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Our File No.	69459
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VIA EMAIL to bueroib2@bmwi.bund.de and armin.jungbluth@bmwi.bund.de

Bundesministerium für Wirtschaft und Energie
Attn: Dr. Armin Jungbluth
Referat I B 2
11019 Berlin
Germany

Dear Dr. Jungbluth:

Re: Proposed Additional Merger Notification Threshold in the Draft 9th Amendment of the *Act Against Restraints of Competition*

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 Group's core activity has been to work with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"), [2] of which Germany's Bundeskartellamt (the "BKartA") is an active and longstanding member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (*e.g.*, the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*, including a prior submission to the BKartA in 2014 regarding domestic effects.[3]

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[1] The current members of the MSG include BHP Billiton, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, 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>.

[3] *See* http://www.mcmillan.ca/Files/177055_MSG%20Submission%20to%20German%20BKartA%20-%20January%202014.PDF.

The Group appreciates the opportunity to provide these comments regarding the proposed new merger notification thresholds contained in the draft of the 9th Amendment of the *Act Against Restraints of Competition* (the "Proposed Thresholds"), as proposed by the Federal Ministry for Economic Affairs and Energy (the "Ministry"). Based on MSG members' substantial experience with multinational merger transactions, the Group is concerned that the additional threshold tests for high-value/low-turnover concentrations will be inconsistent with both the local nexus and objectivity standards in the ICN's *Recommended Practices*. Such a threshold will result in unnecessary time and cost burdens for both the parties to merger transactions and the BKartA itself. Moreover, there is a serious risk that this approach will become a model for other jurisdictions (the ICN has over 125 members), resulting in a proliferation of overlapping and burdensome review processes for German and other multinational companies as well as resource-constrained competition agencies.

I PROPOSED THRESHOLDS

Under the Proposed Thresholds, an additional notification requirement will need to be analyzed for all domestic or international merger transactions where the parties have any current or expected future German activities:

BRANCH	CURRENT THRESHOLD	ADDITIONAL THRESHOLD
(i)	the aggregate worldwide turnover of the parties exceeds €500 million (no change to the existing aggregate party-size threshold); and	
(ii)	the domestic turnover of at least one party in Germany exceeds €25 million (no change to the existing local turnover requirement for the first party); and	
(iii)	the second party to the transaction has domestic turnover in Germany in excess of €5 million (current local nexus requirement).	the second party to the transaction has activities in Germany or is expected to start activities in Germany in the future (new requirement); and
(iv)	n/a	the total value of the consideration for the concentration exceeds €350 million (new requirement).

(a) Rationale for the Proposed Thresholds

The explanatory materials accompanying the draft of the 9th Amendment of the *Act Against Restraints of Competition* (the "Reasons") indicate that the lack of notifiability in Germany of the *Facebook / WhatsApp* transaction provided the impetus for the Proposed Thresholds. However, there was nothing uniquely significant to Germany about that transaction. Both Facebook and WhatsApp are companies based in California. This was a US$22 billion transaction between two US companies which was subject to review in the US, and in at least three EU member states (leading to a referral of the transaction to the European Commission

under the "one-stop shop" rules in Article 4(5) of the *EC Merger Regulation*). From an international competition policy perspective, that is an ample number of overlapping reviews. We also note that the transaction was approved following Phase I reviews, no remedies were required in any of the reviewing jurisdictions, and thus none would have been expected in Germany. A German notification would simply have added costs for the parties and consumed BKartA resources, without any corresponding enforcement benefit.

Even if the *Facebook / WhatsApp* transaction had been a transaction with a material local nexus to Germany (which it was not, for the reasons given above), the very significant expansion of notification requirements in the Proposed Thresholds cannot be justified on the basis of a single transaction that was not subject to review. The absence of any other basis for this major policy change indicates that it is unfounded and premature.

Apart from the *Facebook / WhatsApp* transaction, the Reasons do not provide any further examples of problematic transactions — let alone any transactions which caused any competitive harm and which escaped a review by the BKartA. The Reasons claim that there is an enforcement gap, but fail to demonstrate the significance of any such gap in substance. Moreover, unlike for the implementation of the EU damages directive — which we understand is the primary purpose of the 9th Amendment of the *Act Against Restraints of Competition* — there is no immediate need to adopt significant reforms that will subject many further transactions to merger control without full and appropriate consideration of the consequences of doing so.

(b) Likely Volume of Notifications

The Reasons recognize that it is difficult to predict how many transactions will be subject to review under the Proposed Thresholds. Nevertheless, the Reasons suggest that the number will be minor — perhaps as few as *three* high-transaction-value acquisitions of German start-ups per year.

With respect, the Group believes that this figure very seriously underestimates the number of transactions that would be captured by the Proposed Thresholds. Indeed one of the multinational companies in the Group has reviewed its M&A transactions for 2015 and determined that, for it alone, *four* additional notifications would have been required if the Proposed Thresholds had been in effect.

The Reasons focus on acquisitions of German start-up companies. As described below, however, the absence of a meaningful local nexus requirement will result in many international transactions being swept into German merger control. Indeed, most domestic and international transactions conducted by any sizeable German company (*i.e.*, greater than €500 million worldwide turnover, or less to the extent that the second party also contributes to the aggregate turnover) with a deal value of at least €350 million are likely to require notification in Germany. In addition, the BKartA will become an overseer of many transactions by the numerous multinational companies from around the world that have worldwide turnover of at least €500 million (or less if the second party also contributes to the aggregate turnover) and at least €25 million of turnover in Germany. A €350 million transaction value threshold is not particularly high for international M&A transactions. Every acquisition that such a company

makes, that is expected to have *any* sales into Germany during a five-year period, will be subject to notification to the BKartA – regardless of whether it is a start-up transaction or simply the acquisition of a foreign company that has not entered the German market but might do so in the future.

> **Recommendation:** In order to allow for informed analysis by stakeholders and members of the German parliament, the Group urges the Ministry to release the full data and empirical analysis relating to the predicted notification volume of both domestic and international transactions under the Proposed Thresholds.

With the proliferation of merger control regimes around the world, there is now less rationale than ever before for a single jurisdiction such as Germany to sweep large numbers of transactions with minimal or no local nexus into its merger control regime. Other jurisdictions with significant local nexus can and should be relied upon to address the competition concerns that arise in transactions that affect supra-national markets.

> **Recommendation:** Given the absence of any significant benefits or other justifications and the burdens that would be imposed by the Proposed Thresholds, the Group recommends that these provisions be removed from the 9th Amendment until the BKartA and the Ministry can develop compelling evidence that there is a material gap in the merger control regime that would warrant additional notification thresholds.

II LOCAL NEXUS REQUIREMENT

The *Recommended Practices* state that a jurisdiction's merger notification regime "*should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory*."[4] The "local nexus" threshold should be sufficiently high so that transactions which are unlikely to have a potentially material effect on the domestic economy do not require notification.[5]

(a) Existing Thresholds

As a preliminary matter, the Group respectfully observes that Germany's current €5 million domestic turnover threshold for the second party in a concentration is too low to be considered material or to create a sufficient "local nexus," given Germany's position as the 4th-

[4] *Recommended Practice* I.B, Comment 1 (emphasis added).

[5] *Recommended Practice* I.B, Comment 1 and *Recommended Practice* I.C, Comment 2.

largest economy in the world. Many other jurisdictions with much smaller economies employ significantly higher notification thresholds.[6]

Even after the addition of the €5 million local turnover threshold for the second party to a concentration in 2009, the current German regime generates a very large number of merger filings, with only a very small percentage of the filings proceeding to an in-depth review and an even more minuscule percentage being challenged, blocked, or resolved with remedies. For example, 1219 mergers were filed with the BKartA in 2015, with only 13 (approximately 1%) of those filings warranting in-depth analysis of potential competition concerns. Moreover, only 4 of the notified transactions - representing a *de minimis* 0.3% - were challenged by the BKartA.[7] In other words, over 99% of notified transactions under the current thresholds clearly do not raise competition concerns. Nevertheless, private parties and the BKartA expend significant resources on the preparation and review of such filings.

Given Germany's leadership role in Europe and the global economy, as well as the important position of the President of the BKartA as the Chair of the Steering Group of the International Competition Network, increasing the level of local turnover required for Germany's second party threshold would provide a strong and appropriate endorsement of the importance of all jurisdictions employing a meaningful local nexus materiality standard in the design of merger notification regimes.

> **Recommendation:** In order to provide a more meaningful local nexus for the application of German merger control rules to international merger transactions, the Group encourages the Ministry to consider increasing the local turnover requirement for the second party threshold to the same €25 million level applicable to the first party.

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[6] For example, many European jurisdictions require each of two parties to meet a significant materiality threshold in the range of €15-€40 million:

- *Belgium* — (world's 25th-largest economy) requires notification where *each of two parties* to the transaction has turnover in Belgium in excess of €40 million.
- *Netherlands* — (world's 17th-largest economy) requires notification where *each of two parties* to the transaction has turnover in the Netherlands in excess of €30 million.
- *Sweden* — (world's 22nd-largest economy) requires notification where *each of two parties* to the transaction has turnover in Sweden in excess of approximately €21 million.
- *Finland* — (world's 41st-largest economy) requires notification where *each of two parties* to the transaction has turnover in Finland in excess of €20 million.
- *Greece* — (world's 44th-largest economy) requires notification where *each of two parties* to the transaction has turnover in Greece in excess of €15 million.

[7] *See* Global Competition Review, Rating Enforcement 2016, "Germany's Federal Cartel Office" (8 July 2016), available online at <http://globalcompetitionreview.com/surveys/article/41434/germanys-federal-cartel-office>.

(b) Proposed Thresholds

When consulting on proposed guidance regarding domestic effects as a pre-condition for German merger review in 2014, the BKartA confirmed the important goal "*to avoid the need for mergers without significant effects in Germany to be notified to and reviewed by the Bundeskartellamt*."[8] The Group agrees with this statement of principle and is concerned that the Proposed Thresholds will capture, rather than screen out, transactions that are unlikely to have material local effects. This would impose unnecessary transaction costs on merging parties and expend the BKartA's scarce resources on matters that are unlikely to warrant enforcement action in Germany.

The Proposed Thresholds do not contain any meaningful nexus to Germany. They abandon the minimal €5 million turnover requirement for the second party in favour of a threshold which is met whenever that party has any current or expected future sales into Germany. If every country adopted this approach, an enormous number of countries would be reviewing an enormous number of transactions on an overlapping basis in search of highly unusual "potential competition" theories of harm.

The Reasons attempt to justify the use of thresholds based on transaction value by reference to the *Hart-Scott-Rodino Antitrust Improvements Act* ("*HSR*") in the United States. However, acquisitions of foreign assets by American and non-American companies are exempted from *HSR* filings if the foreign assets that would be held as a result of the acquisition generated sales in or into the United States below US$78.2[9] million during the acquired person's most recent fiscal year.[10] Similar thresholds are applicable under the *HSR* for acquisitions of a foreign issuer by a United States person.[11] The domestic revenue or asset thresholds which accompany the US transaction value thresholds are much higher than Germany's current domestic revenue thresholds and ensure that transactions are not subject to notification if they do not have a significant nexus to the United States.

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[8] *See* Bundeskartellamt, News Release, "More legal certainty for foreign-to-foreign mergers" (30 September 2014), available online at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/30_09_2014_Inlandsauswirkungen.html>. See also *Recommended Practice* I.B, Comment 1.

[9] The monetary levels under the *HSR* are indexed to the annual change in the US GDP.

[10] *See Code of Federal Regulations*, Title 16, Chapter I, Subchapter H, §802.50. Even if the aforementioned threshold is exceeded, the acquisition will nonetheless be exempt if the aggregate sales in or into the United States in the recent completed fiscal year, and the aggregate total assets in the United States, of the acquiring person and the acquired person combined are less than US$168.8 million, or the assets that will be held as a result of the transactions are valued below US$312.6 million.

[11] Specifically, the acquisition is exempt from the *HSR* if the foreign issuer either holds assets in the US valued under US$78.2 million, or made aggregate sales in or into the United States of under US$78.2 million in the most recent fiscal year: *ibid*.
For transactions with a value between US$78.2 million and US$312.6 million, there is an additional "size of the person" test, which provides an exemption for transactions where one party has less than US$156.3 million of annual sales or assets and the other party with less than US$15.3 million of annual sales or assets.

The lowering of the existing €5 million German turnover threshold to any current or future activities in Germany for transactions with a value exceeding €350 million would not comply with the ICN *Recommended Practices* and cannot be justified by reference to the US *HSR* model. It is inaccurate for the Reasons to suggest otherwise by ignoring the important materiality requirement in the *Recommended Practices*.

If there is a genuine desire to focus on German start-up companies, as suggested in the Reasons, this could be achieved by limiting the Proposed Thresholds to the acquisition of shares (or other ownership interests) in a German entity or of assets in Germany, rather than anywhere in the world.

> **Recommendation:** If the BKartA and the Ministry wish to proceed with a notification regime for high-value/low-turnover acquisitions of German start-up companies, the Proposed Thresholds should be revised to cover only acquisitions of assets in Germany or acquisitions of shares or other ownership interests in a German entity.

III OBJECTIVELY-DETERMINABLE THRESHOLDS

The requirement for objectively-determinable notification thresholds is one of the most important components of the ICN's *Recommended Practices*:

> Notification thresholds *should be based exclusively on objectively quantifiable criteria*. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are more judgmental may be appropriate for later stages of the merger control process (such as determinations relating to the amount of information required in the parties' notification and to the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction is notifiable.[12]

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[12] *See Recommended Practice* II-B, Comment 1 (emphasis added). See also Comments 2 and 3:

> The specification of objective criteria will require a jurisdiction to explicitly identify several elements. First, the jurisdiction must identify the measurement tool -- e.g., assets or sales. Second, the jurisdiction must identify the scope of the geographic area to which the measurement tool is applied -- e.g., national or worldwide. Third, the jurisdiction must specify a time component. In the case of certain measurement tools, such as revenues, sales, or turnover, the time component will be a period over which the measurement should be taken -- e.g., a calendar year. In the case of other measurement tools, such as assets, the time component will be a particular date as of which the measurement should be taken. In either case, the above-referenced criteria

Objectively–determinable thresholds are essential for merging parties and their advisors to determine whether or not they have filing requirements in particular jurisdictions. For international 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 which will be required. Objectively–determinable thresholds also serve the interests of competition agencies by clearly establishing which transactions are subject to filings and minimizing case-by-case consultations or disputes.

For the reasons discussed below, both the German Activities branch and the Transaction Value branch of the Proposed Thresholds are inconsistent with the ICN *Recommended Practice* related to objectivity.

(a) German Activities Requirement

The German Activities branch of the Proposed Thresholds has two alternative components: current activities or expected future activities. Neither provides an objectively-determinable standard for notification.

(i) Current Activities

It is unclear whether current German activities would be limited to sales of products or services from a physical location within Germany. In particular, the Group considers that clarity is needed regarding the following questions:

- Does the Proposed Threshold apply to physical sales of a product into Germany by traditional channels of commerce, as well as possibly over the Internet?

- Does the Proposed Threshold apply to the sales of services which are ultimately supplied in Germany by a company located outside of Germany (*e.g.*, transportation from or to Germany by a foreign airline or shipping vessel)?

- More remotely, does the Proposed Threshold apply to products or services sold to German customers by foreign companies which are supplied abroad (*e.g.*, hotel accommodation outside of Germany)?

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may be defined by reference to pre-existing, regularly-prepared financial statements (such as annual statements of income and expense or year-end balance sheets).

The specified criteria should be defined in clear and understandable terms, including appropriate guidance as to included and/or excluded elements, such as taxes and intra-company transfers (as to sales), depreciation (as to assets), and material events or transactions that have occurred after the last regularly-prepared financial statements. Guidance should also be given as to the proper geographic allocation of sales and/or assets. To facilitate the merging parties' ability to gather multi-jurisdictional data on a consistent basis, jurisdictions should seek to adopt uniform definitions or guidelines with respect to commonly used criteria.

Recommendation: In order to remove uncertainty for both private parties and the BKartA, a clear definition of what constitutes activities in Germany, for both products and services, should be included either in the draft legislation itself or in authoritative guidance from the BKartA.

(ii) Expected Future Activities

The same concerns apply to the expected future activities component of the Proposed Thresholds. In addition, such uncertainties are compounded by two more serious shortfalls in objectivity related to future events. The first is the time period to be considered when examining the future, and the second is the probability of the future activities materializing in Germany.

The Reasons suggest, without any supporting analysis, that a time period of 3-5 years generally should be considered. Even this attempt to provide guidance regarding a time horizon lacks objectivity — neither merging parties and their advisors nor the BKartA will know in advance whether a time frame of 3, 4 or 5 years (or possibly a shorter or longer period in exceptional cases) will be the basis for determining whether a notification resulting from expected future activities in Germany will be required.

Moreover, a time frame of 3-5 years is unreasonably long, particularly in the dynamic markets that the Proposed Thresholds are attempting to focus on. It is unlikely that reliable assessments of likely future business initiatives would be clearly defined beyond a period of one or two years, especially in technologically-driven and other markets in which a start-up company with low current sales is able to realize a €350 million transaction value. It is also notable that two years is often regarded as a reasonable timeframe for assessing likely entry into markets (which is a key substantive issue for the potential competition theory of harm that underlies the Proposed Thresholds). For example, the European Commission considers timely entry to be two years for horizontal mergers.[13]

The probability standard underlying the concept of expected future activities also has not been clearly defined. At a minimum, expected could mean "likely", but this is a relatively low and somewhat subjective threshold which merging parties and their advisors may have difficulty applying with confidence. Moreover, the BKartA might not agree with their assessments in particular situations.

Objectivity could be increased by defining what "expected" means in a manner that is testable. One option would be to base this assessment on the existence of established business plans that have been approved by company management (for example, that the party has such a business plan which includes commencement of activities in Germany within two years). This approach would allow merging parties and their advisors to assess objectively

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[13] European Commission, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) [hereinafter Horizontal Guidelines], http://eur-lex.europa.eu/legal-content/EN/ TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN.

whether a notification may be required by checking whether such a business plan has or has not been developed. It would also allow the BKartA to verify such a determination by requesting and reviewing copies of the organization's business plans if a dispute over notification were to arise.

> **Recommendation:** An objective test for future activities should be included in the draft legislation or, alternatively, in authoritative guidance from the BKartA. A possible option would be that "*the party has a business plan approved by company management which includes commencement of sales in Germany within two years*."

(b) Consideration Value Threshold

The Proposed Thresholds and the Reasons appear to assume that the value of consideration in a concentration is always objectively determinable. However, 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 other provisions that may affect the overall consideration value and make it difficult to quantify with precision *ex ante*.

The Reasons note that the US uses transaction value-based thresholds. However, they do not mention that this is a rarity among merger control regimes worldwide. Moreover, the Reasons do not discuss the extensive rules that the US has developed in order to bring greater objectivity to its transaction value threshold.

> **Recommendation:** If a consideration value threshold is to be incorporated into the draft legislation, it will be essential to provide specific rules in the act or authoritative guidance from BKartA regarding the wide range of issues that arise in valuing the consideration exchanged in public and private merger transactions.

The Reasons discuss the BKartA's view that a transaction value threshold of €500 million would be reasonable and sufficient. The Reasons attempt to justify a lower threshold of €350 million on the basis of rough comparability to the US *HSR* thresholds. As noted above, however, the *HSR* thresholds contain substantial local nexus requirements (*e.g.*, sales into the US in excess of US$78.2 million), so this is not a meaningful comparison.

The Ministry's analysis of a €350 million transaction value threshold focuses on German start-up company acquisitions. If the Ministry intends to apply the Proposed Thresholds to transactions outside of Germany, then the principle of proportionality requires a recognition that Germany generally will account for a moderate portion of the sales of a company with a

European focus, and an even smaller fraction of the sales of a company with broad international or global operations. Accordingly, for acquisitions of assets, shares or entities outside of Germany, the overall transaction value threshold should be substantially higher than €350 million. In the Group's view, the transaction value threshold for transactions outside of Germany should be at least €1 billion, since Germany on average would be unlikely to account for more than 35% of the sales of international companies headquartered outside of Germany. Moreover, we note that the sole example given in the Reasons to support the Proposed Thresholds was the *Facebook / WhatsApp* transaction, which involved a transaction value of US$22 billion, a valuation which vastly exceeds the €350 million threshold that is presently being proposed.

> **Recommendation:** If the Proposed Thresholds are implemented, the transaction value threshold should be increased from €350 million to: (i) BKartA's original recommendation of €500 million for acquisitions of assets, shares or entities inside Germany; and (ii) €1 billion for acquisitions of assets, shares or entities outside Germany.

IV FUTURE REVIEW

If the Proposed Thresholds are introduced, the Group believes that it will be essential for the BKartA to collect reliable data on the number of transactions that are notified and the outcomes of such reviews. In addition, there should be a time period for parliamentary review stipulated in the 9th Amendment to ensure that the results achieved from the review of high-value/low-turnover transactions are assessed along with the filing burdens that have been imposed.

Given the relatively low level of Germany's current merger notification thresholds and the extremely high number of filings (as well as the fact that there are only a very small number of cases where second-phase potential concerns are identified), a review of the existing regime would also be warranted if the €5 million level for the second party is not raised.

> **Recommendation:** The BKartA should be required to track data and report to the German parliament three years after the enactment of the 9th Amendment regarding the outcomes of reviews, for both the current regime and the Proposed Thresholds. In addition, if a threshold based on future sales is included (contrary to the Recommendations above), the BKartA should be required to monitor whether future sales materialize where filings are based on expected future activities.

* * *

Thank you very much for considering these submissions. The Group respectfully encourages the Ministry to revise the Draft 9th Amendment of the *Act Against Restraints of Competition* to:

(i) remove (or defer for future assessment) the new alternative high-value/low-turnover regime, which is unnecessary and inconsistent with the requirement for a material local nexus;

(ii) in the alternative, modify the proposed threshold to incorporate a material local nexus and objective filing requirements; and

(iii) raise the current second-party turnover threshold to a level which reflects a material local nexus in respect of the size of the German economy, such as the €25 million level currently applicable to the first party in a concentration.

These changes would benefit both the BKartA as well as German and multinational companies by focusing merger review on cases with potential competitive significance in Germany. This would also enhance Germany's position as a role model in the ICN and the international economic policy community.

We would be pleased to respond to any questions or discuss this submission with you or your colleagues further at your convenience.

Yours very truly,

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
President of the Bundeskartellamt, Andreas Mundt (via email to Inlandsauswirkungen@bundeskartellamt.bund.de)