be based on objective and clear criteria to ensure that only transactions with a material impact on the jurisdiction are subject to merger notification. This principle is consistent with ICN and OECD recommendations,<sup>10</sup> and has been emphasized by the Sections in comments on proposed merger thresholds to other competition authorities.<sup>11</sup>

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<sup>6</sup> ICN Recommended Practices, Section II.C.

<sup>7</sup> Id.

<sup>8</sup> See Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on the European Commission’s Public Consultation on Possible Improvements of the EU Merger Regulation (Sept. 20, 2013).

<sup>9</sup> ICN Recommended Practices, Section II.B.

<sup>10</sup> Id., Section II.B & II.E; OECD Recommendation, Section I.A.2.1–2

<sup>11</sup> Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings (Oct. 6, 2017), page 5,

[https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20171006\\_cn\\_en.uthcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20171006_cn_en.authcheckdam.pdf); Comments of the American Bar Association Sections of Antitrust Law and International Law on the Draft Competition Law of the Socialist Republic of Vietnam (May 24, 2017), page 12-13,

[https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_vietnam\\_20170524.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_vietnam_20170524.authcheckdam.pdf); Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the First Draft Bill of the German Ministry of Economics and Energy for the 9th Amendment

## E. *Ex Post Intervention*

The Consultation suggests an alternative to mandatory notification thresholds by combining mandatory notification with potential *ex post* intervention by the Authority in the event of substantial competition concerns, along the lines of the Swedish system. Such a system would permit the Authority to open an investigation and require a filing after the closing of a transaction if the Authority believes the transaction raises competition concerns.

Several jurisdictions in addition to Sweden successfully incorporate some form of residual jurisdiction or ability to examine transactions post-closing. For example:

- Brazilian authorities can review non-notifiable mergers for up to one year after closing (Law 12,529, of November 30, 2011, Article 88, Paragraph 7).
- The Canadian Commissioner of Competition may review any merger, regardless of whether it exceeds the relevant thresholds, for up to one year after closing.<sup>12</sup> In the 2016-17 reporting year, the Competition Bureau initiated 15 examinations of non-notified merger-related matters.<sup>13</sup>
- The Irish Competition and Consumer Protection Commission may request a voluntary notification when, in its view, the merger raises competition issues. If the parties do not submit a voluntary notification, the Commission may initiate a preliminary inquiry followed by an investigation. The Commission also may investigate a non-notified implemented transaction and, in appropriate cases, obtain a remedy.<sup>14</sup>

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of the Act Against Restraints of Competition (Aug. 15, 2016), Section I.B, [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20160815.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20160815.authcheckdam.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.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20150515_chile.authcheckdam.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.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20151021.authcheckdam.pdf)

<sup>12</sup> Competition Act (Canada), R.S.C. 1985, c. 19 (2nd Supp.), s. 19, § 97.

<sup>13</sup> Canadian Competition Bureau, Competition Bureau Quarterly Statistics Report for the period ending March 31, 2017, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04129.html>.

<sup>14</sup> Ireland Competition and Consumer Protection Commission, Notice in respect of the review of non-notifiable mergers and acquisitions (Oct. 31, 2014) §§ 1.6–1.8, <http://ccpc.ie/sites/default/files/CCPC%20Mergers%20Non%20Notifiable%20Mergers.pdf>.

- The United States Agencies can investigate non-notifiable mergers at any time. From 2012-2016, the Federal Trade Commission and the Department of Justice each conducted in-depth reviews of 28 transactions that were not notifiable under the HSR rules.<sup>15</sup>
- The Japan Fair Trade Commission may review any merger, including those that do not trigger a notification obligation in Japan, at any time. Parties to non-notifiable mergers subject to investigation may consult with and obtain clearance from the JFTC before closing.<sup>16</sup>

Although a residual jurisdiction system has several benefits, if the Authority adopts this approach, the Sections recommend that it consider providing explicit guidance on the types of transactions that will be subject to *ex post* review. In addition, to limit the uncertainty of the potential for *ex post* review, the Sections suggest that residual jurisdiction be available for only a limited duration after the merger. The OECD notes that several jurisdictions that provide for residual jurisdiction limit such challenges to a period of up to one year following the completion of a transaction.<sup>17</sup>

An additional element that the Authority may consider incorporating in a system permitting *ex post* review is to permit voluntary filings by parties whose transactions may not reach mandatory filing thresholds, but may raise competition concerns. Such a system would enable parties to mergers that pose antitrust risk to obtain legal certainty, while bringing potentially problematic transactions to the attention of the enforcement agency.

## II. EXPANSION OF SIMPLIFIED PROCEDURE

The Sections commend the Authority's use of simplified procedures to date and proposals in the Consultation to expand the scope of transactions eligible for the simplified procedure. In expanding the scope of the procedure, the Sections recommend that the Authority apply objective criteria and avoid imposing conditions that could raise uncertainties for the parties and complicate the filing procedure.

The Consultation discusses the range of transactions eligible for simplified procedures at the European level. Although the EU criteria for simplified filings could be adopted as a basis for extension of the current simplified procedure available in France, there have been several inefficiencies in the EU system, and the Sections understand the Commission is currently

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<sup>15</sup> Note by the United States, Working Party No. 3 on Cooperation and Enforcement, OECD Competition Committee, Jurisdictional Nexus in Merger Control Regimes (June 2016), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2016\)22&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)22&docLanguage=En).

<sup>16</sup> ICN Merger Notification and Procedures Template: Japan Fair Trade Commission (Oct. 2014) Section 4.F, [http://www.jftc.go.jp/en/policy\\_enforcement/mergers/ICNmerger.files/ICN\\_Merger\\_Template\\_Japan\\_2014.pdf](http://www.jftc.go.jp/en/policy_enforcement/mergers/ICNmerger.files/ICN_Merger_Template_Japan_2014.pdf).

<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, at ¶ 64, 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).

considering modifications and improvements.<sup>18</sup>

### **A. Market Share and HHI Thresholds**

The Sections suggest that the market share and HHI thresholds used for the EU simplified procedure should be used only as alternative and separate options in addition to the current situations where there is no horizontal overlap, or vertical or conglomerate links. Furthermore, in implementing these criteria, the Authority should ensure that it does not overcomplicate the level of information required under the simplified procedure, requiring submission of market share and HHI data only where the notifying parties apply for these specific eligibility criteria, but not in other cases. In addition, the Authority should give clear direction to its case teams so that discussions on the definition of relevant markets and the calculation of market shares do not go beyond what is strictly necessary, which would be counter to the aims of the simplified procedure.

Indeed, one of the criticisms of the EU simplified procedure has been the European 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." In some cases, this requirement results in information gathering and analytical requirements for notifying parties that, in practice, are similar to standard EUMR notification procedures.<sup>19</sup>

### **B. Joint Ventures with Limited French Turnover**

The Sections recommend that the simplified procedure be extended to cover acquisitions of joint control of joint ventures that achieve only a limited turnover (or no turnover) in France, or to which the assets transferred have a limited value, provided that the thresholds are objectively determined and, in case of reference to "asset value," that this concept is clearly defined. In addition, the Sections recommend that the Authority clarify that only acquisitions of joint control of full-function joint ventures are subject to notification.

### **C. Creation of Full-Function Joint Ventures**

The Sections recommend that the creation of full-function joint ventures should be treated in the same manner as acquisitions of joint control of full-function joint ventures. Therefore, the same turnover and/or asset thresholds should be applied to determine whether such transactions are eligible for the simplified procedure.

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<sup>18</sup> The Sections submitted comments to the European Commission on proposals to revise the simplified procedures earlier in 2017.  
[https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20170113.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20170113.authcheckdam.pdf).

<sup>19</sup> Id.

## **D. Acquisitions of Sole Control of Undertakings Already Jointly Controlled by Acquirer**

As acquisitions of sole control of an undertaking already jointly controlled by the acquirer are generally unlikely to raise competition concerns, the Sections believe they should benefit from the simplified procedure. Indeed, the list of activities provided in the framework for this procedure should be sufficient to allow the Authority to identify the rare cases where the acquirer and the target were in competition prior to the transaction, and where the transaction might lead to potential horizontal, vertical, or conglomerate effects. Should that be the case, the Authority could retain the option of requiring additional information, provided that requests for information (i) remain reasonable and limited to what is strictly necessary to carry out a competitive assessment, and (ii) can be sent by the case teams only within a fixed and limited period after filing.

## **III. TRUSTEES**

### **A. Third Party Access**

While trustees and/or the Authority can decide on their own initiative to consult third parties in order to verify that notifying parties respect the remedies or injunctions conditioning a merger clearance, French law lacks a procedure enabling third parties to contact the trustees to comment about improper implementation of remedies or injunctions of which they might be aware.

One way to improve the rights of third parties in this respect would be, as suggested by the Consultation, to align with the practice of the European Commission by publicizing on the Authority's website the trustee's identity and contact details for each merger control case involving remedies or injunctions.

### **B. Relations between trustees and the Authority**

Although the current system requires trustees to make regular reports to the Authority, there is no formal procedure organizing how, and subject to what deadlines, the Authority should address issues raised in such reports. The Sections understand that this situation has sometimes led the Authority to take enforcement actions well after non-compliance, the most extreme example of which is probably the *CanalPlus/TPS* case, which led to the annulment of the clearance decision more than five years after it was issued.

Establishing a more structured framework in this respect could help the parties to rectify their behavior in a timely manner before the Authority launches any enforcement action. Such improvement would probably be easier to implement if the Authority were granted greater resources to monitor potential non-compliance.

The Sections appreciate the opportunity to comment on the Guidance. The Sections would be pleased to respond to any questions regarding these comments.