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VIA POST and EMAIL to consultation.concentrations@autoritedelaconurrence.fr and bureau-presidence@autoritedelaconurrence.fr

Isabelle de Silva
Président
Autorité de la concurrence
11, rue de l'Echelle
F-75001, Paris
France

Dear Mme. de Silva:

Re: *Consultation publique — Contrôle des concentrations*

We write on behalf of the Merger Streamlining Group (“MSG” or the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.¹ The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network (“ICN”) of which, as you know, the Autorité de la concurrence (“FCA”) is a longstanding member and current Co-Chair of the Merger Working Group.²

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (e.g., the United Kingdom, Canada, Russia, Brazil, India, China, Japan, Korea, Spain, Italy, Argentina, Chile, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*.

The Group writes in connection with the FCA’s current public consultation on merger control issues in France (the “*Consultation Paper*”). We have reviewed an English-

¹ The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

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

language translation of the *Consultation Paper* which we understand was prepared by the FCA. The Group applauds the FCA for its interest in improving the merger control process in France — with the *Consultation Paper* aiming “to modernise and simplify merger law”³ — and in particular for its willingness to consult with stakeholders on these important issues. We hope that this submission, which draws upon the MSG members’ very substantial experience with multinational merger transactions, will prove useful to you.

I. Amount of Current Turnover-Based Notification Thresholds

We understand that a transaction presently requires pre-notification to the FCA where, among other things, at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in France exceeding €50 million.

In the Group’s view, these thresholds are set at a proportionate and reasonable level and are operating well. The Group does not agree that, as queried in the *Consultation Paper*, the “thresholds [are] set too high, which results in not reviewing merger transactions that nevertheless do raise competition concerns.”⁴ Indeed, as the *Consultation Paper* also notes, in the period 2013-2016, 96.4% of FCA merger control decisions were authorisations with no commitments. With more than 205 transactions notified to the FCA on average each year in this period, the 96.4% figure highlights a principle recognized by merger control enforcement in many jurisdictions — that most mergers do not raise material competition law concerns. Indeed, as the *Consultation Paper* notes, “these results are quite close to those of the European Commission.”⁵

The current €50 million thresholds are comparable — if perhaps slightly lower — than the thresholds employed in other, similarly-sized economies:

- As the *Consultation Paper* notes, Spain (whose economy is smaller than that of France), requires that at least two of the undertakings concerned each achieve turnover in Spain exceeding €60 million.
- The United Kingdom’s voluntary regime requires that the target of a transaction achieve at least £70 million (*i.e.*, approximately €78 million at current rates of exchange).
- Canada, whose economy is also smaller than that of France, currently requires notification of transactions where, among other things, the target generates Canadian turnover in excess of C\$88 million (*i.e.*, approximately €58 million at current rates of exchange).

³ *Consultation Paper*, at page 1.

⁴ *Ibid.*, at page 3.

⁵ *Ibid.*

- Belgium, with an economy substantially smaller than France, requires that at least two of the undertakings concerned each achieve Belgian turnover exceeding €40 million.

The ICN *Recommended Practices* state that merger control jurisdiction “*should be asserted only with respect to those transactions that have an appropriate nexus with the reviewing jurisdiction.*”⁶ Moreover, notification thresholds should “*incorporate appropriate standards of materiality as to the level of “local nexus” required for merger notification.*”⁷ This “local nexus” threshold should be sufficiently high so that transactions which are unlikely to have a material effect on the domestic economy do not require notification.⁸ In the Group’s view, the current French threshold of €50 million meets the local nexus standards of the *Recommended Practices*, and should be maintained.

II. Potential Use of Market Share-Based Notification Threshold

The *Consultation Paper* requests feedback on the potential adoption of a market share-based threshold, albeit noting that doing so “*would raise the issue of the necessity to define ex ante the relevant market.*”⁹

The Group strongly counsels against the adoption of a market share-based notification threshold in France. The *Recommended Practices* state that merger notification thresholds “*should be clear and understandable*”, in order to “*permit parties to readily determine whether a transaction is notifiable.*”¹⁰ Moreover, thresholds should employ “*clear, understandable, easily administrable, bright-line tests*”, and the use of market shares is explicitly mentioned as a type of threshold to be avoided for its lack of “*objectively quantifiable criteria*”.¹¹

As the FCA will appreciate, the definition of relevant product and geographic markets — which is a necessary precursor the calculation of market shares — is often a challenging exercise, even for specialized competition law enforcers. Enforcers and private parties, and indeed even enforcers across different jurisdictions, frequently disagree on the precise scope of a relevant antitrust product market. For private companies, many of whom possess little or no familiarity with the principles of competition law, engaging in such an exercise *ex ante*, in order to determine whether a transaction might be pre-notifiable in France, will be burdensome and may lead to incorrect definitions of the relevant market.

⁶ *Recommended Practice I.A.*, and Comment 1 to *Recommended Practice I.A.* (emphasis added).

⁷ *Recommended Practice I.B.* (emphasis added).

⁸ *Recommended Practice I.B.*, Comment 1 and *Recommended Practice I.C.*, Comment 2.

⁹ *Consultation Paper*, at page 4.

¹⁰ *Recommended Practice II.A.*; Comment 1 to *Recommended Practice II.A.*

¹¹ Comment 1 to *Recommended Practice II.B.* Indeed, the Commentary states that “*examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects*” (emphasis added).

The need for “*clear, understandable, easily administrable, bright-line tests*” is especially acute in jurisdictions that impose significant failure-to-file penalties, such as France. As you know, the FCA recently imposed a fine of €80 million on Altice Group for failing to file a reportable transaction,¹² resulting in the highest gun-jumping fine ever issued in Europe.

Even where the relevant antitrust product and geographic markets can be correctly defined by the parties, the calculation of market shares may be difficult, owing to the lack of proprietary or third-party data concerning the total size of the relevant market.

It is presumably for these reasons that the *Recommended Practices* expressly state that market-share based thresholds “*are not appropriate for use in making the initial determination as to whether a transaction is notifiable.*”¹³ The Group therefore recommends that the FCA avoid any such thresholds, and instead maintain the “*bright-line tests*” used in the current turnover-based thresholds

III. Potential Transaction Value-Based Notification Threshold

The *Consultation Paper* also requests feedback on the potential adoption of a transaction value-based notification threshold, similar to “*the solution adopted recently in Germany and Austria (and currently subject to consultation by the European Commission).*”¹⁴ For the reasons given below, the Group believes that such an approach would be inconsistent with the *Recommended Practices* on numerous grounds, and would subject businesses to significant additional costs and burdens without achieving any material enforcement benefits.

As noted above, the *Recommended Practices* indicate that merger control jurisdiction “*should be asserted only with respect to those transactions that have an appropriate nexus with the reviewing jurisdiction.”*¹⁵ Many — indeed, likely most — transactions involving a target that owns any assets located, or generates any turnover from, outside France would not have a material local nexus with the France if a merger notification was required based solely on transaction value. In such a transaction, it would be impossible to correlate and quantify the relationship between the transaction value and the target’s business activities within France. Any attempt to identify specific assets or turnover generated within France, in order to establish a material local nexus, would effectively mirror the current French notification thresholds, which are based on turnover generated within France.

The OECD also advocates against the use of transaction value-based thresholds, noting that “*the value of the transaction is unsuitable to determine whether a transaction will*

¹² French Competition Authority, Decision No 16-D-24, 8 November 2016, available online at <<https://www.concurrences.com/en/bulletin/news-issues/november-2016/the-french-competition-authority-fines-a-multinational-telecoms-company-for-the>>.

¹³ Comment 2 to *Recommended Practice* II.B (emphasis added).

¹⁴ *Consultation Paper*, at page 4.

¹⁵ *Recommended Practice* I.A, and Comment 1 to *Recommended Practice* I.A (emphasis added).

have an impact on a specific jurisdiction.”¹⁶ Hence, the OECD recommends that a transaction value-based threshold should “not [be] applied on its own” but instead “coupled with additional notification criteria better suited to establish local nexus.” The “two main tools used to ensure local nexus in these cases are rules requiring the transaction to have local effects, and exemptions that take into account local turnover or assets.”¹⁷ Again, this would essentially mirror the current French notification thresholds, by looking to local turnover.

The absence of a meaningful local nexus requirement created by a transaction value-based notification threshold would result in many additional transactions that do not have appreciable competitive effects in France being swept into the French merger control regime. This would impose unnecessary transaction costs on merging parties, and require the FCA to expend its scarce resources on reviewing — and publishing decisions in respect of — transactions that are unlikely to raise any competition concerns within France. Moreover, with similar thresholds already in force in Germany and Austria, it would lead to duplicative, costly and unnecessary parallel reviews in multiple EU Member States.

The Group also has doubts that a transaction value-based threshold would comply with the *Recommended Practices*’ requirement that “*notification thresholds should be based exclusively on objectively quantifiable criteria.*”¹⁸ Objectively-determinable thresholds are essential for merging parties and their advisors to determine whether or not they have filing requirements in particular jurisdictions. For global transactions, there may be dozens of jurisdictions to be assessed, and it is important at an early stage in transaction planning to be able to identify and plan for the filings that will be required. Objectively determinable thresholds also serve the interests of competition agencies such as the FCA by clearly establishing those transactions that are subject to filings and minimizing case-by-case consultations or disputes.

The Group does not believe that a transaction value-based threshold will consistently provide an objectively-determinable standard. There are numerous situations in public-market transactions where the value of consideration may not be self-evident, for example in transactions where consideration is paid partially or wholly in shares of the acquirer (which themselves fluctuate in value on a daily basis), or in the case of joint ventures where the parties make various contributions of cash, assets, IPRs, *etc.* and enter into ancillary commercial agreements. Similarly, in private-company M&A transactions there may be “earn-out” arrangements to compensate vendors, purchase-price adjustment mechanisms and escrow and other provisions that may affect the overall transaction value and make it difficult to quantify with precision *ex ante*.

¹⁶ OECD, Working Party No. 3 on Co-operation and Enforcement, *Local Nexus and Jurisdictional Thresholds in Merger Control*, (14-15 June 2016), at para 53, available online 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)> (emphasis added).

¹⁷ *Ibid.*, at para 54.

¹⁸ See *Recommended Practice II-B*, Comment 1 (emphasis added).

For these reasons, the Group does not believe that the adoption of a transaction value-based notification threshold would make a positive contribution to French merger control.

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Thank you very much for considering the Group's views. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell



Casey W. Halladay

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Members of the Merger Streamlining Group