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VIA EMAIL to COMP-A2-MAIL@ec.europa.eu

Johannes Laitenberger
Director-General, Directorate-General for Competition
European Commission
1049 Brussels
Belgium

Dear Mr. Laitenberger:

Re: Ref. HT.3053: Consultation On Evaluation Of Procedural And Jurisdictional Aspects Of EU Merger Control

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]

The Group was founded in 2001. Its work to date has included two major surveys on compliance with the ICN *Recommended Practices*, as well as submissions to competition agencies and governments in over 20 jurisdictions to promote reforms consistent with the ICN *Recommended Practices*. The Group has previously provided several submissions to the European Commission ("Commission"), including: (1) in 2003, in respect of the EC Merger Regulation ("ECMR") amendments; (2) in 2004, on the Draft Form RS; (3) in June 2013, on the proposed draft revisions to the Simplified Procedure and Merger Implementing Regulation; (4) in September 2013, on the Commission's initial consultation on non-controlling minority

[1] The current members of the MSG include Accenture, BHP Billiton, Chevron, Cisco, Danaher, GE, 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>.

shareholdings and case referrals; and (5) in October 2014, regarding the consultation aimed at more effective merger control.

The Group appreciates the opportunity to participate in this public consultation[3] launched by the Commission on procedural and jurisdictional aspects of ECMR merger control, and to provide a response to the Commission's questionnaire entitled "*Evaluation of procedural and jurisdictional aspects of EU Merger Control*" (the "Questionnaire").[4] The Group is submitting this letter in a spirit of constructive engagement, based on its members' very substantial experience in completing multinational merger transactions.

We note that in this submission, and in the form of Questionnaire (copy attached), the Group has limited its comments to Part IV.2 of the Questionnaire relating to notification thresholds, and the Commission's related inquiry into whether there may be an "*enforcement gap of EU merger control*" relating to transactions in the digital economy and in the pharmaceutical sector that may involve a significant purchase price but where the target has not yet generated substantial turnover. The Group is concerned that adjusting the ECMR notification thresholds to include a new transaction value-based threshold, either in general or in these specific sectors, would be inconsistent with both the local nexus and objectivity standards in the ICN's *Recommended Practices*, and quite possibly also infringe the principle of proportionality under the *Treaty on European Union* ("TEU"). Such modifications to the notification thresholds would also create uncertainty as to their scope, and result in unnecessary time and cost burdens on both merging parties and the Commission itself, without necessarily eliminating the perceived "*enforcement gap*" raised by the Commission. We also believe that there is a risk that such an approach could become a model for other jurisdictions, given the Commission's significant profile and leadership role in competition policy circles (including as the recent co-chair of the ICN's Merger Working Group). The widespread adoption of a similar approach would inevitably result in the proliferation of overlapping and burdensome notification requirements that are inconsistent with the *Recommended Practices*.

I. Proposed Alternate Notification Threshold

The explanatory materials provided in the Questionnaire at Part IV.2 indicate that a "*debate has emerged on the effectiveness of turnover-based jurisdictional thresholds, specifically on whether they allow capturing all transactions which can potentially have an impact on the internal market*." The Questionnaire implies that there may be cases where a target with low turnover may already play a competitive role in the market, may hold commercially valuable data, or may have considerable market potential for other reasons, but an acquisition of such target would not be notifiable under the current ECMR thresholds. As a result, it is suggested that notification may be required based on alternate criteria to complement the existing

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[3] *See* Commission, "Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control", available online at <http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html>.

[4] *See* Commission, *Questionnaire for Public Consultation*, "Evaluation of procedural and jurisdictional aspects of EU Merger Control", available online at <http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf>.

turnover-based thresholds, for example by using a transaction value-based threshold or another alternative.

As set out in greater detail below, the Group does not believe that any clear case has been made to demonstrate the existence of an "*enforcement gap*", and that an alternate, transaction value-based notification threshold would be inconsistent with the ICN's *Recommended Practices*.

A. A Transaction Value-Based Threshold Will Lack Material Local Nexus

The *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*."[5] Moreover, notification thresholds should "*incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification*."[6] 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.[7]

Many — perhaps most — transactions involving a target that owns any assets located, or generates any turnover from, outside the European Union would not have a material local nexus with the European Union if an ECMR 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 the EU (the reviewing jurisdiction). Any attempt to identify specific assets or turnover generated within the European Union, in order to establish a material local nexus, would effectively mirror the current ECMR notification thresholds, which as you know are based on turnover generated within the EU member states.

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 have an impact on a specific jurisdiction*."[8] 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.*"[9] No such additional criteria have been proposed in the Questionnaire.

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[5] *Recommended Practice* I.A, and Comment 1 to *Recommended Practice* I.A (emphasis added).

[6] *Recommended Practice* I.B (emphasis added).

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

[8] 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> (emphasis added).

[9] *Ibid.*, at para 54.

The absence of a meaningful local nexus requirement created by such a new notification threshold would result in many additional transactions that do not have appreciable competitive effects in the EU being swept into EU's merger control regime. This would impose unnecessary transaction costs on merging parties, and require the Commission to expend its scarce resources on reviewing — and publishing decisions in respect of — transactions that are unlikely to raise any competition concerns within the EU.

Question 14 of the Questionnaire refers to the *Facebook/WhatsApp* transaction, noting that the transaction was not subject to pre-notification under the ECMR (although it was ultimately referred to the Commission pursuant to Article 4(5) of the ECMR). However, the Group fails to see how this transaction — between two American companies — provides evidence of an "*enforcement gap*" sufficient to justify major structural reforms to the ECMR. This transaction was subject to review in the United States, and in at least three EU member states (leading to a referral of the transaction to the Commission). From an international competition policy perspective, that is an ample number of overlapping reviews — particularly as no remedies were required in any of the reviewing jurisdictions.

Similarly, Question 15 of the Questionnaire refers to AbbVie's 2015 acquisition of Pharmacyclics, Inc. as an example of a "*significant transaction* […] *which had a cross-border effect in the EEA but* [was] *not captured by the current turnover thresholds*" in the ECMR.[10] However, the Group again notes that this transaction, also between two American companies, did not raise any significant competition law concerns, as it was unconditionally cleared by the US Federal Trade Commission following Phase I review.

Amending the established and well-understood ECMR notification thresholds based on two examples of transactions between US companies (one of which was nonetheless reviewed by the Commission with no remedies imposed), appears, with great respect, to be a reaction that will impose significant time and cost burdens on merging parties while not advancing the important goal of competition enforcement. Furthermore, if needed, the European Competition Network already provides a mechanism for the Commission to be consulted where a transaction is considered to have cross-border effects in the EEA and is caught by the merger notification regime of one or more Member States but not by the ECMR.

With the proliferation of merger control regimes around the world, there is now less rationale than ever before for the Commission to sweep in large numbers of transactions with minimal or no local nexus into its merger control regime. Other jurisdictions with more significant local nexus to transactions can and should be relied upon to address any competition concerns that may arise in transactions falling outside the current ECMR notification thresholds. Moreover, as the *Facebook/WhatsApp* transaction demonstrates, the ECMR's current case referral procedures (*i.e.*, Article 4(5) and Article 22) provide an additional means for the Commission to review certain transactions that are otherwise not notifiable under the ECMR.

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[10] Questionnaire, at question 15.

B. A Transaction Value-Based Threshold May Cause Uncertainty

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.[11]

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 by clearly establishing those transactions that are subject to filings and minimizing case-by-case consultations or disputes.

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[11] *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 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.

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*.

C. Existing Thresholds Do Not Create An "Enforcement Gap"

As a general matter, we note that the Questionnaire indicates that a "*debate has emerged on the effectiveness of turnover-based jurisdictional thresholds*". The Group would encourage the Commission to provide further information about the opinions expressed in this debate and the underlying theories and evidence supporting the different views. A better understanding of the arguments made in any such debate can only contribute to the Commission's public consultation process, by helping to ensure that all relevant issues and viewpoints are considered in a thorough and detailed manner.

In respect of any "*enforcement gap*" relating to specific industry sectors, and in particular in relation to low-turnover and high-value transactions within specific sectors, the Group notes that it is rarely the case that merger review principles should be inconsistently applied across industries. The Group believes that the benefits of clear and transparent thresholds for merging parties and for competition agencies far outweigh any potential benefits that may be achieved through sector-specific merger control regulation. Sector-specific rules are likely to prove difficult for the Commission to implement and for merging parties to apply, and will lead to a reduction in objectivity and transparency ─ contrary to the ICN *Recommended Practices* ─ as merging parties may have difficulties determining in which sector or sectors they operate for purposes of the new threshold. Moreover, a move towards greater reliance upon sector-specific principles would be inconsistent with the Commission's general movement towards reduction or abolition of sector-specific regulation in recent years (*e.g.*, motor vehicle distribution, liner shipping, insurance).

We further note that the Commission currently possesses other investigative powers, outside the ECMR, that allow for an *ex post* examination of the effects of transactions under Articles 101 and 102 TEU, and to conduct sectoral inquiries. Indeed, the Commission has used its sector inquiry powers to review some of the same sectors identified in the Questionnaire (*e.g.*, digital industries such as e-commerce, roaming, and new media, as well as pharmaceuticals[12]). The use of such powers in the pharmaceutical industry is facilitated by the high level of transparency of many important characteristics of the industry, both in terms of the visibility of development efforts and of transactional activity. Transactions are generally announced by the

[12] See <http://ec.europa.eu/competition/antitrust/sector_inquiries.html>.

parties via press releases, both to satisfy the acquirors' securities law disclosure obligations and to secure future funding prospects.

The Questionnaire indicates that the Commission has concerns about the acquisition of a target that already plays "*a competitive role*", that owns "*commercially valuable data*", or that has a "*considerable market potential*". While these very generic descriptions may apply to some technology or pharmaceutical companies, they are also likely applicable to companies in other sectors.

Moreover, the acquisition of a target company with a low-turnover, developing business is unlikely to have an immediate competitive impact in a relevant market at the time of the transaction. Merger review is intended to address potential anti-competitive harm that a proposed transaction may create upon implementation or in the near future. It is extremely difficult, and in some cases may be impossible, to predict competitive harm in the more distant future, yet it is precisely this type of analysis that will be required of the acquisition of emerging or "start-up" low-turnover entities. This is particularly applicable to pharmaceutical R&D transactions that may not involve the acquisition of any turnover stream, but only the possibility of generating turnover several years in the future, as many products under development never make it to market. The Commission itself has acknowledged that products that reach the stage of Phase III trials — to say nothing of products at Phase I or II — are only successful approximately 50% of the time.[13]

Consequently, the Group also has doubts about the compatibility of a new transaction value-based notification threshold with the requirement, set out in Article 5 TEU, that the Commission may not take any action that could "*exceed what is necessary to achieve the objectives of the Treaties.*"[14] The adoption of an additional merger notification threshold, beyond the existing (and effective) thresholds, to require *ex ante* notification of all transactions, regardless of their local nexus and potential competitive impact with the European Union, would result in a significant additional burden on companies, and appear in many ─ and possibly the vast majority of ─ transactions to "*exceed what is necessary*" in order to ensure that "*that competition in the internal market is not distorted*".[15] Even if the Commission were able to define a clear local nexus requirement, it remains questionable whether the benefit of catching one or two transactions per year with alleged "*considerable market potential*" outweighs the potential burdens imposed on many other transactions.

The Group therefore does not believe that an effective case has been made to demonstrate an "*enforcement gap*" and the corresponding need for a new, alternate merger notification threshold within the ECMR.

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[13] *See* Case COMP/M.1846, Glaxo Wellcome/SmithKline Beecham, at para 70.

[14] Consolidated version of the Treaty on European Union, OJ C 203, 7.6.2016, p. 13-46, at Article 5.

[15] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22, at para 2.

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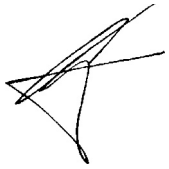
Thank you very much for conducting this public consultation and for considering the Group's views. We would be pleased to respond to any questions or discuss this submission with you or your colleagues further at your convenience.

Yours very truly,



A. Neil Campbell Casey W. Halladay

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