ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION

IBA MERGERS WORKING GROUP COMMENTS ON THE FRENCH COMPETITION AUTHORITY PUBLIC CONSULTATION ON THE MODERNISATION AND THE SIMPLIFICATION OF MERGER CONTROL

29 November 2017

1. INTRODUCTION

1.1 This submission is made to the French Competition Authority (the ***Authority***) by the Mergers Working Group (the ***Working Group***) of the Antitrust Committee of the International Bar Association (***IBA***) on the public consultation on the modernisation and the simplification of merger control published by the Authority on 20 October 2017.

1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at: http://www.ibanet.org.

1.3 The Working Group's comments draw on the vast experience of the IBA Antitrust Committee's members in merger control law and practice in jurisdictions worldwide. Further information on the Antitrust Committee and its Mergers Working Group is available at: https://www.ibanet.org/LPD/Antitrust_Trade_Section/Antitrust/Default.aspx.

2. EXECUTIVE SUMMARY

2.1 The Working Group aims to contribute constructively to the Authority's consultation on the modernisation and the simplification of merger control. It welcomes the Authority's proposals, which may indeed modernise and simplify the merger process for companies contemplating transactions that involve a notification to the Authority.

2.2 Nevertheless, the Working Group respectfully considers that some suggestions put forward by the Authority may extend the scope of merger control beyond what is desirable. We therefore suggest further clarifications or reconsiderations which may help to provide further legal clarity and certainty. These areas include:

(a) *Appropriate scope of cases subject to merger control*. The Working Group recommends that the Authority's new merger control regime bring more clarity and legal certainty to undertakings contemplating a merger that requires a merger filing in France. In order to achieve this purpose, the Authority should refrain from over-extending the scope of its jurisdiction. It should increase the thresholds that trigger the obligation to notify because they are low in comparison to other large European countries and other major jurisdictions. Furthermore, it should maintain turnover thresholds which are clearer and easier to use as a jurisdictional test compared to market shares. There is merit in being cautious about introducing any value based thresholds in particular given the uncertainty they have generated with their recent introduction in Germany and Austria and the limited extent of any gap in enforcement. With regard to referrals, the Authority should limit its use of referral to very specific cases because this process greatly delays the implementation of transactions. Finally, the Working Group considers that neither the application of the *Continental Can* case law nor the application of the *Phillip Moris* case law are appropriate and may raise legal uncertainty concerns. In the event that the Authority chooses to implement an *ex post* control for mergers that raise competition concerns, it would be important to limit the control period to a brief and clearly defined period after the merger is completed to ensure legal certainty for the parties concerned (similar to the periods included in, for example, UK merger control).

(b) *Simplification of merger procedures*. The Working Group welcomes the proposal to extend the scope of the simplified procedure to other cases. Regarding the introduction of a pre-notification procedure, the Working Group recommends that it be limited to a month in order not to extend too much the review period.

(c) *Role of merger control trustees*. The Working Group recommends the introduction of the trustee legal status in the French Commercial Code, which would provide that the trustee is in charge of the review of the implementation by parties of their commitments and that he/she is independent both from parties and from the Authority. In addition, the Working Group fears that it would be difficult to appoint technical advisors meeting the conditions of independence set by the Authority in very specific industries such as broadcasting or telecommunications. The Working Group considers that the introduction of a common fund to pay trustees may lead to lower remuneration and thus a lower quality in their work.

3. COMMENTS ON THE ISSUES DISCUSSED AND THE SUGGESTED AVENUES FOR CHANGE

3.1 Below, the Working Group provides a summary of the issues discussed and the avenues for change suggested by the Authority in the framework of the public consultation, along with the Working Group's comments, questions or recommendations in respect of the main provisions.

Questions and propositions	Comment
Part I/ Framework for thinking about the opportunity to create a new regime of merger control	
Are the thresholds set too low, which results in reviewing too many merger transactions that do not raise any competition concerns?	Among large EU member States that impose a mandatory and suspensory notification regime (the merger cannot be completed prior to clearance), France has one of the lowest thresholds with respect to combined turnovers. The Working Group considers that, the thresholds appear too low and result in the review of too many transactions that do not raise any competition concerns (on average, between 2013 - 2016, 96.4% of notified transactions were cleared without commitments). The Working Group submits that the Authority could increase the turnover thresholds at higher levels regarding the first limb of the test. Comparatively, Italy — a country with a smaller economy — requires that the parties to the transaction have a EUR 499 million domestic combined turnover. Regarding the retail industry, most jurisdictions do not employ separate merger review thresholds. The thresholds for retail mergers in France are significantly lower than for other sectors (parties' combined worldwide turnover exceeding EUR 75 million and each party to the transaction has a turnover in France of at least EUR 15 million). This results in many smaller transactions being notified which do not raise significant competition concerns. In 2016, 53% of notified transactions concerned the retail industry. Therefore, the Working Group recommends that the Authority increases the thresholds to trigger notification, at the very least regarding the retail industry.
Are the thresholds set too high, which results in not reviewing merger transactions that nevertheless do raise competition concerns?	No, see supra.
Would indicators other than those relating to turnover be relevant?	Firstly, in accordance with the International Competition Network Recommendations for Merger Notifications and Review Procedure, the Working Group recommends that thresholds should be based on objectively quantifiable criteria. Thus the Working Group recommends that the Authority not reintroduce a market share threshold, as market share-based tests are inherently subjective and it is difficult for parties to determine with certainty whether notification requirements are met. Indeed, such a threshold implies that parties to the transactions must define what is the relevant market *ex ante* in order to determine whether a notification to the Authority is needed, which may raise complex issues and legal uncertainty. Furthermore, undertakings may not have enough reliable data to assess their market shares. Therefore, a market share threshold may bring legal uncertainty back into the field of merger control. Secondly, the Working Group notes that the introduction of an alternative threshold based

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	on transaction value with a significant business activity of the target in France does not appear to be necessary, may raise practical difficulties and could potentially have significant resource consequences for both the Authority and private parties. Moreover, there is no evidence that there is a significant enforcement gap at the national level and the Authority should keep in mind that many other undertakings beyond the digital economy also may be affected by the new thresholds. If new thresholds based on transaction value were to be considered, it would be critically important to design them in a manner that avoids catching foreign-to-foreign transactions or transactions unlikely to have any effects on the French market: o The local nexus of the transaction would need to be clearly established using a clear and easily applicable criterion. The Working group recalls that the need for a clear, objectively determinable local nexus is recognized by the ICN's Recommended Practices for Merger Notification Procedure. It is crucial for merger control assessment and it needs to be easily determinable by the merging parties and their advisors. The most objective approaches use a minimum turnover or level of domestic assets, rather than a vague and unclear condition such as having "significant domestic presence" in France. Otherwise, value-based thresholds may catch transactions relating to products that are not yet on the market or in development with uncertain dates of entry and with no guarantee they will perform the way the parties expect them (e.g. medical devices or pharma products, pipeline products etc.). Germany and Austria, which changed their laws recently to include a value of transaction threshold, require that the targets have significant domestic presence, but it is unclear what this means in practice and the new threshold creates uncertainty for notifying parties (as well as the enforcement agency). o Value-based thresholds would need to be set at a sufficiently high level. They would need to be combined with turnover thresholds applicable to the acquirer and with a requirement for the target to have an ascertainable level of domestic presence and revenue generating activities (see above about local nexus). o Also, the criteria to calculate the value would need to be clearly defined to avoid that transactions be unnecessarily notified to the Authority or that notifications be subsequently withdrawn from notification if the value of the transaction changes during the period following notification. The Working Group stresses that the calculation of the deal value may be complex and, depending on the date of signing, closing or notification may fluctuate significantly.

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	Therefore, the Working Group recommends maintaining turnover as the sole relevant factor to determine whether a transaction has to be notified.
Is it necessary to adjust the thresholds according to the business sectors concerned?	In France, thresholds are already adjusted for one business sector because there are specific thresholds regarding mergers in the retail industry. However the Working Group is not in favor of adjusting the thresholds depending on the business sector concerned. There is no obvious justification for treating undertakings differently depending on their sector of activity and doing so may not be compliant with the general principle of equal treatment. In addition, uncertainty may arise in determining whether or not a particular undertaking falls within a particular sector, especially if its business activities are novel or multi-faceted.
The solution adopted recently in Germany and Austria (and currently subject to consultation by the European Commission) introducing an alternative threshold based on the value of the transaction with as a local focal point a significant business activity of the target in the Member State;	No, see supra. In addition, the Working Group notes that the new German threshold came into force only in June 2017. Thus it is too early to say whether this type of threshold will have any success in identifying competitively problematic transactions that would not otherwise have been subject to review, or to assess the burden arising from notification of additional non-problematic transactions.
The re-introduction of a market share threshold, which would raise the issue of the necessity to define *ex ante* the relevant market;	No, see supra
The voluntary implementation of existing tools: - Referral at the initiative of the parties (article 4, § 5, of the merger regulation);	The Working Group considers that the current referral system under Article 4, § 5 of the EU Merger Regulation has worked effectively in the past to ensure a good allocation of cases between the European Commission and the national competition authorities even though no referral occurred to the Authority in 2016.
The voluntary implementation of existing tools: - Referral to the Commission by the Member States (article 22 of the merger regulation), which would require the Commission to change its consistent policy of recent years consisting in only accepting such referrals if the State making the request is competent;	The Working Group disagrees with the Authority's suggestions to refer to the European Commission, in the framework of Article 22 of the EU Merger Regulation, cases that are non-reviewable by the Authority. The Commission's policy is to decline any referral made by a national authority that has no competence, under its national law, to review the merger. The acceptance by the Commission of such referrals risks to unduly involve national authorities which do not have jurisdiction under the merger thresholds. Accordingly, the Working Group is not in favour of soliciting a change of the current Commission's practice.

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	Furthermore, referral processes are quite time-consuming and may delay a transaction for months and even cause it to fail. Thus the Working Group recommends the Authority issue requests for referral only in exceptional cases.
The voluntary implementation of existing tools: - Application of the *Continental Can* case law of 1973, according to which the strengthening of a dominant position by means of a merger may constitute an abuse of a dominant position, or the *Philip Morris* case law of 1987 making it possible to review coordinated effects likely to result from minority shareholdings;	Although the *Continental Can* case law is still in existence, following the adoption of EU Regulation 139/2004[1], it has not been used in practice and it is not clear whether it could be applied by a national competition authority. The European Commission does not apply this case law in practice and indeed the case law predates adoption of the EU Merger Regulation. If the Authority chooses to change its approach and apply the *Continental Can* case law actively, it would diverge from the position adopted by the Commission and the majority of the other national competition authorities. Guidance at EU level would be required in the Working Group's view before such an approach is to be adopted as otherwise there would be significant legal uncertainty for the undertakings concerned, which defeats the purpose of merger control which in principle provides certainty for transactions. Therefore, the Working Group does not recommend the application of this case law. The Working Group agrees with the conclusion of the Court of Justice in *Philip Morris* that "*the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition*"[2]. But it submits that considering that they "*may serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business*" [3] puts an unnecessarily high suspicion on investments involving minority shareholdings. In practice, minority shareholdings may only on very rare occasions raise competition concerns. For instance, the IBA noted, in its submission to the European Commission in 2013[4], that the Commission could not identify any case of non-controlling stakes which had given rise to competition concerns in Member States whose merger control regimes do not cover this situation. As per the above, applying this case law to transactions would require guidance at EU level and should be approached only exceptionally and with great care. Accordingly, the Working Group does not consider

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, article 21.

[2] Cases C-142 and 156/84, British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities, [1987], para. 37.

[3] Ibid.

[4] IBA submission of 12 September 2013 to the European Commission, para 1.9.3.

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	that applying *Philip Morris* to merger cases by the Authority would be desirable. It would increase legal uncertainty very significantly with very little benefit, if any, given minority shareholdings do not appear to be a significant issue.
Implementation of a hybrid model, based on Sweden's approach, which allows the authority to require mandatory notification of certain mergers *ex post* in the event that there may be significant competition concerns.	The Working Group is of the opinion that a system of possible *ex post* review may cause material uncertainty for merging parties related to potentially significant economic consequence for transactions already implemented. The Working Group thus recommends an *ex ante* system based on objectively quantifiable criteria. If the Authority decides to consider an *ex post* model, the Working Group recommends the inclusion of a binding threshold below which the *ex post* review would not be possible. This would be in line with the current Swedish model, where the *ex post* review is only possible if the upper threshold of SEK 1 billion of combined Swedish turnover is exceeded. In addition, it will be important to provide sufficiently clear rules or guidelines on transactions that may merit an *ex post* review, so that the merging parties can, when appropriate, submit a voluntary notification and thereby avoid the uncertainties related to the potential *ex post* review. Such rules or guidelines should be clear in reserving the *ex post* review only for transactions that may raise significant competition concerns. In order to maintain a high degree of legal certainty, the period in which the *ex post* review may be conducted should be limited in time to a few months after the merger is completed similar to the limitation rules in the UK, which applies a voluntary regime but allows the CMA to intervene within a 4 month period. Further, the Working Group recommends that transactions that have been brought to the attention of the Authority by the parties *ex ante* and that the Authority has not considered to merit a review or challenge should not be subject to *ex post* review.
Part II/ Framework for the simplification of merger control procedures	
Extension of the procedure Extension of the simplified procedure to cases of files that raise no competition difficulty even though they are not eligible for the existing simplified procedure is a conceivable option. In particular, this could involve aligning French thresholds with European vertical and horizontal thresholds (the question of the adoption of the European incremental threshold may then be	The Working Group believes that the simplified procedure has reduced time and costs for many companies that are parties to transactions that do not warrant detailed review, as well as for the Authority. Thus, it welcomes the proposal made by the Authority to extend the scope of the simplified procedure to cases which currently cannot benefit from the simplified procedure even though they do not raise any competition concerns. In particular, the Working Group recommends the extension of the simplified procedure to additional non-problematic transactions such as a change from joint to sole control over a company or transactions falling within the Authority's jurisdiction but having no material

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raised, as this threshold does not significantly increase the number of transactions eligible for the simplified procedure). Another option could be to include in the scope of the simplified procedure transactions that do not give rise to affected markets. If the scope of the simplified procedure were to be extended, it might, however, be appropriate to make the pre-notification phase mandatory, at least for transactions giving rise to horizontal or vertical overlaps.	impact on markets in France. The Working Group welcomes the Authority's suggestion to broaden the categories of transactions that can benefit from the French simplified procedure by including the categories covered by the European Commission Notice on a simplified procedure[5]. Indeed, such transactions never give rise to competition concerns and it would ensure consistency with the EU approach. It would also save resources for private parties and the Authority. Regarding the pre-notification phase, the Working Group recommends that the Authority encourage this process but not make it mandatory, as it is not required at the European level and in most Member States. However, in order to prevent an increase in the length of the notification period, the Working Group suggests that the Authority limit the duration of the pre-notification phase to one month, which should be ample for these types of relatively non-complex cases.
Change to the content of the file Thought might be given to reducing the information contained in the notification file (requirement to provide the reports of legislative bodies, presentation of economic objectives, table of financial data, etc.). Furthermore, for transactions that would fall within the scope of the simplified procedure after the introduction of new thresholds, it might prove necessary to carry out more thorough checks than those permitted by the current simplified procedure. In addition to the information currently covered by the Commercial Code, a potential form for transactions eligible for the simplified	The Working Group would welcome the introduction of a specific Short Form for simplified procedures falling within the new simplified regime. As the Authority points out, this is the case in many European jurisdictions already, including at EU level. This would help clarify the parties' obligations and focus their efforts when notifying transactions. The Working Group submits that the simplified procedure should avoid burdensome and disproportionate requirements in the context of transactions that are unlikely to raise any competition concerns. This is a key mechanism for ensuring that the potential resource savings arising from a simplified procedure will in fact be realized by the merging parties and the Authority. In that sense, the Working Group considers that information requirements could be aligned with the transaction scenarios as provided by point 1.5 of Annex II of the EU's Implementing Regulation.[6]

[5] European Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04).

[6] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

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procedure, modelled on the European simplified form, might ask for additional information, to ensure that these transactions do not present any difficulties. These requests could be formalised by including them in the list of required information in a specific form for the transactions. Finally, thought might be given, in general, to reducing the number of "paper" copies required to be disclosed. Currently, the Commercial Code provides for four copies. The Autorité's internal rules and the guidelines indicate that one of these copies must be provided in digital format. The number of paper copies required could be reduced to one.	
Introduction of a prior declaration procedure Another change could consist in introducing a prior declaration procedure for transactions eligible for the current simplified decision procedure and with the intention of replacing it. After a period of time following the declaration, the Authority might no longer have jurisdiction over the transaction in order to submit it to commitments or orders. Expiry of the time limit would have the same effect as a tacit authorisation. Such a procedure could be subject to safeguards such as: - during the time limit available to the Authority, the examination department would	The Working Group would welcome the implementation of a prior declaration procedure for transactions currently eligible for the simplified procedure, i.e. in case of lack of horizontal overlap or vertical link. The Working Group submits that this procedure could also be extended to situations where transactions lead from joint to sole control. This would streamline the merger control process and provide flexibility to the parties to non-problematic transactions. Nevertheless, the Working group considers that the examination period with suspensory effects may raise concerns and should be limited to one month. This should be a sufficient time period for dealing with the types of cases that would be eligible for a simplified procedure. Otherwise, following a long suspension period, the Authority could require from an undertaking to formally notify, which would delay the transaction beyond what is reasonable.

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have its powers of examination to ensure that the transaction raises no competition concerns; if there is any doubt, a system of questions resulting in the suspension of the transaction for a given period could be envisaged and the Authority could ask for a formal notification, making the file subject to the standard authorisation system; - furthermore, the Authority could retain the right to prohibit, make conditional or penalise the completion of the transaction, in the event of omission or inaccurate declaration in the declaration file. The implementation of this procedure would therefore result in the existence of two systems: prior declaration for transactions falling within the current scope of the simplified procedure and simplified procedure for new classes of transactions. Other avenues might be suggested by the stakeholders after the consultation.	
Part 3/ Framework for thinking about the role of merger control trustees	
If, after the consultation, it is concluded that a change in practices with regard to the role of trustee is necessary, several avenues may be considered, including: considering accepting only proposals for commitments offering a list of at least 3 trustees; furthermore, in sectors where technical issues are particularly significant, such as audiovisual and telecommunications, thought might be given to	The Working Group considers that parties to a transaction should be free to put forward one preferred trustee and does not see the justification for putting forward a list of at least three trustees. Without affecting the independence of a particular trustee, parties and their advisors may have working preferences due to work quality and prior experiences with certain trustees. In any event, the Authority —like the European Commission—already vets the trustee's independence before the formal appointment. In addition, given the current state of the market, the limited number of trustees and the need to avoid conflicts of interest, it sometimes may be difficult to offer a list of at least three trustees. Furthermore, requiring industry experts may raise concerns concerning the independence

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having systematic recourse to industry experts in addition to representatives;	of the appointed experts, especially in some specific markets, such as oil and gas or telecoms, where experts frequently work with many of the undertakings on the market.
further formalising and systematising the links between the representative and the Authority;	The Working Group advises that the trustee status should be included in the merger control chapter of the commercial Code (article L.430-1 to L.430-10) in order to specify his/her mission, including his/her reporting obligation to the Authority and his/her independence both from the parties and from the Authority. Furthermore, it would make the relationship between the trustee and the Authority more transparent.
Publishing on the Authority's website the identity of the trustee selected for each conditional authorisation decision; this information may include the name and contact details of the representative in charge of monitoring the commitments;	The Working Group has no objection to the publication of the trustee's identity on the Authority's website.
Finally, consideration might be given to setting up a fund for paying the trustees in charge of monitoring the remedies related to the merger authorization decisions; this could be funded, for example, by undertakings that enter into structural or behavioural commitments before the Authority de la concurrence or which have orders imposed on them.	As regards the payment of the appointed trustee, the Working Group considers that the introduction of a common fund may lead to a decrease in the trustees' remuneration and thus to a lower quality in their work. The Working Group is not aware of any significant concerns regarding the current system of remuneration of trustees by parties to the transaction, and thus recommends that it be maintained. In the event that the Authority chooses to introduce such a fund notwithstanding the Working Group's recommendation to the contrary, and the absence of any clear problem with the current approach, the Working Group suggests that the amount of the fees contributed to it could be set according to the turnover of the undertakings which are parties to the transaction.

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