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Our File No.	69459
Date	December 2, 2016

VIA EMAIL to Leitfaden-Zusagen-in-der-Fusionskontrolle@bundeskartellamt.bund.de and facsimile to +49.228.9499.400

Andreas Mundt
President
Bundeskartellamt
Kaiser-Friedrich-Str. 16
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Dear President Mundt:

Re: Public Consultation Regarding Guidance On Remedies In 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] of which, as you know, the Bundeskartellamt ("BKartA") is a leading 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 prior submissions to the BKartA in 2014 regarding domestic

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

effects and to the BKartA in 2016 regarding a proposal for an additional merger notification threshold in Germany.

The Group appreciates the opportunity to provide these comments regarding the BKartA's public consultation on merger control remedies,[3] and we applaud the BKartA for conducting this public consultation. Our comments draw upon the MSG members' substantial experience with multinational merger transactions, and are based upon the English courtesy translation (the "Discussion Paper") published by the BKartA (for which we offer the BKartA our sincere thanks for preparing an English translation).

As set out below, while the Group believes that most of the Discussion Paper provides valuable analysis and insight into the BKartA's approach to merger control remedies, the Group has concerns that the potential usage of behavioural or "conduct" remedies has been treated in an overly narrow fashion. We have identified several instances in which, we respectfully suggest, that the BKartA reconsider some of the language in the Discussion Paper, to avoid taking an unnecessarily restrictive approach to the topic of behavioural remedies on an *ex ante* basis. This would allow the BKartA to take a more flexible approach the usage of behavioural remedies based, as the BKartA quite sensibly suggests in other portions of the Discussion Paper, on "*the context of the particular market conditions and the respective mergers […] in the particular case.*"[4] Given the BKartA's leadership role in competition policy matters, this approach would also avoid creating a precedent for an unnecessarily narrow approach to behavioural remedies that may be emulated by enforcers in less experienced competition law regimes.

The Group has also identified one area in which it believes the Discussion Paper — and the business community, for which the Discussion Paper has been prepared[5] — would benefit from the provision of further information regarding the availability of behavioural remedies.

I. Additional Guidance On The Concept Of "Continuous Control"

As part of its detailed analysis of the usage of behavioural remedies, the Discussion Paper indicates that behavioural remedies "*must not aim at subjecting the parties'*

[3] *See* Bundeskartellamt, News Release, "Public Consultation regarding Guidance on Remedies in Merger Control" (October 7, 2016), available online at <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2016/07_10_2016_Public_Consultation_regarding_Guidance_on%20Remedies_in_Merger_Control.html>.

[4] Discussion Paper, at para 27.

[5] One of the stated purposes of the Discussion Paper is to "*provide[s] the business community with detailed and practicable guidance*": *see* the comments of Andreas Mundt, Bundeskartellamt News Release, "Public Consultation regarding Guidance on Remedies in Merger Control" (October 7, 2016), available online at <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2016/07_10_2016_Public_Consultation_regarding_Guidance_on%20Remedies_in_Merger_Control.html>.

market conduct to continued control."[6] The Group gathers that this issue may arise, at least in part, from the jurisprudence of German courts interpreting domestic legislation.[7]

Despite this prohibition, the Discussion Paper discusses various acceptable remedies, including those relating to mandatory access, licensing, and supply or purchasing agreements. These remedies would also appear to involve elements of "*continued control*" over the companies affected. Given the importance of this concept, as it may disqualify from consideration various types of remedies, the Group suggests that the BKartA consider supplementing the draft Discussion Paper with additional information concerning the concept of "*continued control*" under German law. In particular, examples of the specific types of remedies that have been found to be acceptable, and those that have been rejected, under this concept in prior transactions would provide valuable guidance to transaction parties when structuring transaction agreements and potential remedy proposals. This is particularly important given that merger control remedies often have effects beyond the jurisdiction in which they are required.

II. Commentary On Firewall Remedies And Monitoring Obligations

(1) Firewall Remedies

Despite their frequent usage in other jurisdictions, the Discussion Paper states that firewall remedies (described as "*Chinese Wall commitments*") are unacceptable to the BKartA. Specifically, it notes that "*the obligation to implement firewalls to protect information is not an acceptable remedy*",[8] in part because it is "*not effective*"[9] and because such a remedy "*cannot be effectively monitored by a competition authority*".[10]

The Group believes that these statements present an overly restrictive view of the use of firewall remedies, which have been successfully used by experienced competition regulators in other jurisdictions for many years. A recent example was provided by the European Commission's ("Commission") reliance on a firewall remedy in its approval of the *Airbus Safran Launchers / Arianespace* transaction in July 2016, in which the Commission imposed a behavioural remedy to clear the transaction following an in-depth review.[11] This transaction is but the latest in a long line of *ECMR* matters similarly resolved using firewall remedies.[12]

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[6] Discussion Paper, at para 24.

[7] Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition) ("GWB") in the version published on 26 June 2013 (Bundesgesetzblatt I p. 1750, 3245), as last amended by Article 2 of the law of 26 July 2016 (Bundesgesetzblatt I p. 1786 no. 37), at section 40(3), sentence 2.

[8] Discussion Paper, at para 85.

[9] *Ibid.*, at para 70.

[10] *Ibid.*, at para 26.

[11] European Commission, News Release, "Commission approves acquisition of Arianespace by ASL, subject to conditions" (July 20, 2016), available online at <http://europa.eu/rapid/press-release_IP-16-2591_en.htm>. The remedy required the parties to: (i) implement firewalls between Airbus and Arianespace to prevent information flows that could harm competitors; (ii) put in place measures restricting employees' mobility between the companies; and (iii) provide for

The U.S. and Canadian authorities have also accepted firewall remedies in a range of transactions including, for example, the imposition of complex firewalls (spanning a 20-year duration) in the *Coca-Cola* and *Pepsi-Cola* bottling acquisitions.[13]

The Group strongly believes that firewall remedies can be particularly effective, and certainly less intrusive than divestiture orders, in addressing competition concerns in vertical or joint venture transactions, by preventing the sharing of competitively-sensitive information between joint venture partners or the upstream and downstream segments of a vertically-integrated business. Where the competition concerns can be addressed, imposing a firewall remedy — and therefore obviating the need for a divestiture — may be a competitively-preferable outcome to divesting assets that played an important role in the decision to initiate the transaction, or that may facilitate efficiency gains in the hands of the merged firm.

The greater flexibility that behavioural remedies may offer caused Canada's Federal Court of Appeal to describe divestiture orders as "*drastic* powers" which "*in the hands of [the Canadian Competition Bureau] […] constitute a rather blunt instrument for the implementation of Canada's competition policy*" while, in contrast, note that behavioural remedies offer "*sophisticated solutions*" that "*may contain a vast range and number of fine-tuned provisions designed to satisfy the requirements both of public interest and commercial reality*."[14]

The Group therefore respectfully suggests that the BKartA consider whether the apparent prohibition on the availability of firewall remedies set out in the Discussion Paper can be reconsidered, in line with the arguments set out above and the approach taken by competition regulators and courts in other experienced competition law regimes.

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an arbitration mechanism to be included in all their future non-disclosure agreements signed with third parties, to ensure the effective implementation of the firewalls.

[12] *See* N. Levy, *European Merger Control Law: A Guide to the Merger Regulation* (Matthew Bender: looseleaf service) at chapter 18; and *Airbus / Safran* JV, Case COMP/M.7353, Commission decision of November 26, 2014; *Amer / Salomon*, Case COMP/M.3765, Commission decision of October 12, 2005; and *Areva / Urenco / ETC JV*, Case COMP/M.3099, Commission decision of October 6, 2003.

[13] *See, e.g.*, United States Federal Trade Commission, News Release, "FTC Puts Conditions on PepsiCo's $7.8 Billion Acquisition of Two Largest Bottlers and Distributors" (February 26, 2010), available online at <https://www.ftc.gov/news-events/press-releases/2010/02/ftc-puts-conditions-pepsicos-78-billion-acquisition-two-largest>; United States Federal Trade Commission, News Release, "FTC Puts Conditions on Coca-Cola's $12.3 Billion Acquisition of its Largest North American Bottler" (September 27, 2010), available online at <https://www.ftc.gov/news-events/press-releases/2010/09/ftc-puts-conditions-coca-colas-123-billion-acquisition-its>; and Canadian Competition Bureau, News Release, "Competition Bureau Requires Remedy in Coca-Cola Acquisition" (September 27, 2010), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03290.html>.

[14] *Canada (Director of Investigation and Research)* v. *Air Canada* (1993), 49 C.P.R. (3d) 417 (F.C.A.), rev'g 49 C.P.R. (3d) 7 (Comp. Trib.) at 430, 433 [emphasis added].

(2) Monitoring Obligations

The Discussion Paper argues that divestitures offer "*a major advantage*" over behavioural remedies because they "*do not require any further monitoring or intervention by the competition authority.*"[15] It also states that firewall remedies, in particular, are "*objectionable*" because they "*cannot be effectively monitored by a competition authority*".[16]

However, in the Group's view these concerns have been overstated, as they do not take account of the significant, and increasing, use of third-party monitors (at the merging parties' expense) and/or arbitration clauses to perform the monitoring function or to enforce behavioural obligations. Such an arbitration clause was included in the behavioural remedy imposed by the Commission in the recent *Airbus Safran Launchers / Arianespace* transaction discussed at Part II(1) above. The Commission's firewall remedies were subject to review by an outside monitor in the *Areva / Urenco / ETC JV* matter,[17] and in the American and Canadian behavioural remedies imposed in the *Coca-Cola* and *Pepsi-Cola* bottling transactions discussed above.[18]

The Group believes that where a behavioural remedy can correct the competition concerns raised by a transaction, such a remedy should not be dismissed simply because it may require some level of monitoring — particularly as any costs or burdens raised by such monitoring would not be borne by the competition regulator, but by the parties themselves.

We also note that the International Competition Network's *Recommended Practices* acknowledge that some remedies may require monitoring, without any suggestion that such monitoring should invalidate the remedy. Among other things, the *Recommended Practices* state that:

- "*[a]ppropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy"*;[19] and
- "*[t]he remedy should contain adequate means of ensuring its implementation and/or monitoring compliance*."[20]

* * *

[15] Discussion Paper, at para 22.

[16] *Ibid.*, para 26.

[17] *Areva / Urenco / ETC JV*, Case COMP/M.3099, Commission decision of October 6, 2003, at para 234.

[18] *Supra* note 13.

[19] International Competition Network, *Recommended Practices for Merger Notification Procedures*, at *Recommended Practice* XI.D [hereinafter, the "*Recommended Practices*"].

[20] International Competition Network, *Recommended Practices for Merger Notification Procedures*, at Comment 1 to *Recommended Practice* XI.D.

Thank you very much 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

Copy to: Members of the Merger Streamlining Group