UniCredit comments on the White Paper and the Commission Staff Working Document “Towards more effective EU merger control”  
(ID Number 03094871618-32)

3 October 2014

General remarks

UniCredit S.p.A. (hereinafter, “UniCredit”), as the holding company of the UniCredit banking Group – which operates in 17 countries in the EU and beyond – welcomes the opportunity to contribute to this consultation which – following the consultation launched by the European Commission (hereinafter, the “Commission”) on the same matter in 2013 - aims at (i) extending the scope of the merger control to non-controlling minority shareholdings; (ii) reforming the referral system set forth in the EC Regulation 139/2004 (hereinafter, the “ECMR”); and (iii) amending the ECMR itself.

Preliminary, UniCredit supports the Commission’s proposals on (a) the reform of the referral system, (b) the exclusion of full-function JVs located and operating outside the EEA from the scope of the ECMR, as well as (c) the exemption from notification under the ECMR of transactions not raising competition concerns (such as those not involving horizontal or vertical relationships). In this respect, UniCredit believes that – for the sake of legal certainty – clear and exhaustive guidelines, especially with respect to items (b) and (c) above, providing with guidance as to the applicability of the mentioned exemptions, should be made available by the Commission.

Moreover, UniCredit makes reference to the comments submitted to the Commission in September 2013 (hereinafter, the “2013 UniCredit Comments”, attached herewith as Annex 1 for ready reference1), which apply to this consultation too. Particularly, UniCredit still believes that art. 101 and 102 TFEU can address the competition concerns arising from acquisition of minority shareholdings. In UniCredit’s view, in fact, such articles do cover, and apply to, commercial behavior of undertakings involved in acquisitions of minority shareholdings (i.e. the “acquiring” and the “participated” undertakings), rather than the acquisition itself, as observed by the Commission2. In case of either horizontal or vertical relationship between the involved undertakings, any commercial conducts affecting freedom of competition that would arise from the acquisition of minority shareholdings would lead to, and take the form of, a “concerted practice”, or otherwise a forbidden agreement or abuse of dominant position pursuant to articles 101 and 102 TFEU, that can be fought by means of the EC Regulation 1/20033. The already existing rules on forbidden agreements and abuse of dominant position, in UniCredit’s view, can therefore cover the commercial behavior following the acquisition of minority shareholdings, rather than the acquisition itself, as they cover forbidden agreements and abuse of dominant position in the lack of, or regardless of, any acquisition of minority shareholdings.

However, although UniCredit still believes the “self-assessment system” to be the best solution for joining the market’s need of speed with the control’s needs of the Commission4, UniCredit does acknowledge that the Commission supports a “targeted” transparency system. Pursuant to such system, particularly:

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1 Please refer to pages 3-21 below.
2 Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points from 61 to 65.
3 Please refer to the attached 2013 UniCredit Comments (answer to Q3, pages 11-13 below).
4 Please refer to the attached 2013 UniCredit Comments (answer to Q3, pages 11-12 below).
- only acquisition of minority shareholdings between competing undertakings, or “vertically-related” undertakings, would fall in the scope\(^5\);
- only acquisitions of shares over 20%, or between 5% and 20% where “certain rights” are conferred to the acquiring undertaking, would fall in the scope\(^6\);
- in case of acquisition of minority shareholdings falling in the scope, an “information notice” should be submitted to the Commission\(^7\), provided that a “full notification” is requested only where the Commission decides that the case merits an investigation\(^8\); and
- a 15 business days “waiting period” should be observed prior to implement the acquisition of minority shareholdings. In case of acquisition via a stock exchange, however, the voting rights should not be exercised until such waiting period is expired\(^9\).

Before going through the questions attached to the Commission Staff Working Document, UniCredit proposes the following general observations.

The “targeted” transparency system supported by the Commission aims at making acquisitions of minority shareholdings subject to Commission’s control only where they lead to “competitively significant link”\(^10\). In this regard, without prejudice to the comments on art. 101 and 102 TFEU, UniCredit believes that:

- “competitively significant link” can actually arise only in case of acquisition of minority shareholdings involving competing undertakings, to the extent it could lead to restrictions of competition. Should such restrictions arise, however, in UniCredit’s view they would configure forbidden agreements or abuse of dominant position, through the exchange of commercial sensitive information, which can be fought by means of art. 101 and 102 TFEU as well as EC Regulation 1/2003. Such kind of restrictions, in UniCredit’s view, would not happen in case of vertical relationships: therefore, UniCredit believes that the scope of this “targeted” transparency system should be limited to competing undertakings only, so that acquisition of minority shareholdings in undertakings with a vertical relationship (including the “vertically-related” ones) should be per se exempted from this control.

Should the Commission disagree with this view, UniCredit suggests to clearly define the notion of “vertically related undertakings”, in order to avoid misinterpretations.

Accordingly, UniCredit is of the opinion that acquisitions of minority shareholdings involving undertakings which do not operate in the same product or geographical market should clearly be exempted from the scope of this “targeted” transparency system per se;

- such “competitively significant link”, moreover, appears too broad and not very selective, also with reference to horizontal relationships. In particular all cases where financial institutions, with diverse portfolio of interests in different industries, acquire minority shareholdings, could potentially meet the notion of “competitively significant link”, also in the lack of actual competition concerns (since financial institutions do not have any influence in the management of the targets). Therefore, UniCredit believes that the “competitively significant link” should be better defined and clarified, in order to avoid such improper effects;

- as regards to the minority shareholding thresholds, UniCredit believes that the proposed lower threshold of 5% (with “certain rights”) should be increased at least to 10% tout court in order to limit, on the one hand, the administrative burdens on undertakings and, on the other hand, the Commission’s scrutiny to potentially competition-sensitive cases only. Should the Commission

\(^5\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 78.
\(^6\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 78.
\(^7\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 104.
\(^8\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 102.
\(^9\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 107.
\(^10\) As explained in section 3 of the Commission Staff Working Document.
disagree with this view, UniCredit believes that such lower threshold should be increased at least for acquisition of minority shareholdings by banks and financial institutions that deal with acquisition and disposal of stakes in the ordinary course of their business;

- the “certain rights” that give ground to the competitively significant link\(^\text{11}\) in case of acquisitions of shareholdings between 5% and 20%, should be clearly identified for the sake of legal certainty. Particularly, UniCredit believes that only “qualified” rights should be included in these “certain rights”, while the rights normally depending on the percentage of shares to be acquired should not be relevant for these purposes. To that aim, UniCredit further believes that acquisition of shares belonging to special categories, or otherwise financial instruments, (conferring no voting rights, or otherwise limited administrative rights compared to ordinary shares), should fall out of the scope of the control over acquisition of minority shareholdings. UniCredit would like to observe that it is not easy to understand the notion of the “de-facto blocking minority”\(^\text{12}\). Generally, veto rights either grant decisive influence over the target\(^\text{13}\), and therefore actually lead to acquisition of control; or they do not\(^\text{14}\), and therefore they cannot lead to any “competitively significant link” accordingly. Anyway, UniCredit suggests that a “check-list” of those rights – qualifying the acquisition of minority shareholding as a “competitively significant link” – should be made available by the Commission, by means of *ad hoc* guidelines, in order to allow undertakings the most reliable assessment on a case-by-case basis;

- in case of “staggered” acquisitions\(^\text{15}\), the information notice should be submitted once only, i.e. when the relevant “participation percentage thresholds” are met. The same should apply with reference to subsequent acquisitions: i.e. where undertakings already holding a minority shareholding – although below the relevant thresholds – acquire another minority shareholding that – in combination with the pre-existing shareholding – does meet the threshold;

- according with 2013 UniCredit Comments, a set of “safe harbours”, or otherwise exemptions, should be set forth\(^\text{16}\). Such safe harbours, particularly, should be applicable to both acquisition of minority shareholdings and concentrations, since they have the same aim.

Without prejudice to any of the comments above, as well as the 2013 UniCredit Comments, UniCredit answers below the questions listed in the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”.

**Answers to questions**

### 1. MINORITY SHAREHOLDINGS

**Question a)**: Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission’s competence or not be subject to the 15 days waiting period.

I – RESTRUCTURING TRANSACTIONS

\(^\text{11}\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 78.

\(^\text{12}\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 90.

\(^\text{13}\) Where they give the right to block decisions over adoption, e.g., of business plan, budget, significant investments, appointment/removal of managers.

\(^\text{14}\) E.g. a right merely aimed at protecting the minority shareholders.

\(^\text{15}\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 111.

\(^\text{16}\) Please refer to the attached 2013 UniCredit Comments (answer to Q7, pages 15-17 below).
UniCredit welcomes the Commission’s proposal of exempting restructuring transactions from the scope of control over minority shareholdings\(^\text{17}\). Nevertheless, in UniCredit’s view, this should be implemented through an exemption \textit{per se} of restructuring transactions from the control over minority shareholdings.

However, in UniCredit’s view, amending article 3(5) ECMR could not achieve, \textit{per se}, such goal. Particularly in these times of financial crisis, it may happen – more often than in the past – that restructuring operations aimed at rescuing potentially “failing” firms cannot be completed in the one-year time limit set forth in article 3(5) ECMR, due to many factors, such as the negative conditions of the markets where the “target” company operates.

In this regard, UniCredit wishes to observe that the main character of restructuring operations lies in the conversion of pre-existing debts into new ones (by way of acquisition of shareholdings, bonds, or creating a new company) granting creditor banks some rights vis-à-vis the debtor company. In this context, limiting the participation of banks in debtor companies to one year only pursuant to article 3(5) ECMR would not be consistent with the purposes of “rescuing” the debtor itself\(^\text{18}\). Moreover, that would lead to different treatment of restructuring operations lasting more than one year, that would be subject to deeper Commission’s scrutiny than those lasting less than one year. A “participation” of creditor banks in the debtor company lasting more than one year, in fact, does not affect the nature and the aim themselves of the operation, which still lie in recovering the highest amount possible of the credits granted to the debtor.

The same aim outlined above for minority shareholdings, however, applies to proper concentrations too. Creditor banks have in fact neither motive nor skills for affecting competitive and commercial behaviour of debtor companies on their own markets. Such debtor companies are generally active on markets not only unrelated to banks’ ones, but actually far from them, such as in case a bank carries out a restructuring operation with a company, e.g., manufacturing cranes or plastics.

In light of the above, then, UniCredit believes that “\textit{restructuring transactions, carried out by financial institutions in the normal course of business and for a limited period of time\(^\text{19}\)\textit{}}” should fall out of the scope of the control over the acquisition of minority shareholdings, or concentrations, \textit{per se}, since the aim of a restructuring operation is the same in both the cases where it leads to minority shareholding or to change of control.

Should the Commission disagree with this view, UniCredit suggests to replace the “time limit” of one-year set forth in article 3(5) ECMR with a temporary participation, i.e. a participation that is \textit{ab origine} limited to a certain period of time (with an expiration date) or otherwise limited to a certain event to occur.

The situation where banks acquire minority shareholdings in, or control over, debtor companies – for debt restructuring purposes with a commitment of disposing, or otherwise hand over, those shareholdings, or control, by a certain deadline – is not different at all from the case of “\textit{parking transactions\(^\text{20}\)\textit{}}”, where banks are the “\textit{interim buyer\textit{}}”, and the “\textit{ultimate buyer\textit{}}” may be still to be identified and could be simply the “investors” on the stock exchange. In such a case, then, in UniCredit view it would make little sense to treat banks as they were the ultimate buyer acquiring minority shareholdings or control.

In any case UniCredit believes that such restructuring transactions should be fully exempted from the “waiting period” (or the standstill, in case of concentrations). In UniCredit’s view, it would not be reasonable to require creditor banks to refrain from exercising the voting rights in the debtor company granted to them by way of the restructuring operation itself. Such rights – which sometimes lie at the heart of debt restructuring operations – are granted to banks not for affecting commercial conducts of

\(^{17}\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, points 69 and 99.

\(^{18}\) In this regard, the Bank of Italy exempts from the limits to shareholdings that banks may acquire in non-financial companies (pursuant to Supervisory Instructions, for Supervisory capital purposes), the shareholdings acquired following debt restructuring operations, where the bank’s participation to such financial companies lasts no more than five years.

\(^{19}\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 100.

\(^{20}\) Please refer to the Commission Staff Working Document accompanying the document “White Paper towards more effective EU merger control”, point 198.
undertakings, but for the only purpose of protecting credits and investments in the debtor company, as well as to ensure (as it happens where creditors appoint part of the Board of Directors or the Board of Statutory Auditors) the sound management of the debtor company and the compliance of such management with the restructuring agreements entered into by debtor and creditors.

Therefore, should the Commission disagree with UniCredit’s suggestion of exempting restructuring transactions from the scope of the Commission’s control (over acquisition of minority shareholdings and concentrations both), UniCredit believes that those transactions should at least be exempted from the “waiting period” (or the standstill, in case of concentrations).

For the sake of completeness and legal certainty, furthermore, UniCredit believes that the Jurisdictional Notice21 should also be amended in accordance with the proposed amendments above.

II – LIQUIDITY OF EQUITY MARKETS

With reference to liquidity of equity markets – as a proposal of general scope and without prejudice to the above – UniCredit welcomes the purpose of exempting acquisitions of shares via stock exchanges from the waiting period subject to the condition that the voting rights are not exercised. That may address many concerns on the liquidity of equity markets. According to the above, UniCredit observes that some transactions however could be affected nonetheless, such as in case the acquisition of shares on a stock exchange for the purposes of debt restructuring operations.

**Question b): Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?**

As observed in the general remarks above, UniCredit believes that only acquisition of minority shareholdings over the percentage thresholds and involving only competing undertakings should fall in the scope.

Furthermore and without prejudice to any of the comments proposed by UniCredit, UniCredit believes that dedicated “safe-harbours” providing for explicit exemptions should be set forth for that purpose, according to the 2013 UniCredit Comments22.

**Question c): Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?**

As observed in 2013 UniCredit Comments, UniCredit believes that a dedicated “form” for the information notice should be made available. Such form, on its turn, should require short and synthetic information on the main points of the transaction that allow the Commission (along with member States and third parties) to preliminary assess whether the transaction falls in the scope or not23. In this respect undertakings should be allowed to complete such information notice relying on internal documents.

**Question d): Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.**


22 Please refer to the attached 2013 UniCredit Comments (answer to Q7, pages 15-17 below).

23 Please refer to the attached 2013 UniCredit Comments (answer to Q4, pages 13-14 below).
UniCredit has not enough information for answering this question. However, the envisaged targeted transparency system would mean a certain and significant increase of the workload and costs for the undertakings required to carry out the relevant obligations.

**Question e): Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?**

UniCredit disagrees with the provision of a “waiting period”, since it would impose a relevant administrative burden on undertakings. Particularly, UniCredit believes that there would be no need of any waiting period – and therefore information notice should not be a “prior notice” – where the Commission, as well as the NCAs are allowed to take remedies or impose obligations in case of acquisitions of minority shareholdings that actually harm competition.

Should the Commission disagree with this view, UniCredit believes that such waiting period should be clearly defined and should not mean a “standstill obligation”, so that undertakings are not prevented from executing the acquisition immediately, provided that they should be prohibited from exercising the voting rights until such waiting period is expired.

### 2. REFERRALS - ARTICLE 22

**Question a): Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?**

UniCredit supports the Commission’s proposals. Particularly, UniCredit believes that where referrals are not opposed by competent member States, the Commission should have full jurisdiction for the entire EEA, without limitation. In UniCredit’s view, in fact, it would make little sense to limit the Commission’s jurisdiction where the Commission itself is “the most appropriate authority” for deciding on the concentration\(^\text{24}\). This enforcement of “one-shop-stop” principle, moreover, would prevent diverging decisions from NCAs, since the Commission would be the only one authority empowered to exercise jurisdiction over the referred concentration. In this regard, in UniCredit’s view, no concerns regarding the awareness of the relevant NCAs should arise, provided that the proposed “mandatory early information system” among the NCAs and the Commission can address any issue in this respect.

**Question b): Would such a system reduce the risk of diverging decisions by the Member States?**

Please refer to UniCredit’s answer to question a) under section 2 above.

### 3. MISCELLANEOUS

**Question: Please comment on the suggestions listed in Section 5 "Miscellaneous" including the more detailed and technical suggestions in the accompanying Staff Working Document.**

Prior to go through the proposed amendments to the ECMR, UniCredit wishes to emphasize the need of extending any of the amendments proposed in the Commission Staff Working Document to both acquisitions of minority shareholdings and concentrations. It would make little sense that, e.g., the renewed referral system applies to concentrations only, while it should apply to both concentrations

\(^{24}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", point 5.
and acquisition of minority shareholdings. In UniCredit's view, then, the same should apply for the following.

I  *Extra-EEA Joint Ventures*\(^{25}\)

UniCredit fully supports the Commission’s purpose of excluding full-function JVs located and operating outside the EEA from the scope of the ECMR. To that aim, UniCredit suggested to amend article 3(4) ECMR\(^{26}\). UniCredit does acknowledge however that the same goal can be achieved by amending article 1 ECMR by way of excluding those JVs from the notion of “community dimension” and, of course, supports this solution too.

II  *Exchange of confidential information between Commission and Member States*\(^ {27}\)

UniCredit has no particular comments in this respect.

III  *Further simplification by extending the transparency system to certain types of simplified merger cases*\(^ {28}\)

UniCredit welcomes the Commission’s purposes of further simplification. Particularly UniCredit believes that the “targeted” transparency system should apply to all concentrations that do not involve any horizontal or vertical relationships and are applicable for simplified submission. In UniCredit view, in fact, those concentrations should be eligible for the transparency system. In order to ensure the effectiveness of these means of submission, obviously, the information notice pursuant to transparency system (rather than the “simplified” form) should be submitted only after the positive assessment of the Commission during the pre-notification contacts pursuant to the *Best Practices* issued by the Commission, similarly to what happens in case of simplified notification of concentrations.

IV  *Notification of share transactions outside the stock market (Article 4(1))*\(^ {29}\)

UniCredit has no particular comments in this regard: according to the comments in section 3 above, UniCredit supports the extension to concentrations of the rules to be introduced for acquisition of minority shareholdings.

V  *Clarification of methodology for turnover calculation of joint ventures*\(^ {30}\)

UniCredit has no particular comments in this respect.

VI  *Time limits*\(^ {31}\)

UniCredit has no particular comments in this respect.

VII  *Unwinding of concentrations with regard to minority shareholdings (Article 8(4))*\(^ {32}\)

UniCredit agrees, in principle, with the proposal of extending the scope of article 8(4) ECMR to acquisitions of minority shareholdings. However, the power of the Commission of requiring the disposal of the shares should necessarily be limited to the stake in excess of the relevant threshold, provided that stakes below such thresholds fall *per se* outside the scope of this control over acquisition of minority shareholdings. Otherwise, each acquisition of minority shareholdings.

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\(^{25}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", point 180.

\(^{26}\) Please refer to the attached 2013 UniCredit Comments (answer to Q1, page 11 below).

\(^ {27}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", point 181.

\(^ {28}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points 182-183.

\(^ {29}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points 184-185.

\(^ {30}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points 186.

\(^ {31}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points 187-189.

\(^ {32}\) Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points 190-194.
shareholdings would actually become questionable, regardless of the percentage of shares (as well as the “certain rights”).

VIII Staggered transactions under Article 5(2)(2) of the Merger Regulation

UniCredit agrees with this Commission’s proposal.

IX Qualification of “parking transactions”

UniCredit agrees with the Commission’s proposal of specifying in the ECMR that “parking transactions” should be assessed as part of the acquisition of control by the ultimate acquirer. In this respect, UniCredit believes that the interim buyer should be exempted from notification duties, provided that it is not going to exercise control on a lasting basis and it is exercising control on a temporary basis or on behalf of the ultimate buyer. Therefore the latter, rather than the interim buyer, should be subject to notification duties which should cover the explanation of the role played by the interim buyer in the notification itself. However, also for the purposes of restructuring operations, UniCredit believes that such “parking transactions” should be dealt with by means of re-thinking the notion of “control on a lasting basis”: where an interim buyer acquires control over an undertaking, such control per se cannot be considered to be “on a lasting basis”, also where it lasts more than one year.

On the other hand, for the sake of legal certainty, UniCredit suggests that the notion and the scope of such “parking transactions” should be clearly defined in the ECMR itself.

X Effective sanctions against use of confidential information obtained during merger proceedings

UniCredit believes that a misuse of such pieces of information should be treated by referring, extensively, to forbidden agreements or abuse of dominant position pursuant to art. 101 and 102 TFEU.

XI Commission’s power to revoke decisions in case of referral based on incorrect or misleading information

UniCredit has no particular comments in this respect, since this proposal appears consistent with the aim of the power to revoke decisions pursuant to articles 6(3)(a) and 8(6)(a) ECMR.

Technical contact experts

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33 Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", points 195-197.
34 Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", point 198.
35 Please refer to the answer to Q1a) above.
36 Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", point 199.
37 Please refer to the general remarks above.
38 Please refer to the Commission Staff Working Document accompanying the document "White Paper towards more effective EU merger control", point 200.
ANNEX 1

UniCredit comments on the Commission Staff Working Document “Towards more effective EU merger control’ of September 10th, 2013.
UniCredit comments on the Commission Staff Working Document
“Towards more effective EU merger control”

10 September 2013

General remarks

UniCredit S.p.A. (hereinafter, “UniCredit”), as the holding company of the UniCredit banking Group – which operates in 22 countries in the EU and beyond – welcomes the opportunity to contribute to this Commission Staff Working Document “Towards more effective EU merger control” (hereinafter, the “Consultation Paper”), initiative which aims both at (i) extending the scope of the merger control to non-controlling minority shareholdings; and (ii) reforming the referral system set forth in the EC Regulation 139/2004 (hereinafter, the “Merger Regulation”).

With specific reference to non-controlling minority shareholdings (hereinafter “structural links”), UniCredit agrees with the opportunity of setting up a “selective system” for identifying relevant structural links that may be subject to EC’s assessment. In this regard, the ex-ante merger control laid down in the Merger Regulation appears to be disproportionate in respect of structural links. The existing rules set forth in the Merger Regulation would, in fact, delay the implementation of transactions not involving acquisition, or change, of control and would therefore lead to economic and financial instability, especially in cases where listed undertakings are involved. While selective systems should be preferred, that neither require the EC’s prior approval, nor prevent implementation before clearance.

In order to let the “selective systems” work – and therefore to select among transactions on minority shareholdings the actually relevant structural links – however, UniCredit believes that the conditions for applying these rules, as well as the concrete boundaries of the notion of “structural links” should be clearly and unambiguously defined. Otherwise, the lack of clear statements would lead to legal uncertainty on the rules to comply with, as well as on their scope of application.

For those reasons, UniCredit supports the development of efficient rules for implementing such “selective systems” that join the needs of supervision with the market needs of legal certainty. To that purpose, UniCredit believes that transactions on minority shareholdings do not imply, per se, competition concerns and therefore it is essential that the forthcoming rules on structural links apply to those minority shareholdings that are likely to rise such concerns actually. Such selection would ensure, on the one hand, the avoidance of any disproportionate administrative burdens on undertakings and, on the other hand, cases that actually deserve the EC’s attention are effectively considered.

In order to avoid misalignments in national laws of member States, however, UniCredit believes that the EC should also rule the possibility of member States to provide control over domestic structural links that do not meet the turnover thresholds laid down in the Merger Regulation. Since the need and the effectiveness of such control over structural links depend on domestic market conditions, however, UniCredit believes that member States should be granted with the option of setting up, or not, this kind of control (which, in turn, should be consistent with the rules laid down in the EC’s provisions as much as possible).

For the sake of legal certainty, furthermore, UniCredit would like to point out the need that the forthcoming rules on structural links are not retroactive, and therefore apply to new acquisitions of structural links only (i.e. following the entry into force of such rules).
Questions on structural links

Question 1: In your view would it be appropriate to complement the Commission’s toolkit to enable it to investigate the creation of structural links under the Merger Regulation?

In UniCredit’s view, investigating structural links appears to be consistent with the aim of the Merger Regulation. In order to enable the EC to effectively investigate structural links, however, UniCredit believes that the following should be clearly defined:

1. the notion and the scope of “structural links”, different from acquisition of control over pre-existing undertakings, or newly created ones; and
2. appropriate criteria for unambiguously selecting the relevant structural links only, that may actually rise competition concerns.

Otherwise, the lack of an unambiguous notion of structural links and/or their concrete scope of application would lead to legal uncertainty and would oblige – de facto – undertakings to “notice” (or otherwise inform) the EC of – and the EC to investigate on – any newly acquired minority shareholdings. In UniCredit’s view, fighting any such legal uncertainty – that would lead to the heaviest administrative burdens for both undertakings and the EC at all – should be the highest priority.

Question 2: Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?

The substantive test introduced by the Merger Regulation resolved some shortcomings arisen from the “old” test laid down in the merger Regulation of 1990, which was opened to wide interpretation, and therefore UniCredit believes such substantive test to be viable for application to structural links also.

Question 3: Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:

a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,
b) the administrative burden on the parties to a transaction,
c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;
d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;
e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

As explained in the general remarks above, UniCredit strongly disagrees with the simple extension of the merger control regime pursuant to the Merger Regulation – that would require prior notification and prevent implementation of transactions before clearance – to structural links (i.e. “notification system”). In UniCredit’s view, in fact, such kind of limitations should be avoided.
I – THE “SELF-ASSESSMENT SYSTEM”

At first sight the “self-assessment system” appears to be the most efficient one, since undertakings would not bear any further fulfillments, as well as administrative burdens, provided that structural links are subject to EC’s scrutiny nonetheless. In addition, UniCredit believes that the “self-assessment system” would strengthen legal certainty of transactions provided that acquisition of minority shareholding should not be notified to the EC at all (either in advance or later) and could be implemented without delay. In this regard, the importance of the “time-factor” in transactions involving minority shareholdings – especially (but not limited to) listed companies – should be taken into consideration.

With regard to considerations referred to in letters from a) to e) of Q3 above, UniCredit observes, respectively, the following:

a) information to EC, member States, third parties and thereafter, would be left to “market intelligence” and “complaints”, as observed in the Consultation Paper. In UniCredit’s view, there is no need of “ad hoc notices”, provided that the market itself – through market players – is able to make the EC aware of any situations that give ground to competition concerns. That is what currently happens in case of forbidden agreements and abuse of dominant position pursuant to art. 101 and 102 TFEU, where the EC has no dedicated “information flows”, but exercises effective supervision over market competition nonetheless. In this regard, it should be regarded that structural links are something different from the “control” set forth in the Merger Regulation (otherwise structural links would be a concentration and the Merger Regulation would apply), and therefore should be treated differently from concentrations, according to the “principle of equal treatment”;

b) administrative burdens over the involved parties would be limited to potential requests for information, or investigations, of the EC over structural links. This would join the markets’ need of “speed” (i.e. such kind of transactions are usually decided and implemented in the shortest times) with the control needs of the EC, which could be addressed to examine the relevant operations only, saving efforts (and time);

c) with regard to number of potentially problematic cases, they depend on the notion of structural links; i.e. the lower the “triggers” for structural links, the higher the number of cases to be investigated (please refer, in this regard, to our answer to Q7), provided that, according to the self-assessment system, the need of investigating structural links would arise form market itself, rather than objective parameters only. On the other hand, UniCredit does not agree with any concerns on impact of each potentially harmful transaction on competition, provided that EC’s scrutiny after the implementation of the transaction could be an effective means of control, as it currently happens with regard to forbidden agreements and abuse of dominant position (art. 101 and 102 TFEU);

d) also in respect of the potential need to remove structural links, UniCredit believes that concerns should not arise. In order to ensure the effective supervision, the EC should of course be granted with appropriate powers, also in addition to those set forth in the Merger Regulation, if needed. For example the EC could be granted with the following powers for the purposes of ensuring effective competition: (i) prohibiting the exercise of voting/veto rights; or (ii) ordering the sale of the minority shareholdings (or part thereof) by a certain deadline. Furthermore, “commitments” may be undertaken for ensuring the compliance of the transaction with freedom of competition;

e) again, UniCredit believes that concerns related to removal of anticompetitive effects of already implemented structural links should be treated consistently with issues on forbidden agreements or abuse of dominant position, provided that enforcement of articles 101 and 102 TFEU may also require the removal of already occurred anticompetitive effects. In light of that, UniCredit refers to the answer provided under letter d) above.

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39 Please refer to page 6 of the Consultation Document.
40 According to the EU case-laws (please refer to judgment of the Court of First Instance, Third Chamber, in Case T-10/93, as well as judgment of the Court in Joined Cases T-18/89 and T-24/89 Tagaras v Court of Justice [1991] ECR II-53), “the principle of equal treatment is breached [...] where situations which are different are treated in an identical manner”.

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II – THE "TRANSPARENCY SYSTEM"

Should the EC disagree with UniCredit's view on the "self-assessment system", the "transparency system" appears to be better than the "notification system", unless it requires prior notification and prevents implementation before clearance. In order to let this system work, however, very selective criteria for defining structural links, should be clearly and unambiguously set up. In fact:

a) only a very selective notion of structural links could ensure the effectiveness of "notices" to EC, member States and third parties. Otherwise, too much information, none information; and therefore any notices would be actually useless to effectively inform anyone;

b) for the same reasons, only an high selective system would be able to ensure an acceptable level of administrative burdens. While such burdens would become unbearable in case of disclosure of a great number of transactions on minority shareholdings.

With regard to letters c), d) and e), UniCredit believes that the related comments on self-assessment system apply to the transparency one too.

Subject to the conditions above, the EC would receive notices on material structural links only; and member States and third parties would easily identify the structural links deserving their attention. Obviously UniCredit believes that such "notice" on structural links should not be a prior notice (given the shortest times these transactions are usually entered into), but should be allowed after the implementation also (e.g., in a short term after sing-off). At these conditions, the administrative burdens on undertakings would be acceptable.

For the purposes of lightening the administrative burdens on undertakings, however, the release by the EC of a dedicated "form" for notices pursuant to the transparency system – that would allow a "prima facie" assessment of the structural links – should be advisable (please refer to answer to Q4 a) below for further details).

**Question 4: In order to specify the information to be provided under the transparency system:**

**a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?**

According with the aim of the “transparency system” – which lies in a “short information notice” – UniCredit believes that a dedicated “form” for such kind of notices should be made available. Such form, on its turn, should require short and synthetic information on the main points of the transaction that allow the EC (along with member States and third parties) to preliminary assess whether such transaction is likely a structural link which rises competition concerns – and therefore deserves further ascertainments – or unlikely, and therefore does not. In UniCredit's view, information to be provided pursuant to the “transparency system” – and to be included in the "form" described above – should therefore be the following:

1) short details on the involved undertakings, including their main activities and business;

2) general reference to the affected markets (both product and geographical ones), including those in which the undertakings involved operate (if different), especially whether:
   - overlaps may occur in the respective product markets, or in the respective geographical markets, or not;
   - geographical markets go beyond the EU/EEA, or non-EU markets are involved only.

   It is understood that such general reference to the affected markets should not require undertakings provide indications on market shares also;

3) the percentage of shareholding acquired and the main rights conferred by such shareholding (and/or by way of shareholders agreements), especially with regard:

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41 As described at page 6 of the Consultation Paper.
- percentage of voting rights in respect to majority and quorum for approvals (for both shareholders meeting and management body), or the lack of voting rights, in spite of the acquisition of minority shareholding;
- the existence of individual right of "veto"; and
- the right of appointing member(s) of the management body;
4) the purpose of the transaction from the acquiring undertaking's side (i.e. financial shareholder, rather than business one);
5) the turnovers – applying the thresholds set forth in the Merger Regulation – of the involved undertakings; and
6) the "safe harbor(s)" (if any) applicable to the transaction, providing also relevant data to evidence that safe harbors occur.

**b) What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?**

UniCredit is of the opinion that information publicly available is the easiest and quickest one undertakings may provide to the EC – such as that included in financial statements – while non-public information (especially price sensitive one) is more difficult to gather within the same undertaking and therefore to disclose to the EC. In this regard, UniCredit desires to remark that undertakings should not be requested to provide "notices" in advance, since minority shareholdings are usually discussed and planned until sign-off, and therefore clear, correct and non-misleading information on the details of the transaction sometimes could not be fully provided in advance.

**Question 5: For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the Commission decides to investigate a case, or under the notification system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.**

In this regard, UniCredit observes that it is quite hard to estimate the "average filing cost", provided that each concentration is never equal to another also from the "Antitrust Authority filing" perspective. However filling in the notification forms attached to EC Regulation 802/2004 is a very complex activity that often requires UniCredit to bear the costs of external law firms. Subject to the adoption of a transparency system "form" (as suggested above), UniCredit believes that filing activities would be easier (i.e. could be dealt with by undertakings themselves, without external lawyers’ assistance) and quicker (i.e. the notice could be made available to the EC in less time than the Forms attached to EC Regulation 802/2004).

Obviously, as soon as information to be provided refers to the most "objective" aspects without leaving anything to interpretation (e.g. percentage of shareholdings, voting rights) lower costs would be borne, than in case of information referring to more complex and detailed aspects (e.g. "Form CO").

**Question 6: Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?**

Without prejudice to the notion of structural links proposed under Q7 below, UniCredit agrees with the criteria proposed in this question, but believes that such instrument could be further enhanced. It may happen that concentrations, or structural links, have a “community dimension” pursuant to the Merger
Regulation due to the turnover of only one of the undertakings involved. Any acquisition of structural links by such undertaking, then, would fall under the EC jurisdiction per se, regardless of the fact that, for instance, only the geographical market of one member State is actually concerned. In such cases, UniCredit believes that not just the turnover thresholds should be considered, but the geographical markets concerned too. Whenever, despite the turnover thresholds are met, an undertaking active in a certain member State is acquiring structural links in an undertaking active in the same member State only (country-to-country), UniCredit believes that the National Competition Authorities (hereinafter “NCAs”) of such member State should examine the structural links, rather than the EC.

**Question 7: Regarding the Commission’s powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?**

UniCredit welcomes the opportunity to contribute to the notion of “structural links” subject to EC jurisdiction, as well as safe harbours.

I – Structural links – UniCredit’s proposed notion

According to the aim of structural links, as described in the Consultation Paper, and also considering the provisions set forth in German and Austrian laws, UniCredit believes that structural links should be defined as follows, unless they fall in the scope of “concentration” pursuant to the Merger Regulation: “shareholdings in another undertaking, newly acquired, or increased, through one or more transactions, reaching 25% of the capital or the voting rights of such undertaking, at group level. Shareholdings not reaching such percentage, but granting the right of appointing at least 25% of the members of the management body of such undertaking, or the individual right of “veto” in the general shareholders meeting or in the management body for ordinary management transactions (with the exclusion, then, of veto rights normally granted to minority shareholders and/or lenders in order to protect their financial interests, such as in case of change of by-laws, increase or decrease of in the share capital or liquidation or other extraordinary transactions) shall also be considered structural links.”

In this respect, in the context of a restructuring transaction of a company (“target”), where a financial institution may acquire a shareholding in the target (debtor of the financial institution) the existence of rights of “veto” on transactions which could jeopardize the financial situation of the target, due to their nature or value (e.g., transactions such as assumption of new indebtedness, granting of guarantees or of right of use on the target’s movable or immovable assets) should not configure a structural link too.

For the avoidance of any doubts on the scope of application of the notion of “structural links”, and for clarity purposes, UniCredit believes that shares underlying to derivatives contracts (such as in case of put/call options) should fall outside the scope of the 25% thresholds above, since such derivatives would not grant any shareholdings, or otherwise confer any company rights, until their execution.

On the other hand, in case of reciprocal shareholdings among competing undertakings, even if realized in different times, the relevant percentage should be lower than 25%, since in UniCredit’s view such reciprocal structural links may be more likely to raise competition concerns than others.

Such “structural links” as defined above would obviously fall in the jurisdiction of the EC as soon as they have a “community dimension” pursuant to article 1 of the Merger Regulation. Therefore structural links not reaching the turnover thresholds would be out of the scope of the EC scrutiny, provided that member States should be allowed to introduce an own control on minority shareholdings for structural links not reaching the “community dimension” (please refer to UniCredit’s general remarks above).

II – Safe harbours: UniCredit’s proposed exceptions

On the other hand, in UniCredit’s view, “structural links” should not be subject to any control, as soon as they unlikely raise competition concerns, although the notion above is fulfilled. In this regard, UniCredit believes that safe harbours should be not only defined, but listed too, in order to avoid legal
uncertainty on their scope of application, as well as to lighten the administrative burden arising from safe harbours subject to interpretation. For these purposes, then, UniCredit would like to suggest the following exceptions and exemptions:

1) the undertakings involved in structural links belong to the same group of undertakings;

   **Justification:** this is consistent with rules applicable to concentrations.

2) structural links are subsequent steps to be taken in the context of a “proper” concentration which has already been cleared by the EC, or the competent NCA;

   **Justification:** in such cases the whole operation has already been cleared by the competent Authority and therefore the “structural links control” would be a second and partial (and definitely useless) check.

3) the “target” company (i.e. the company whose shareholdings have been acquired) does not operate in the EU or EEA, regardless of the product markets concerned;

   **Justification:** in case structural links involve undertakings that do not operate in any EU or EEA markets (regardless of where their registered offices are located), competition concerns are not likely to rise and therefore such structural links should not be subject to these rules.

4) according to no. 3 above, in case of full-function JVs, the geographical markets concerned – related to one or more countries – fall outside the EU and EEA both, regardless of the product markets concerned;

   **Justification:** the same ratio of no. 3 above applies to full-function JVs, provided that other JVs should be out of scope per se, according to Commission Notice 98/C 66/01 of March 2nd, 1998.

5) the involved undertakings, either potentially, are neither “competitors” nor part of the same supply chain related to the same products, taking into account their activities and business;

   **Justification:** in case the involved undertaking are neither competitors nor suppliers/retailers with each other, competition concerns are unlikely to rise and therefore such structural links should not be subject to these rules.

6) the “safe harbours” set forth in article 3, no. 5 of the Merger Regulation should apply *mutatis mutandis* to structural links too, provided that the aim of that provision is consistent *a fortiori* with minority shareholdings;

   **Justification:** this is consistent with rules applicable to concentrations.

7) the 25% shareholdings, or more, does not grant any voting rights, or grants less than 25% voting rights (due to a particular “class” of shares or by way of shareholders agreements, in consideration of the pure “financial nature” of the acquisition of shareholdings), or does not grant the right of appointing 25% of members of the management body, or any individual right of “veto”, or grants only the rights of “veto” normally granted to minority shareholders and/or lenders in order to protect their financial interests, such as changes in by-laws, increase or decrease in the share capital or liquidation or other extraordinary transactions;

   **Justification:** in case the ratio of structural links control is not met, although minority shareholdings formally meet the notion of structural links, the rules on structural links should not apply. In this case, 25% of a certain class of shares that, for instance, do not grant any voting rights; or 25% shareholdings without voting rights – or granting limited voting rights – e.g. due to shareholders agreements, would not meet the ratio of structural links controls and therefore should fall out of the scope of application. The same, *mutatis mutandis*, should apply where 25% shareholdings grant neither the right of appointing 25% of directors, nor the right of “veto”.

8) the “target” company is an entity incorporated for the purpose of carrying out specific operations, limited to the acquisition and financing of specific assets (i.e. Special Purpose
Vehicle), e.g. for issuing asset back securities, regardless of the shareholding percentage and/or the rights that it grants.

*Justification: SPVs are usually incorporated for carrying out single operations that do not rise competition concerns and therefore should be exempted from structural links control.*

9) structural links, and/or voting rights, are held by a bank for trading purposes or acquired within placement and guarantee activities, or by way of credit restructuring transactions or enforcement of pledges.

*Justification: in these cases, the shareholdings or the voting rights held by banks lead to temporary participation (different from a business or a financial one), rather than a lasting participation, in the target company.*

**Question 8: In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.**

In UniCredit's view, a voluntary notification does not seem to be consistent with the selective systems as described in the Consultation Document.

Nevertheless, UniCredit welcomes any form of cooperation between undertakings and the EC, enabling parties to ask for EC's preliminary opinions, of course on a voluntary basis, also for preventing non-compliance with structural links rules, due to their wrong interpretation. For those reasons, then, UniCredit believes that the "pre-notification contacts" set forth in the "DG Competition best practices on the conduct of EC merger control proceedings" should apply mutatis mutandis to structural links too.

However, should this voluntary notification be provided by the EC, such notification should be absolutely on a voluntary basis - not mandatory - and therefore no sanctions should be provided for the lack of this voluntary notice. Moreover, according to the answer provided under question 3 above, UniCredit believes that such voluntary notification should not be a “prior” notice, as well as implementation of transactions should not be prevented before EC's clearance.

**Question 9: Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?**

In UniCredit’s view, the EC should be subject to limitation periods for investigating or intervening in structural links transactions, especially in case of self-assessment system. In principle, the EC should be granted with a short period of time (for instance, three months) starting from the date the EC has been informed on the transaction itself, e.g. through pre-notification contacts or voluntary notification; while the EC should benefit a longer deadline (for instance, six months) starting from the implementation of structural links pursuant to self-assessment system, or otherwise unnoticed.

By the way, UniCredit believes such limitation period not to be a material issue, provided that the EC may investigate anyway pursuant to the EC Regulation 1/2003 for ensuring undertakings comply with articles 101 and 102 TFEU. Therefore UniCredit believes that also in case of unnoticed structural links that do not rise any competition concerns at the time of implementation, but rise them later, the EC could actually intervene pursuant to EC Regulation 1/2003, regardless of time elapsed from implementation of structural links.
Limiting the time-limit for starting investigating related to structural links would therefore not prevent the effectiveness of the supervisory powers of the EC.

3 REFERRAL OF MERGER CASES
QUESTIONS ON THE CASE REFERRAL SYSTEM

**Question 1: Do you consider that the suggestions would make the referral system overall less timeconsuming and cumbersome?**

UniCredit substantially agrees with the suggestions explained in the Consultation Paper and supports the option of one filing in case of referral pursuant to article 4.5 of the Merger Regulation, rather than two filings. Moreover, UniCredit agrees with the proposed shortening of the consultation period to 10 days.

**Question 2: Regarding the suggestion on Article 4 (5) referrals:**

a) **Do you support the idea to be able to directly notify to the Commission without preceding Form RS?**

UniCredit supports this option, provided that relevant information for the purposes of the Form RS could be provided directly through the Form CO.

b) **Please try to estimate savings in (a) time and (b) costs resulting from the elimination of the Form RS procedure in a typical case.**

UniCredit has not enough information in this regard.

c) **For transactions to be notified in at least three Member States, would you consider that you will use the referral according to Article 4(5) under the suggested system more often than under the current system - or that you will advise your clients to use it more often?**

The opportunity to use the referral is generally assessed on case-by-case basis, provided that this referral is surely more likely to be used, since one filing only has to be done.

d) **Do you consider that the 15 working days consultation period could be shortened in order to limit the duration of uncertainty as to whether or not a case will remain in the competences of the Member States?**

UniCredit is aware of the complexity of the assessment the NCAs are requested of in case of referral pursuant to article 5.4 of the Merger Regulation. However UniCredit supports any initiatives aimed at increasing legal certainty; especially where the clearance process may be longer than usual, as it happens in case of consultation period.

e) **Do you consider it useful if contacts between the Commission and the competent Member States could take place already during a possible prenotification phase, in order to enable the Member States to assess the referral?**

In UniCredit’s view, it is advisable that such contacts between EC and NCAs take place during the pre-notification period, so that as soon as such pre-notification phase expires, also the opposition period does. That would concentrate two steps (informal contacts of the parties vis-à-vis the EC and consultation of NCAs) in one and would definitely allow to limit the duration of uncertainty.
f) Do you agree that a broad information exchange between the Commission and the Member State which includes the information gathered in the market investigation should be made possible? Should the results of the Commission’s market investigation be accessible to NCAs also following a veto of a Member State?

UniCredit has not particular comments on this proposal, provided that UniCredit has nothing to object in this regard.

g) What would be in your view appropriate measures to assure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral (e.g. early information of the Member States, forwarding of a draft notification received by the Commission)? How do you view this suggestion with regard to confidential transactions which are not yet in the public domain?

UniCredit has not particular comments on this question. However, in UniCredit’s view, the early information of member States would make it easier for them to properly assess the case and would definitely lead to the shortening of the consultation period. In addition, information on similar cases dealt in the past, as well as the decisions taken in similar circumstances, could be provided to member States by the EC.

h) Regarding pre-notification referrals from the Commission to the Member States, Article 4(4), do you see similar room for improvement to streamline the process and to align it with the suggestions on Article 4(5) above, while at the same time safeguarding the interests of all Member States?

UniCredit believes that such pre-notification referrals should be aligned with article 4.5, in order to ensure internal consistency of the Merger Regulation itself.

Question 3: Regarding the suggestion on Article 22 referrals:

a) Do you agree with the underlying principle of the envisaged modification, i.e. that Article 22 should enable the Member States to refer cases to the Commission for which the Commission is the more appropriate authority due to cross-border effects? Do you also agree that the Commission should then have EEA-wide jurisdiction as for all the other cases it is dealing with?

UniCredit agrees with the envisaged modification, provided that accurately assessing cross-border impacts and effects could be quite hard for a member State. For internal consistency of the Merger Regulation itself, furthermore, UniCredit believes that the EC should have EEA-wide jurisdiction, as the effects of referrals pursuant to art. 22 need to be aligned with effects of referrals under the provisions of art. 4 (5) of the Merger Regulation.

b) Do you agree that the envisaged modification would lead to a clear delineation of which level - Commission or Member States - should deal with a case, taking account of the one-stop-shop principle? Do you agree that this would avoid a patchwork approach of parallel proceedings of the Commission and Member States?

UniCredit has not particular comments in this regard.
c) Do you agree that the envisaged system would make European merger control more effective and would allow it to obtain cases for which the Commission is the more appropriate authority? In particular, do you consider it appropriate that only competent Member States can refer cases to the Commission, as opposed to the current system where also non-competent Member States can refer a case?

UniCredit has not particular comments in this regard.

d) Do you agree that legal certainty for undertakings would be increased if only a Member State competent under its national law could make a referral request?

UniCredit has not particular comments in this regard.

e) Do you agree that the procedural solutions would prevent the scenario or mitigate the risk that a Member State might have already cleared the transaction before another Member State requests a referral? In your view what would be appropriate procedural solutions?

UniCredit has not particular comments in this regard.

f) How do you see the possibility of a making national clearance decision conditional upon no Article 22 referral taking place? Under the law of your respective Member State, would it be possible to issue clearance decisions under the condition that no Article 22 referral takes place?

UniCredit believes that “suspending” the effectiveness of an already taken decision to clear a transaction would lead to legal uncertainty and therefore suggests NCAs to be enabled to clear only after the expiration of the referral term.

g) In your view, could the suggestion raise costs for undertakings or would it lead to costs savings due to a better predictability of the system?

UniCredit has not particular comments in this regard.

h) Regarding Article 22 (5) do you consider that the current procedure that the Commission can invite the Member States to refer a case could be improved in terms of procedure? And if so, in which ways?

UniCredit has not particular comments in this regard.

4. MISCELLANEOUS QUESTIONS

Question 1: How could the jurisdictional rules of the Merger Regulation be modified in order to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not have to be notified to the Commission? Please take into account the need for jurisdictional rules to be clear and easy to apply.

UniCredit believes that the case referred to in this question could be dealt with by supplementing article 3.4 of the Merger Regulation as follows (proposed amendments in bold style):
“4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity and operating on the EEA market(s) ("full-function joint venture") shall constitute a concentration within the meaning of paragraph 1(b); while joint ventures not performing such functions, or carrying out their activities exclusively outside the EEA, fall out of the scope of this Regulation.”

Justification: in UniCredit’s view, the reference to JVs that operate in, or otherwise affect, the EEA markets, should be part of the definition of "full-function JVs" pursuant to article 3.4 of the Merger Regulation. According to the amendment proposed by UniCredit, therefore, only "full-function JVs" would be subject to the Merger Regulation, provided that only JVs as described in the current version of art. 3.4 which – at the same time – operate in EEA market(s) could be qualified as “full-function JVs”.

Question 2: Would you recommend any other amendments to the Merger Regulation? Please elaborate.

UniCredit wishes to take this opportunity to suggest the introduction in the Merger Regulation of a list of hypothesis of transactions that – although they formally meet the requirements and thresholds for “concentrations of community dimension” – fall out of the scope of the Merger Regulation nonetheless. In this regard, UniCredit believes that such a list – to be set up on the basis of the EC’s experience – could be a very useful tool, aimed at lightening on the one hand the administrative burdens on undertakings (granting them the opportunity to immediately recognize cases of non-applicability of the Merger Regulation) and on the other hand the number of cases submitted to the EC (in order to select as much as possible the actually material ones).

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