International Chamber of Commerce
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ICC COMMENTS ON THE EU WHITE PAPER ON MERGER CONTROL

DISCUSSION PAPER

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INTRODUCTION

1. The one-stop shop introduced at European level 25 years ago in order to control large-scale mergers has been an overall success and the new European Merger Regulation has later contributed to a more efficient merger control within the EU since it came into force on 1st May 2004[1]. Also, the improved system of case re-allocation between the European Commission ("EC") and the National Competition Authorities ("NCAs") has allowed business to draw more benefits from the EC's "one-stop shop" assessment and to have their cases reviewed by the most appropriate authority.

2. Whereas in the early days of the EU merger control system, obtaining EU approval was often little more than an afterthought especially for non-European companies, today's global enterprises involved in large transactions are increasingly seeing EU approval as one of their main regulatory priorities. It is an important priority due in part to how onerous and time consuming the EU merger approval process is, as well as the EC's track record of enforcement in some spectacular cases. The truth is that EC has earned its reputation as one of the world's most respected and competent merger control authorities.

3. However, there is always room for improvement[2]. This is particularly true since, taken as a whole, merger control in Europe has not evolved towards simplification. Much to the contrary, the multiplication of merger control regimes at national level has rendered the merger control process even more burdensome for undertakings whose transactions fall outside the EC jurisdictions. Stakes are high and the current regulatory fragmentation which prevails from one Member State to the next has damaging effects on outcomes of strategic importance. This is all the more regrettable since, in addition to what happens in Europe, companies are also facing an increase in the complexity of merger control at worldwide level.

4. When one takes a bird's-eye view of the last decades, Europe has played an ambiguous role in the evolution of merger control. On the one hand, Europe created the first supra-national one-stop shop regime, a spectacular and welcome step toward simplification. However, on the other hand, the simultaneous proliferation of new merger control regimes which imitate the EU regime, both outside and inside the EU, has led to the current rather nightmarish situation where multi-jurisdictional assessments and multi-filing have dramatically increased the costs, risks and duration of many transactions that are, otherwise, positive for the global economy.

5. On 9 July 2013, the EC issued a White Paper under the heading: "Towards more effective EU merger control" which follows the report addressed by the EC to the EU Council of Ministers in 2009[3] and the 2013 Staff Working Document dated 25 June 2013[4]. The White Paper provisions include an eye-catching proposal to extend the EC's powers of review to acquisitions of non-controlling stakes where there is a competitive link. The reforms would also make case referrals between the EC and EU Member States more effective, and make

[1] See, for an overall state of play: Speech by Joaquín Almunia held in September 2010: "The past and the future of merger control in the EU", available at: http://europa.eu/rapid/press-release_SPEECH-10-486_fr.htm?locale=fr ; see also: Mel Marquis, 'Regulating Mergers: Substantive and Procedural Issues, Judicial Review, International Convergence and Best Practices' (2010).

[2] The EC itself came to this conclusion in its press release announcing the publication of the White paper: http://europa.eu/rapid/press-release_IP-14-801_en.htm

[3] Such report focused more specifically on the functioning of the Merger Regulation, in particular the allocation of cases between the EC and Member States was drafted based on the outcomes of a prior public consultation.

[4] http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf

certain procedures less onerous (including exempting review of joint ventures that operate only outside the EEA).

6. The publication of this White Paper, which occurs in the context of the ten year anniversary of the European Merger Regulation 139/2004 ("EUMR") comes alongside the procedural simplification package adopted in December 2013, which was aimed at increasing the use of a so-called “simplified” procedure for non-problematic mergers and a substantial reduction in information requirements for all notified cases.

7. Against this background, ICC welcomes the opportunity which it is granted to submit comments on this White Paper, but also wishes to seize the opportunity to go a step further and identify potential strategic evolution paths for the forthcoming renovation of the EUMR. While a lot has already been done, ICC believes that two priorities should be embraced: a broad simplification of the EU merger control system itself and a dramatic adaptation of merger controls in general to the reality of the Internal Market, which implies that a true reform must extend to the role of NCAs and not be limited to the role of the EC. Achieving those European objectives will also allow the European Union to regain its status as role model by showing to the world that an efficient merger control system in a large geographic area does not need to be complicated or uselessly burdensome.

8. Beyond the comments it entails as regards the proposals made by the White Paper, this response paper highlights a number of specific issues, based on practical experience from ICC members, that have been identified and encountered during the decade which has elapsed since the EUMR was adopted. The paper is hence divided between comments ICC wishes to submit regarding proposals made by the White Paper (2) and further reaching propositions as regards future improvements of merger control in Europe (3), both at EU and Member State levels.

1. AN INTERESTING WHITE PAPER WHICH UNFORTUNATELY OVERLOOKS KEY ISSUES

9. As a broad statement, ICC is of the view that the reforms proposed by the White Paper should be welcomed insofar as they alleviate the workload for businesses and streamline existing procedures and requirements. Especially, ICC welcomes the proposed exemption from review for non-EEA joint ventures, which would alleviate the administrative burden on many industries who depend on joint ventures to enter into new markets, and deals with no overlaps, which would be particularly good news for financial investors such as private equity houses.

10. However, ICC regrets to see that these gains in procedural simplification would be significantly reduced by the contemplated extension of merger control to non-controlling interests.

11. ICC is also disappointed that the propositions contained in the White Paper overwhelmingly address what really are "technicalities" and does not call for the much-needed complete overhaul of the merger control system, by which the present paper means the combination of the EU and of the Member States merger control regimes.

1.1 The White Paper misses the opportunity to address actual key issues of merger control

12. During the 25 years that have lapsed since 1989, merger control has been expanded throughout the entire European Union. There are now about 30 European competition authorities[5], as opposed to 3 in 1989[6] and 14 in 2000. This amounts to approximately 25% of the total number of competition authorities in the world (approximately 125[7]).

13. While the expansion of merger control regimes throughout the European Union is one which ought to be praised, the fragmentation of the regulatory framework which derives from such proliferation of competition authorities is in complete opposition with the concept of the Internal Market.

14. For decades now, the business community has had to adapt to the emergence of an efficient Internal Market in which the EU enabled and encouraged all freedoms of movement. However, the current patchwork merger control system is all but in accordance with Internal Market objectives: the very institutions that have pushed toward the creation of this Internal Market (the Member States and the EC itself) have at the same time let a system of merger control develop that led to a heavy red-tape burden on undertakings, where the numbers actually show that such a burden proves to be unnecessary.

Key issue - At EC level, the administrative burden appears to be unjustified: how to alleviate it?

15. Based on EC data[8], during the period ranging from September 1990 to June 2014, a total of 5568 cases were notified to the EC. Among these cases, 4877 were declared compatible without commitments and only 232 were declared compatible after commitments: less than 5% of the concentrations notified to the EC were deemed dangerous for the markets.

16. As regards the calendar year 2013, it must be highlighted that 277 merger transactions were notified to the EC. During that year, the EC adopted six Decisions initiating Phase II proceedings, less than those issued during 2012 (ten) and 2011 (eight) but above those issued in 2009 (five) or 2010 (four)[9]. However, this rate still remains undoubtedly low and provides a clear indication that the current EU merger review framework leads to the review, by the EC, of an overwhelming majority of unproblematic transactions. In addition, the great majority of competition problems raised by the EC are solved through Phase I commitments[10]. Though this observation shows that the EC generally has a pragmatic approach, it also points to a lack of usefulness of pre-merger control in problematic cases: as long as the consequence of a competition problem is not the unwinding of the deal, there is no absolute necessity to find a solution before the closing of the transaction.

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[5] Precisely 28 if one considers the European Commission and the national competition authorities of the 27 Member States of the European Union out of 28 that have a system of merger control (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), and even 31 if one adds the members of the European Free Trade Area (EFTA) which have a similar system (Iceland, Norway) and Switzerland. Liechtenstein and Luxembourg do not have their own merger control.

[6] At the time only France, Germany and the United Kingdom had a national merger control system.

[7] The International Competition Network (ICN) counted 126 member authorities in the summer of 2013.

[8] http://ec.europa.eu/competition/mergers/statistics.pdf.

[9] These numbers tend to confirm the overall trend during the last years which has been for the European Commission to be increasingly comfortable about initiating in-depth ("Phase II") investigations. As a matter of fact, the rate at which M&A transactions notified to the European Commission trigger a Phase II investigation has nearly doubled over the past three years, from 1.19% in 2010 to 2.17% in 2013.

[10] In 2013, out of 429 cases declared compatible in Phase 1, 11 were declared compatible pursuant to Phase I commitments.

17. The administrative burden imposed on the private sector is thus not justified by economic reasons.

18. ICC considers that one major goal of any reform of the EUMR should be to simplify the regime and alleviate the obligations imposed to the undertakings involved in transactions.

Key issue - The burden is even much heavier when transactions fall outside the EC jurisdiction: how to simplify the European merger control system?

19. This diagnosis is even truer for mergers that fall outside the EC jurisdiction: unless the notifying party is fortunate enough to have to deal with just one NCA, those mergers lead to intricate legal and administrative analyses, beginning with the heterogeneity of the notification thresholds in the Member States, continuing with the necessity to notify in various languages and to respond to inconsistent requests for information, and culminating in a variety of substantial tests and of timings.

20. The whole renders it difficult to anticipate timing and outcome, and also leads to legal uncertainty because of the mere necessity to verify the notifiability in 30 countries whose thresholds sometimes impose the need to address arcane market definitions (when the thresholds are based on market shares).

21. In some cases, an identical market situation can lead one NCA to clear a project in a few weeks while another NCA opens a Phase II[11]. As the two recent contradictory decisions rendered in the UK and in France on the trans-channel links show, it is even possible to see one and the same market analysed in opposite ways by two NCAs.

22. ICC considers that Europe has now created, in addition to its official European EUMR, a *de facto* European merger control system, whose complexity and fragmentation is simply contradictory with the construction of the Internal Market. This is a major issue that any reform of the merger regulation must tackle.

Key issue three. Legal uncertainty has grown in Europe in the field of merger control: how to restore it?

23. The review by the EC of numerous unproblematic transactions has as an immediate consequence: a dramatic increase in the number of decisions published under the simplified procedures which lack both comprehensive market definitions and extensive legal assessments. Such drawbacks of simplified decisions are worsened by the large number of precedents released by national authorities, in their own language and with diverging market definitions or approaches[12]. To put it another way, the corpus of available “precedents”, which is the basis of legal analyses in any efficient and secure legal system, is limited when

[11] Famous to this respect is the Austrian regime, where a public prosecutor whom the parties have never met can without warning open a Phase 2 when the transaction has been cleared in a wink in neighbouring countries

[12] An example can be drawn from the way competition authorities define the geographical markets in the retail sector. Although all the methodologies can look rather similar from a bird's eye point of view, there are a number of technical differences that in practice make the life of companies quite difficult: e.g. Italy focuses on 'regions'(see press release n°C11878 : Joint control of ISONTINA RETE GAS (IRG) to ACEGAS-APS and ITALGAS related to gas distribution), Spain on 'metropolitan areas' (see decision n°06062, 28 June 2006, Madrigal / Castellana De Capital / Empresarios Integrados / Grupo El Árbol,p.7), France on 12 or 30 minutes driving time (see decision n°14-DCC-121, 19 August 2014 regarding the acquisition by Système U Centrale Régionale Nord-Ouest of Bridis related to hypermarkets and supermarkets para. 9), UK on areas where 80% of the clients are located (see decision n°ME/6310-13, 17 April 2014, Completed acquisition by Ridgeway Garages (Newbury) Limited of Parkview Skoda, paras 28,31 to 33) and the European Commission seems to let the precise method relatively open (see inter alia decision n°IV/M.1085, 6 February 1998, PROMODES / CATTEAU related to retail sales of consumer goods by self-service, paras 13 to 15).

compared to the growing number of decisions rendered at EU and national levels. Admittedly, the EC has published merger guidelines that provide useful guidance, but their usefulness is limited for two reasons. Firstly, the guidelines are inevitably generic and do not entirely compensate for the lack of precedents, notably in specific areas such as market definition. Secondly, the guidelines do not bind the national authorities of Member States.

24. Unlike in the field of antitrust, where the ECJ and the guidelines released by the EC enable a coherent application of articles 101 and 102 throughout all jurisdictions, there are few guidance instruments in the field of merger control. The EC admittedly issues notices in the merger control field but most of these concern procedural rather than substantive questions, and therefore they fail to facilitate, let alone constrain, merger control application by the NCAs.

25. ICC considers that the modernisation of the merger control policy should address the question of guidance, especially with a view of harmonising the NCAs practices.

Key issue four. Europe has become a negative model for the world: how to restore a positive influence?

26. As recalled in the introduction, the EU was once a model for the rest of the world, both because it rightly advocated the importance of merger control for the sustainability of a healthy competition and because it showed that, thanks to its one-stop shop policy, it was possible to simplify the regulatory burden at the level of a huge supranational economic area.

27. Now, even if it is done unwillingly, the influence of the EU is now exercised for the worse rather than for the better. Every year, new countries are adding a merger control regime to the already large collection. In their majority, those new regimes are inspired by the EUMR and impose similar obligations on companies. In addition, new supranational regimes are also created, especially in Africa, that take their inspiration from the EU, with the result of often adding a new supranational regime to the pre-existing national ones rather than substituting one for the other.

28. The present situation is reaching the intolerable: many transactions must be preceded by burdensome legal researches as to their notifiability and then must suffer from numerous filings and uncertain delays and outcomes.

29. Therefore, with the EC planning to add a new category of operations to the scope of its review (namely, the minority acquisitions), it is concerning because these problems will likely be duplicated elsewhere.

30. ICC believes that the contrary should and can happen: by daringly simplifying its merger control system (and not only the EUMR), Europe can again inspire the world, only this time it must move toward more efficient models.

31. Having summarised what are the key issues in the field, ICC expresses its disappointment vis-à-vis the White Paper, and all the more so when noting that the paper nevertheless contains a number of excellent ideas. Indeed, the main criticisms do not concern the technical suggestions, many of which are excellent, but the fact that the White Paper *only* addresses these technicalities, thereby overlooking the opportunity to make necessary strategic steps forward. On the technical side, unfortunately, the simplification that results from several excellent measures is regretfully overreached by the creation of a new

administrative burden: the obligation to self-review and notify,in all but explicit words, non-controlling minority acquisitions.

1.2 ICC warmly welcomes the simplifying initiatives set out in the White Paper, while suggesting a number of improvements

32. The White Paper entails a number of simplifying and streamlining measures, including exempting entirely from review:

- full-function joint ventures located and operating outside the EEA with no effect on EEA markets; and
- deals leading to no "reportable markets", *i.e.* where there are no horizontal or vertical overlaps (or at least those deal will require only an Information Notice).

33. ICC warmly welcomes the proposals of the EC in relation to the possible exemption from review of full-function joint ventures located and operating outside the EEA with no effect on EEA markets. However, and as already set out in ICC's first Response to the European Commission Public Consultation[13], ICC is of the opinion that in order to eliminate redundant filing requirements for transactions that have no nexus with the EU, the most appropriate measure is that the applicable turnover threshold should be satisfied by the joint venture undertaking. Such rule would ensure that jurisdiction under the Merger Regulation would not arise solely based on the turnover of the controlling parent undertakings[14].

34. If the EC however refuses such proposition and retains the proposition it makes in its White Paper, ICC highlights the fact that a secure self-assessment must have recourse to clear guidance. While the first criterion is straightforward (localisation outside the EEA), the second (operating totally outside the EEA) would benefit from clarification or further consideration since the word 'totally' could lead to some difficulties; for instance if a marginal part of the products are (directly and moreover indirectly) sold in the EEA, thatmust not oblige the parties to notify the project. But it is overall the third criterion (no effect on EEA markets) which needs greater clarification.

35. This last point is all the more important because the “effect theory” could convince other competition authorities in the world to avoid the capture of transactions lacking any local nexus.

36. ICC thus recommends the publication of unambiguous guidelines on the notifiability of full-function joint ventures.

37. ICC also approves the project to exempt from notification and review the deals leading to no "reportable markets". However, while the White Paper contemplates moving away from a simplified procedure towards a targeted transparency system similar to that envisaged for the review of the acquisition of non-controlling minority shareholdings, ICC strongly advocates in favour of a self-assessment review. Such a self-assessment would have the advantage of avoiding a burden on notifying parties that is disproportionate to the competition risks and thus avoids defeating the purpose of the envisaged measures.

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[13] ICC Response to the European Commission Public Consultation: "Towards More Effective EU Merger Control"dated 12 September 2013, available at: http://ec.europa.eu/competition/consultations/2013_merger_control/icc_en.pdf

[14] For scenarios illustrating the consistency of this proposition with the proper allocation of cases between the merger regime and Article 101 and with principles of international comity, please see the Annex to the ICC response dated 12 September 2013.

38. The self-assessment would be particularly suitable, absent any reportable market, since there are very few occasions in which a potential harm to competition could occur. A self-assessment mechanism would be entirely sufficient, provided that the EC would issue guidelines addressing the rare cases where those transactions may give rise to competition concerns (e.g. portfolio effect).

2.3 The extension of merger control to non-controlling minority acquisitions would significantly diminish the effect of the simplifying initiatives

39. The proposition of the White Paper would give the EC power to review acquisitions of non-controlling stakes, particularly those which allow the exercise of material influence over commercial policy or access to commercially sensitive information,even where the shareholding acquired is as low as 5%.

40. While the EC stresses that this is similar to the tests used in the UK, Germany and Austria, it is nevertheless a considerable widening of the EC's remit, and the 5% threshold itself is actually lower than those applied in these other jurisdictions. The justification to the review of such acquisition of non-controlling stakes invoked by the EC is the currently prevailing enforcement gap, since the EUMR only applies to "concentrations".

41. The proposed requirement for a "competitively significant link" means that only minority acquisitions which appear problematic from a competition perspective need to be notified. This requires a competitive relationship between the buyer and target, *i.e.* where they are nominally active in the same market or in vertically related markets – a broad test which could quite easily be met by financial buyers with a diverse portfolio of interests, even absent any sort of conceivable competition concerns.

ICC considers that the suggestion is ineffective and dangerous

42. The Consultation Paper which preceded the White Paper put forward three procedural options for the control of minority shareholdings: a notification system, broadly similar to that currently prevailing under the current EU merger control, and a "targeted transparency system", which implies that an Information Notice would only be submitted in cases where the undertaking proposes to acquire a minority shareholding qualifying as a "competitively significant link". Finally, the EC briefly touched upon a self-assessment system.

43. The preferred option retained in the White Paper is the targeted transparency system. Under such system, the Parties to a deal involving the acquisition of a minority shareholding with a "competitively significant link" would be required to submit an Information Notice to the EC, as opposed to a fully-fledged Form CO notification. At this stage, the White Paper remains rather vague as to the level of detail which would be required in the context of such Information Notice. However the EC has already indicated that it would include transaction structure and some market share information. Parties would also be obliged to wait for a period (e.g. three weeks) for the EC to decide whether a full notification is required, and during which time the parties would of course still need to prepare the Form CO, pre-notify and wait for the EC's formal review to take place. The proposal also suggests that the EC is provided with a four- to six-month window to investigate a transaction following the submission of the Information Notice, regardless of whether it has been implemented.

44. As a general statement, ICC highlights that any extension of the merger control regime to cover non-controlling acquisitions means adding more delay and cost to those deals for

businesses. By effectively seeking to lower the test for "control" to where there is a competitive link, the EC will require businesses to notify it of transactions that currently pass unexamined by merger control. The attention of the EC must be drawn to the fact that any administrative burden directly linked to a notification or an information notice also translates into a hidden burden of which the EC is never aware: burdensome pre-assessment of operations, inequality between investors who would not face the same risks as risk-adverse investors, even if in the end the operation would not have been vetoed.

45. ICC does not consider that the arguments and evidence set out in the White Paper make the case for regulation of minority interests in the manner proposed by the EC. In particular, ICC stresses the fact that the economic theories discussed in the White Paper have very little to say about whether the relevant scenarios of harm arise with any frequency in commercial reality, or whether they apply to levels of influence which fall short of decisive influence. The experience of ICC members in jurisdictions that have already explored this field suggests that they do not. When EUMR was introduced, there was a historical wealth of empirical and anecdotal evidence that acquisitions of "full" control can and sometimes do lead to price rises. ICC's view is that before extending the scope of the EUMR in a way that might harm incentives to invest in minority shareholdings, the EC must first develop at least some similar empirical evidence of their harmful effects.

46. Furthermore, and even if it were established that structural links do have anti-competitive effects, ICC's view is that such effects could be addressed through existing enforcement tools, whether under Article 101 of the Treaty on the Functioning of the EU ("Article 101"), national merger control regimes or through application of the existing scope of the EUMR. In particular, ICC sees no justification for treating anti-competitive exchanges of information differently – under the EUMR or Article 101 - according to the corporate context.

47. The EC suggests that Article 101 is not an appropriate enforcement tool to intervene against anti-competitive minority shareholdings because it is not clear whether acquiring that shareholding would constitute an “agreement” in all cases, for example, in the acquisitions of a series of shares via the stock exchange. However, in most cases there clearly will be an agreement that would serve to trigger a jurisdiction to review under Article 101. Consequently, if the EC considers that the merger regulation must be extended to cover minority shareholdings, it should only do so to the extent Article 101 cannot be applied. The merger regulation should not be extended to cases – such as joint venture arrangements involving an acquisition of a minority stake – where there is clearly an agreement in place. In addition, it should be noted that Article 101 can cover situations where there is a *de facto* agreement. If, for example, minority shareholders can appoint a director who will sit at a competitor's board, one would expect that a barrier of information rules will prevent this director from having access to confidential information; without such barriers, the information flow may be qualified as a concerted practice between the two competitors, and thus be caught by Article 101. Another solution would be for this director to be bound by confidentiality obligations limiting her or his ability to disclose information to other persons working for the same company. If those precautions are deemed unpractical, then the minority shareholding acquisition could be ruled out after a self-assessment.

48. Moreover, the EC asserts that extending the Merger Regulation is justified by a need to ensure that jurisdiction does not depend on the order in which transactions involving a minority interest take place. However, the same issue also applies to a wide variety of arrangements that are not subject to mandatory pre–notification and standstill obligations.

For example, long-term contracts, non-full-function JVs and acquisitions of sole control of non-producing assets all remain outside the scope of the EU Merger Regulation, but are addressed perfectly adequately under Article 101 and, where relevant, can be taken into account as part of the competitive context when carrying out a substantive assessment of a merger. We therefore consider that the EUMR should only be extended to those non-controlling interests in respect of which it may not be clear whether or not there is an agreement in place. It should not be applied to arrangements such as joint ventures where there is clearly an agreement in place and which can therefore be addressed under Article 101.

49. As a consequence, ICC does not believe that there is a case for introducing minority acquisition control and fully reject this aspect of the project.

If the EC persists in its views, ICC considers that the technical choices envisaged by the White Paper are not the most appropriate

50. Since the EC's White Paper opts to extend the scope of the EUMR to non-controlling interests, ICC wishes to highlight the fact that it disapproves of this proposed system.

51. Firstly, the shareholding threshold that may trigger a review by the EC should be much higher, 5% being an unreasonably low figure.

52. Secondly, under the White Paper's proposed system, the parties will be required to conduct a substantive analysis as to whether a transaction creates a “competitively significant link” and then conclude whether they must or not lodge an Information Notice,which ICC sees as notification in all but words. ICC observes that such an assessment prior to a notification decision is completely contrary to the administrative logic that has been followed by the EU since 1989. It has always been held that administrative obligations (such as notifications) should be triggered by formalistic and easy to conduct assessments (e.g. the turnover thresholds), and not by substantive assessments.

53. While determining whether a “competitively significant link” exists may be a straightforward exercise for most, in some cases companies will generally need (i) to determine whether their activities compete or are vertically related, and (ii) to identify whether this link is “significant.” The latter will require an analysis of the rights and powers attached to the acquisition of the shares to verify whether those rights may amount to a level of material influence as defined in the White Paper. Experience under the UK and German merger regimes that use those kinds of concepts suggests that this analysis often can result in widely divergent interpretations and disagreements between the parties and the antitrust agency.

54. Finally, making an administrative obligation dependent upon a difficult substantive analysis would be contrary to the best practices recommended by the ICN, undermining the "role model" position of the EU.

55. Against this background, ICC strongly disagrees with the contemplated targeted transparency system. The burden on notifying parties would be disproportionate to the competition risks. ICC invites the EC to consider alternatives. A first alternative would be to simply set out the objectives of the criteria for notification. The second would be to replace notification by self-assessment, which would avoid imposing filing obligations, such as liability for penalties and standstill obligations.

56. Admittedly, a self-assessment creates its own risks because it would also be based on the difficult verification of the existence of a "competitively significant link." However, if the consequence of a competition problem finding by the EC is reasonable, and generally does not imply unwinding the deal but is limited to corrective measures, a self-assessment should be considered. In addition, the EC could publish guidelines explaining how the existence of "competitively significant links" are to be assessed.

57. To conclude, even assuming that the large majority of non-controlling shareholding acquisitions will not be deemed to involve a "competitively significant link", it is in reality a huge universe of minority acquisitions above 5% that would now be included in the scope of the EUMR and impacted by the hidden burden of pre-assessment, inequality between investors and renouncement by excessive risk-adverse investors. The effect of this extension largely negates the positive impact of the two simplifying measures.

2.4 The White Paper rightly attempts to improve the European trans-agencies merger control system but its purely technical improvements fall short of addressing the relevant key issues

58. While all in all the White Paper fails to propose a much needed recast of the current merger control system, it does entail a few technical initiatives which must be welcomed. As a matter of fact, the White Paper proposes some changes to the EU referral system which are depicted as a promise to facilitate and accelerate the referral of a notified merger to the EC under Article 4(5) and Article 22 of the EUMR, and to NCAs under Article 4(4).

Article 4(5)

59. One of the most heralded amendments to the Merger Regulation made in 2004 was the introduction of Article 4(5), which allows merging parties whose transaction does not meet the EU turnover thresholds but is capable of being reviewed in three or more Member States to request referral of the case from the competent Member States to EC. In a section dedicated to such a mechanism, the White Paper seeks to limit the number of cases reviewed by multiple EU Member States, a move that ICC strongly supports.

60. The White Paper suggests abolishing the requirement for a reasoned submission and replacing this procedure with a system under which the parties seeking a referral would only have to provide a Form CO notification to the EC. The EC would immediately forward the Form CO to all Member States, and Member States competent to review the transaction under their national regimes would have 15 working days to oppose the referral request. Absent Member State opposition during that time period, the EC would review the transaction instead of the competent Member States. This new procedure would effectively cut down the process by 15 working days, not to mention the time required to prepare the reasoned submission.

61. ICC agrees that this reform would be beneficial in terms of timing and costs. In ICC's experience, it is the cumbersome nature of the Form RS process that prevents many companies from taking advantage of the Article 4(5) referral possibility. While statistics show that requests for referral under Article 4(5) are rarely opposed, there are no statistics showing how often companies opt not to request referral owing to the burdens involved in making such a request. In the practitioners' experience, it is not at all unusual for merging parties to decide to take a pass on the Article 4(5) referral possibility in favour of making multiple Member State filings.

62. While the envisaged reform will at least partly address this concern, it is silent on another reason that limits the willingness of the notifying parties to use Article 4(5), namely the fact that the EC will review the transaction in all the EEA Member States, while a notification before multiple NCAs only entails the review of the impact of the transaction within the economy of the concerned Member States. In other words, choosing the one-stop shop which supposedly alleviates burden may lead to a more burdensome process, which is an unsatisfactory situation. ICC thus advocates the introduction of a rule limiting the geographic scope of the EC review to the territory of the otherwise competent Member States.

63. Furthermore, the White Paper suggests enhancing information exchange between Member States and the EC by having the EC sending the parties' initial briefing paper or the case allocation request to the Member States to alert them about the transaction during the pre-notification contact.

64. However, ICC does not consider that unauthorised pre-notification contacts and exchanges of information between the EC and national authorities are necessary or desirable for many reasons.

65. Involving several NCAs at this early stage of the process could lead to more complexity and questions being asked to the parties, thus delaying the actual notification time and eliminating the positive effect of the reduction in time and costs that would otherwise occur. ICC thus recommends specifying that, where waivers executed by the notifying parties authorise communication of confidential information to the competent NCAs prior to the actual notification, the parties may also specify in those waivers how that information may be used, for example by requiring NCAs to refrain from intervening in the pre-notification discussions between the EC and the notifying parties.

66. Another undesirable side-effect is the potential “creeping” formalisation of the pre-notification phase. In particular, it is unclear how the EC intends to reconcile the White Paper proposal with the non-mandatory nature of the pre-notification phase.

67. Also, for transactions not yet in the public domain, allowing the EC to transmit information to NCAs would result in multiple NCAs receiving highly sensitive market information. ICC does recognise that the ECN has a good record of maintaining the confidentiality of documents, but as events in recent years have shown, information can escape from even the most secure of systems, such that widespread disclosures should be avoided unless absolutely necessary. For the reasons described above, ICC considers there to be no such necessity here.

68. With regard to the criterion itself which may trigger the application of Article 4(5) of the EUMR, ICC considers that the condition that the proposed transaction would have to be notified in at least three Member States hinders the use of this referral mechanism. To use the words of Fabien Zivy, in his December 2013 report[15]: "*In earnest, either a merger is cross-border or it is not. When it is, i.e. when it is notifiable to more than one competition authority, there is no objective reason to treat it differently whether two or three authorities are involved*". Therefore, ICC recommends lowering the threshold for triggering an upward referral to the EC from three NCAs to two.

[15] Report to the Ministry for Economy and Finance of December 2013, pp 30.

Article 22

69. As regards Article 22 in its current redaction, it provides that one or more Member States may request a transaction is referred to the EC, even if the transaction does not satisfy the EUMR turnover thresholds. If accepted, the EC only takes jurisdiction for the territory of the Member State(s) requesting (or supporting) the referral request, which leads to parallel review of the same transaction by the EC and by Member States contrary to the "one-stop shop" principle.

70. Pursuant to the White Paper, the Article 22 procedure would be amended to provide that only the competent Member State(s) have the right to request a referral to the EC. If the EC accepts the request, it would have jurisdiction for the whole of the EEA. If any of the Member States with jurisdiction over the transaction opposes the referral, all competent Member States would retain their jurisdiction and the transaction would continue to be subject to the national regimes.

71. ICC agrees with the EC that only Member States which have jurisdiction over the notified transaction should be allowed to make a referral or join a referral request under Article 22. However, ICC strongly disagrees with the proposed broadening of the geographic scope of the EC's jurisdiction after referral. In particular, it would not avoid the potential problem of a patchwork approach of parallel proceedings and would mean that further legal costs are wasted on unnecessary EEA-wide substantive analyses.

72. All in all, ICC acknowledges that the proposals are designed to encourage greater use of the existing case referral provisions, particularly from Member States up to the EC. However, ICC is of the opinion that even absent a major proposition for a global overhaul of the system, the EC should have seized this opportunity to propose further reaching amendments to its merger control regime. In particular, ICC is concerned that the propositions made by the White Paper do not address in a satisfactory manner the complexity which affects the current merger control system and which is overwhelmingly due to the co-existence of two levels of review (*i.e.* national and EU level).

73. This is all the more striking when one reads the statement made by the EC according to which its long-term aim is to develop a European Merger Area with a single set of rules used by itself and Member States. Echoing Mario Monti's 2010 report entitled *"A new strategy for the single market"*[16], the EC also stressed the need for a greater coherence and convergence with the merger control rules of EU Member States. The aim is quite straightforward: it is to enhance co-operation and to avoid divergent decisions where there are parallel reviews.

74. As an overall comment, ICC considers that the changes put forward in the White Paper both fail to propose the ambitious measures much needed in the course of reforming the EU merger control and might, in spite of some excellent simplifying measures, lead to an "algebraic" increase of the administrative burden already weighing on the parties to a concentration[17].

75. Against this background of a White Paper which focuses on technicalities and fails to embrace a much needed major overhaul of the EU Merger Regulation, ICC hereinafter

[16] Report to the President of the European EC José Manuel Barroso by Mario Monti, 9 May 2010, accessible under: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

[17] Especially as regards the inclusion of minority interest in the scope of EU merger control.

provides a set of both substantial and procedural proposals designed to address the numerous pitfalls which affect the current merger control system in Europe, and not only at EC level.

2. AGAINST THE EC'S MINIMALISTIC APPROACH, ICC CALLS FOR A MAJOR OVERHAUL OF THE CURRENT MERGER CONTROL SYSTEM

76. Notwithstanding the large deals reaching the EU thresholds and reviewed since 1989 by the "one–stop shop", the past ten years have witnessed a dramatic increase in cross-border mergers being investigated by a large number of NCAs, each one of them applying its national law. While some progress towards convergence has been achieved over the past 10 years, such heterogeneity of national merger control systems lead to unreasonable costs and efforts for undertakings. Thus, ICC calls both for a major simplification of the EU merger control regime itself and a more general adaptation of the merger control regime to the Internal Market. Finally, ICC makes a number of proposals aimed towards the promotion of legal certainty in the field of merger control.

2.1 Need for major improvements to the EU merger control regime

77. The large majority of merger jurisdictions throughout the European Union have mandatory notifications. However, there are a few countries which have continue to keep non-compulsory pre-merger notifications, such as the UK. Parties are given the option of voluntary notification before merger consummation, or to take the risk of seeing the regulator challenge a merger that was not notified.[18]

78. There are a number of implications associated with compulsory and voluntary notification regimes. Parties under a compulsory regime are given the opportunity to negotiate with the regulator before the merger is consummated, thereby avoiding costly litigation and the theoretical risk of having to dismantle the merger.[19] However, compulsory notification entails reviewing costs for the regulator and significant notification costs for the merging parties. The latter is especially shocking for non-problematic transactions, which are by far the majority.

79. Against this background, ICC considers that today's prevailing compulsory system[20], *i.e.* that the transaction (i) must be notified and (ii) cannot be carried out prior to the obtaining of an authorisation or clearance, lacks in efficiency both in timing and in costs. Based on experience of the last decade, ICC does not consider it necessary to entirely abandon the compulsory notification system for a voluntary system, but it believes an intermediate solution would prove most practicable. This solution would be a declaration, rather than an authorisation, control regime.

80. The declaration merger control regime could be structured as follows[21]:

[18] Choe & Sekhar, *supra* note 21 at 2. For further comments on post-notification and post-assessment models, see III.B. and C., below.
[19] Choe & Sekhar, supra note 37 at 13.
[20] Both for the mergers reviewed by the EC and those reviewed by NCAs.
[21] Except for deals leading to no "reportable markets" which, in ICC's view, should be subject to a self-assessment.

- The notifying party would have to file the proposed transaction with the EC prior to its completion and would then have to observe a 15 working day standstill obligation.
- There would no longer be a pre-notification phase.
- Once this 15 working day period has expired, the parties would be able to proceed with the transaction, unless the EC or NCA has declared the merger problematic and opened a Phase I which could not last any longer than 25 working days (if no remedies are necessary).
- Additional information would only be possible if a Phase I has been opened.
- A Phase I could only be opened if a **motivated** "Phase I opening decision" has been issued. The obligation to adopt a motivated Phase I opening decision would avoid a systematic opening, and therefore the risk of seeing case teams transforming back the standstill notice in pre-notification and the declaration regime into an authorisation regime.
- The Phase I duration could be extended if commitments were to be negotiated. In the majority of cases, a Phase I would not be open and the EC would not have to issue any decision at all, which would alleviate its own administrative burden.
- A potential Phase II would be opened by the NCA after a Phase I and would not last any longer than 65 days from the initiation of proceedings.

81. In addition, the filing requirements would be calibrated and limited to material which is absolutely essential to the antitrust assessment. ICC is of the opinion that the detailed information required in the Form CO, to which the case teams very often add additional information requests, is not indispensable to a proper merger review. ICC's view is notably formed through the comparison with the notification process in two other leading merger control jurisdictions: the United States and Germany.

82. In the United States, Hart-Scott-Rodino merger filings are typically very short and can often be completed in a day or two. Rather than requiring extensive amounts of information up front[22], the U.S. authorities request just enough to understand the transaction and then rely heavily on the views of customers and competitors concerning the likely impact of the transaction on competition. In the U.S., such “market testing” is often done by phone[23], making it quicker and less burdensome on the U.S. authorities as well as on respondents. Should the U.S. authorities decide that a case requires a more detailed examination, they may make a so-called “second request” of the merging parties where very large volumes of documents must be provided, far eclipsing the amount of information the parties must provide in Form CO. However, this only applies to the minority of cases that raise potentially serious issues. The simple cases are quickly weeded out in the U.S. system, typically through the practice of “early termination,” while, as discussed above, they can be unduly burdensome in cases before the EC where much information must be provided up front.

[22] The Federal Trade Commission requires that persons filing a Hart-Scott-Rodino (HSR) notification with respect to a proposed transaction use the North American Industry Classification System (NAICS) to report their revenues and certain overlap information in Items 7 and 8 of the Notification and Report Form for Certain Mergers and Acquisitions (HSR Form).

[23] The European EC also actively engages in market testing, but this is typically done only after a detailed Form CO has been submitted. It is usually not the EC’s standard practice to telephone companies to seek their input. This could be due to the fact that the EU EC, unlike the U.S. authorities, the EC must issue a reasoned decision in every case, and this is made easier by receiving answers in writing rather than orally.

83. In Europe, the German Federal Cartel Office accepts notifications made by a simple letter explaining the transaction and why it does not raise competition concerns, dispensing entirely with the need to complete a detailed form. This gives the parties the flexibility to discuss in their notification what is relevant to the merger and to disregard what clearly is not. Again, like their U.S. counterparts, the German authorities will poll the market, and whether or not they pursue a case will depend largely on the reaction of customers and competitors[24]. In this regard the German authorities have a reputation for quickly approving unproblematic transactions, often issuing clearance decisions within a matter of weeks after notification is made. There is also no practice of pre-notification consultations or submission of draft notifications in Germany.

84. ICC is of the view that the EU and national merger control process throughout the EU could benefit from the importation of those aspects of the U.S. and German practice that contribute to shortening the time needed to produce a decision. It would be more efficient for the EC to request less information up front and reserve the more onerous information requests for cases where serious competition issues are identified, for example as a result of customer and/or competitor feedback.

85. This move would also be of great importance to change the course of merger control in other jurisdictions: given the role model of the EU, one may expect that a revolution toward more simplicity would be widely followed.

86. ICC therefore advocates in favour of a shift at the EU level from the compulsory authorisation system towards a declaration merger control regime, which would mean significant gains in time and reduction in legal fees for the parties, as well as a consequent downsizing in standard filing requirements.

2.2 Adaptation of the merger control system to the Internal Market

a) <u>Implement an enhanced "one-stop shop"</u>

87. In his report entitled: "A new strategy for the single market"[25], Mario Monti advocated in favour of a greater convergence in regards to how mergers are assessed on the substance and the review process at national level, and considered that sterilising the impact of national public policy concerns on cross-border cases would actually require that NCAs apply the substantive EU merger control rules also at national level where a merger has cross-border effects. He also expressed his views on the needto enhanced co-operation between NCAs in order to ensure procedural and substantive convergence between them and with the EU level. However, he acknowledged that a more radical, and perhaps more efficient, option would be to revise the Merger Regulation's mechanisms for case allocation and re-allocation. What Mario Monti had in mind was the abolition of the so called "two-thirds rule", which requires that mergers in principle eligible for EU review under the merger regulation are nevertheless left to NCAs when more than two-thirds of the parties turnover is realised in one and the same Member States. In his eyes, the resulting advantage would be a more consistent treatment of mergers in key areas of the EU economy.

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[24] In this regard it should be noted that the German authorities prohibit significantly more transactions than their counterparts in the EU. While this outcome is not necessarily to be imitated, it means that the level of detail in German notifications suffices to allow the German authorities to conduct a thorough investigation or identify serious competition issues.

[25] Report to the President of the European EC José Manuel Barroso by Mario Monti, 9 May 2010, accessible under: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

88. While ICC fully agrees with the need for a greater convergence[26] and the adoption at the national level of the European merger control standards, it is in favour of an even greater step forward and the implementation of a real, single "one-stop shop". The ICC proposal could be summarised as follows: **if the notifying party wishes so, it is entitled, whatever the size of the transaction, to notify it to one and only one authority in one language.**

89. Today, at least in theory, it is possible for a transaction to have to be notified in 28 Member States because the EC has no jurisdiction and because the discretionary element of the Article 4(5) referral procedure may impede a referral to the EC. It is also possible in theory that a transaction that meets the EC jurisdictional thresholds is referred by the EC to 28 Member States, obliging the notifying parties to deal with 28 NCAs. Even if caricature cases of that kind rarely arise, less spectacular situations happen all the time and they are always difficult to predict. That obliges the parties to a transaction to envisage a number of different options that notably impact the timing of the transaction.

90. The suggestion would be to systematically implement a single interlocutor for the notifying party, if the latter so wishes. That could be achieved by implementing the following rules:

- A concentration that does not meet the EC jurisdictional threshold and that only meets one Member State jurisdictional threshold will still, as it is currently the case, be notified to the relevant NCA. One authority = one NCA.

- A concentration that does not meet the EC jurisdictional threshold and that meets **more than one** Member State jurisdictional thresholds could, **if the notifying party so wishes**, be notified only to the EC. The latter would only assess the impact of the transaction on the territory of the Member States whose jurisdictional thresholds were met. The relevant institutions (EC and relevant NCA) could, if they wish so, decide that the case is referred to the NCA, but that should be neutral for the notifying party, who will not be obliged to re-notify the case to those NCAs and would not suffer from any language requirement or timing impact, nor will have to deal directly with the NCAs (the rationale being that, should the notifying party have wished to deal with the NCAs, it would have decided to notify the transaction to them, an option that would remain open in the system advocated by ICC). One authority = the EC.

- A concentration that meets the EC jurisdictional thresholds would of course continue to be notified to the EC. Under the regime adovated by ICC, this operation could still, as it is the case today, be referred to the NCAs at the request of the latter or of the EC. However, such measure should again remain neutral from administrative and timing perspectives. If the notifying party does not want to deal directly with the NCAs, it could decide to deal exclusively with the EC; in that case, only the EC procedural rules would apply. Only if the notifying party itself requests a referral to the NCAs (or accepts, further to a referral decided by the EC, to deal with several authorities) would it have to face the burden of a real multi-notification.

91. Another kind of one-stop shop has been suggested by Fabien Zivy who envisaged that one NCA could take the lead in the case of multiple filing before NCAs. He considered an allocation depending on the breakdown turnover of the parties in the Member States (75% or 2/3 of the turnover), which could be adapted so that the NCA which has jurisdiction would be

[26] For further arguments in favour of such convergence, please refer to an article summing up Fabien Zivy's report : "Diverse perspectives on the cross-borders mergers, Concurrences n°1, 2014.

that of the EU Member State where 2/3 of the turnover is achieved. ICC however considers that using the EC as a single one-stop shop is simpler and allows the company to chose the notification language.

92. *ICC therefore calls for the implementation of an enhanced one-stop shop, where the notifying party, whatever the size of the transaction, could if it so decides have only one interlocutor.*

b) Pursue a global harmonisation of Member States' national regimes

Harmonisation of the substantive test

93. However, a decade after it was adopted at EC level, the SIEC test still has not been adopted by all the Member States across the European Union. ICC considers that today's vast matrix of merger control systems ideally protects consumers from the point of view of price, choice, quality and innovation, and also protects sellers against exploitation of buyer power, but it also presents significant discrepancies in regards to the substantive test implemented which tends to raise regulatory costs[27].

94. If all Member States adopted the European "significant impediment of effective competition" formulation, this would ensure greater consistency of merger review outcomes throughout Europe, as well as enhancing the ability of companies to benefit from the learning that can be extracted from precedential decisions.

95. That being said, in a conference held in 2010 while Germany was debating whether to replace its substantive test with the European test, Andreas Mundt, Head of the German Competition Authority, noted that he did not consider any cases would have been decided differently had the test already been harmonised. This is likely to be why, beyond the substantive test, merger thresholds convergence should be the top priority.

96. *ICC considers that all Member States should be obliged to align their substantive test to that of the EC.*

Threshold Level – "Materiality"

97. It is acknowledged that notification regimes must strike a balance:

- A notification regime that is too permissive may have detrimental effects on social welfare by allowing the implementation of anti-competitive mergers.
- However, a notification regime that is too strict may put unacceptably high administrative and financial burdens on merging parties and the competition authority, ultimately hampering welfare-enhancing merger activity[28].
- Therefore, an optimal notification regime should capture the mergers with "significant potential" for anti-competitive effects from the set of all consummated mergers with a nexus to a certain economy[29].

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[27] For example Austria, Bulgaria and Italy all have a " creation or strengthening of a dominant position" test, whereas Portugal only aligned on the EU test in July 2012.

[28] See Paul K Gorecki, "Too many unnecessary merger notifications in Ireland?" (2011) 7:3 J Competition L Econ 651 at 664; *Karagök & Rutz, supra note 14 at 3.*

[29] *Karagök & Rutz, ibid at 3.*

98. According to the ICN's Recommended Practices, Member States should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory, thus avoiding unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit[30].

99. The thresholds should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as turnover or assets levels[31].

100. ICC is of the opinion that, within the EU, the level of these thresholds can vary from one country to another for legitimate reasons, such as the size of the national economy or the level below which the legislator considers mergers to be too small to warrant an investigation (*de minimis* deals).

101. ICC considers that it is not its responsibility to recommend a particular level of materiality because the size of the relevant economy and its particular features must be taken into account. However, it insists that the thresholds must be such that they avoid the creation of "catch-all" regimes under which a notification is necessary even if the local presence is limited to some very modest imports.

Threshold Type – Market Share vs. "Minimum Turnover" or Assets

102. In Europe, all the merger control regimes require companies to notify a projected merger or acquisition only if its size is above a particular threshold. ICC approves this approach since it allows very small transactions to avoid the heavy administrative burden and the delay implied by a notification. However, ICC considers that companies should easily be able to check whether their project meets or does not meet the notification thresholds.

103. As a consequence, market share based thresholds are problematic because market definition is not "rocket science", but more of an "art," which exacerbates uncertainty. Furthermore, market share thresholds are uncommon, complicated, and inconsistent with modern economic thinking.[32] Finally, it may require the exchange of sensitive commercial information, increasing the likelihood and risk of gun-jumping.[33]

104. An additional difficulty with market shares is that different authorities may delineate them in different ways. Under "new" merger control regimes, it often happens that there is no precedent helping companies or lawyers to assess their market definition.

105. Finally, even when a market definition is reached, it is still difficult to measure one's market share because public information about the sales of all the operators acting in a particular market is often unavailable. Admittedly, once a merger has been notified, companies must always find ways to circumvent this difficulty, since market shares are an essential element of the subsequent analysis. While it is acceptable to bear the costs of market definition and market data gathering in the limited number of countries where the project is to be notified, ICC considers inappropriate to impose such burden at the early stage of notifiability verification.

[30] ICN, Recommended Practices, *supra* note 14, I.B.
[31] ICN, Recommended Practices, *ibid*, I.B.
[32] ICC, *supra* note 5 at 4.
[33] ICC, *ibid.* See also *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange*, William R Vigdor, ed., (Chicago: ABA Publishing, 2006).

106. This view is shared by other organisations. According to the ICN's Recommended Practices for Merger Notification Procedures [34], clarity and simplicity should be "essential" features of notification thresholds so as to permit parties to readily determine whether a transaction is notifiable.[35] Furthermore, notification thresholds should be based "exclusively on objectively quantifiable criteria," such as assets and sales, and identify the scope of the geographic area to which the measurement tool is applied.[36] Indeed, the business community, competition agencies, and the efficient operation of capital markets are "best served by clear, understandable, easily administrable, bright-line tests."[37]

107. A threshold expressed in turnover or asset levels "removes the source of the size ambiguity measure."[38] Moreover, if information exchange is required, information about turnover or asset values is far less competitively sensitive.[39] Therefore, ICC considers that it is necessary that the thresholds that govern the controllability of cross-border mergers in the various Member States are put in line with the international best practices that have long recommended favouring thresholds expressed in terms of turnover in view of their objective nature.

108. Furthermore, it must be borne in mind that it is extremely unlikely that an acquisition for which only one party is active in the relevant jurisdiction can have any economic impact. The best way to avoid superfluous notifications is thus to always use a double threshold.

109. ICC considers that it is necessary that the thresholds that govern the controllability of cross-border mergers in the various Member States be put in line with the international best practices that have long recommended favouring thresholds expressed in terms of turnover in view of their objective nature.

110. In addition, a clear rejection by EU Member States regimes of market share thresholds would likely have an impact on legislators around the world and help to eliminate this approach from the merger control landscape. Member States should therefore be required not to impose more demanding thresholds than those provided by European law. With the recent abandonment of any reference to market share criteria by Member States such as the Czech Republic or Poland, these only subsist today in a few European countries such as Portugal, Spain and the UK, although the latter has a voluntary filing regime, for which market share thresholds are less pernicious[40].

111. ICC strongly advocates the harmonisation of thresholds above which mergers are reviewable in the various Member States, but not their level, by retaining only thresholds expressed in terms of turnover reached by more than two undertakings to the mergers and the total ban of market share thresholds.

[34] International Competition Network, whose members are national or regional competition authorities

[35] ICN, Recommended Practices for Merger Notification Procedures, II.A [ICN, "Recommended Practices"]. See also Yavuz *Karagök & Samuel Rutz, "Towards optimal merger notification regimes: evidence from Switzerland" (2014) J Antitrust Enforcement 1 at 4.*

[36] ICN, Recommended Practices, *supra* note 14, II.B.

[37] ICN, Recommended Practices, *ibid*, II.A.

[38] Nicolas Harle, Philippe Ombregt & Karel Cool, "Merger Control and Practice in the BRIC Countries vs. the EU and the US: Review Thresholds" (2012), INSEAD Faculty & Research Working Paper at 1.

[39] ICC, *supra* note 5 at 4.

[40] Source: report No C(2013)72 of the Competition Committee of the OECD, p. 18.

3. PROMOTING LEGAL CERTAINTY IN THE FIELD OF MERGER CONTROL

3.1 The ECN as a watchdog of the decisional practice coherence

112. ICC is of the opinion that an in-depth evolution of the EUMR, which would involve entirely resolving the issues and pitfalls as identified, can only succeed through a reshaping of procedural and substantive rules governing EU and national merger control, and only if such reshaping is accompanied by an institutional renewal. Making the EC the sole interlocutor of undertakings in more numerous merger control cases would be a first step, but this cannot be the only step of an evolution which would be inspired by mechanisms implemented in the field of antitrust[41]. In particular, the mechanism of a formalised network between NCAs and the EC could be extended and adapted to merger control under the constraint of a much higher number of cases and strict deadlines.

113. To this date, ICC is disappointed by the lack of an actual mechanism of "collective governance"[42], such as those which are being discussed in other antitrust areas including the control of anti-competitive practices with the European Competition Network or prudential supervision[43], only to name a few examples.

114. ICC practitioners have identified a need to secure the arrangement which allows European Competition Authorities to keep each other informed of the notification of cross-border mergers, which is currently based on an informal exchange of information notices set up on the basis of "best practices" dating back to the early 2000s. In order to ensure an efficient governance of merger control, ICC suggests reinforcing the ECN's central role.

3.2 The need for substantive guidelines

115. Among the roles that the ECN could play in this field one should be to address two of the key issues identified in section 2.1: the need for an enhanced coherence between EC and NCAs and the necessity to provide more background to predictability. The ECN should become the non-binding watchdog of the merger control coherence and resolve divergence resulting from the various approaches adopted by national competition authorities.

116. In ICC's opinion, such coherence could be achieved through the ECN issuing substantive guidelines[44], providing practitioners and undertakings with guidance as to the "objective" aspects of merger control. Such guidelines could be designed in a way that is similar to those which already exist in the antitrust field.

117. Furthermore, ICC considers that the ECN should also engage in issuing:

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41 ICC has especially in mind Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty which implemented a Network focusing on antitrust enforcement.

42 The EC did announce that it was working towards this objective, and has launched intitiatives, such as the Merger Working Group, which is described as an "extremely active forum between the EU EC and National Competition authorities"

43 See, for example, directive 2007/44/EC of the European Parliament and of the Council, of 5 September 2007, amending Council directive 92/49/EEC and directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings in the financial sector, which proceeds to harmonise the main rules of procedure, deadlines and substantive provisions applicable to the intervention of the national authorities.

44 As opposed to merely procedural or very technical guidelines which currently exist.

- Common precedents for market definitions in order to ensure consistency throughout Member States and avoid market definitions being "left open". ICC is of the view that a database compiling all merger decisions classified by relevant market definitions could be one way to achieve a greater coherence in this respect.

- A "remedy repertoire", setting out the background against which they were adopted as well as their content to ensure all authorities can access a consistent toolkit as regards acceptable remedies and remedies which can be imposed in Phase II.

- A coherent framework for joint investigations led between NCAs, providing further guidance as to the existing assistance mechanism between EC and NCAs[45].

4. CONCLUSION

ICC has identified several key issues in the field of merger control in Europe: the need to alleviate the administrative burden at EC level, the importance of adapting the European merger control 'system' to the Internal Market, the necessity to improve the predictability and the importance for the EU to be seen as a role model of simplification and efficiency around the world.

ICC is satisfied that the White Paper takes some of those issues seriously. Firstly, ICC welcomes many of the changes introduced by the White Paper, especially in regards to the exclusion from review of certain types of transactions such as full-function joint ventures located and operating outside the EEA with no effect on EEA markets and mergers deprived of reportable markets. ICC also welcomes the measures enhancing the efficiency and attractiveness of the one-stop shop created by the EUMR.

However, ICC strongly disagrees with the extension of the merger control review to the acquisition of non-controlling minority interests, the White Paper defeats the purpose of those simplifying measures and actually increases the resulting administrative footprint of the EUMR on the private sector.

Moreover, ICC believes that the key issues have not been addressed, most notably a much needed comprehensive revolution of the European merger control system, encompassing a simplification of the EU merger control itself, the creation of a real and faultless one-stop shop system and an ambitious harmonisation and co-ordination of the whole merger control system including both the EC and the NCAs.

Against this backdrop, ICC considers that there is room for major improvements, and strongly recommends to replace or complement the purely technical measures presented in the White Paper by an ambitious overhaul. This involves shifting towards a declarative system, reducing the time it takes for mergers to be processed, the burdens placed on merging parties, implementing a true "one-stop shop", and strengthening harmonisation and coordination between the EC and other NCAs.

Further to the current public consultation, if the EC fails to embrace a more ambitious agenda, the business community will be disappointed and, beyond this community, issues which are important to European and global economies will remain unaddressed.

[45] Mechanism provided for under Articles 12 and 13§5 of the Merger Regulation.

INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

The International Chamber of Commerce (ICC)

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