

## Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with \* are mandatory.

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### I. Introduction

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*Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on some procedural and jurisdictional aspects of EU merger control. The questionnaire does not necessarily reflect the views of the European Commission and does not prejudice its future decisions, if any, on further action on these aspects.*

## **A. Purpose of the consultation**

The purpose of the present consultation is to gather information on particular aspects of the performance of EU merger control. This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide feedback on their experience/knowledge of issues under scrutiny and what action, if any, should be taken in this regard.

Input from stakeholders will be used in a Staff Working Document to evaluate procedural and jurisdictional aspects of EU merger control. The Commission will carefully analyse the outcome of this consultation and previous consultations as well as the findings of the evaluation as a whole before deciding whether it should take further action.

## **B. Background**

Merger control constitutes one of the instruments of EU competition law. Its main objective is to ensure that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations.

In recent years (particularly in 2009 and from 2013 onwards), the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU Merger Control (the "White Paper", COM(2014) 449 final). The White Paper confirmed that EU merger control works well and that no fundamental overhaul of the system is needed, but envisaged specific amendments in order to make it more effective.

The key proposals of the White Paper were the following:

1. Introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition;
2. Making case referrals between Member States and the Commission more business-friendly and effective;
3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns; and
4. Fostering coherence and convergence between Member States with a view to enhance cooperation and to avoid divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

Based on the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system overall works well but welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification.

Recently, a debate has emerged among stakeholders and competition experts on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control. These jurisdictional thresholds are set out in Article 1 of the Merger Regulation and determine which transactions have a Union dimension and are reviewed, in principle, by the European Commission.

Some stakeholders have raised the question of whether the turnover-based jurisdictional thresholds allow capturing, under EU merger control rules, all transactions which can potentially have an impact in the internal market. This question may be particularly significant for transactions in the digital economy, but also in other industry sectors, such as pharmaceuticals, where acquisition targets may not have always generated substantial turnover yet, but nevertheless are highly valued and constitute, or are likely to become, an important competitive force in the relevant market(s).

Moreover, recent experience in enforcing the EU merger control rules has shown that certain technical aspects of the procedural and investigative framework for the assessment of mergers may merit further evaluation. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

### ***Scope of the Evaluation***

It therefore appears opportune to build upon the work undertaken so far in the context of the White Paper and prior consultations and complement it by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail:

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,<sup>[1]</sup> the Implementing Regulation,<sup>[2]</sup> and the Commission Notice on simplified procedure;<sup>[3]</sup>
2. Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover;
3. Functioning of the case referral mechanisms set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on case referral;
4. Certain technical aspects of the procedural and investigative framework for the assessment of mergers.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

[2] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.04.2004, p. 1, as amended.

[3] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, OJ C 366, 14 December 2013, p.5 and its Corrigendum to the Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 011, 15 January 2014, p 6 (the "Commission Notice on simplified procedure").

## II. Practical Guide to fill in the questionnaire

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Please respond to all questions that you have knowledge about. Feel free to skip those questions that you cannot answer or are unsure about.

### Replying to the questions:

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

### Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:
  - show you a message indicating that your draft reply has been saved,
  - give you the link that you will have to use in order to continue replying at a later stage,
  - give you the possibility to send you the link by email (we encourage you to use this option).
- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

### Submitting your final reply

- The submission of the final reply can only be done by clicking the "Submit" button that you will find in the last section "Conclusion and Submission".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("Case Id"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

## III. About you

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Please provide your contact details below:

\*1. Are you replying as:

- a private individual
- an organisation or a company
- a public authority or an international organisation

\*The name of your organisation/ company/ public authority/ international organisation

Abreu & Associados, Sociedade de Advogados, SP, RL (Abreu Advogados)

\*Your full name

Armando Martins Ferreira / Inês Sequeira Mendes

\*Email address

apcrue@abreuadvogados.com

\* Organisation represented

1.1 Please indicate which type of organisation or company it is.

- Academic institution
- Non-governmental organisation
- Company/SME/micro-enterprise/sole trader
- Think tank
- Media
- Consumer organisation
- Industry association
- Consultancy/law firm
- Trade union

\* 1.1.1 Is it a multinational enterprise (groups with establishments in more than one country)?

- YES
- NO

\*1.1.2 How many employees does your company have?

- 1-9
- 10-49
- 50-249
- 250-499
- 500 or more

\*1.2 Please provide a brief description of the activities of your organisation.

Founded in 1993, Abreu Advogados is one of the most dynamic and recognised Law Firms in Portugal.

We believe that a Project can only be successful and satisfy the needs of its Clients, if it allies Ethics, Quality, Compliance and Technical Excellence.

With more than 300 professionals, almost 200 of which are Lawyers, Abreu Advogados is still distinguished as one of the "best companies to work for in Portugal" (since 2008) as a result of a detailed survey of the Portuguese Working environment conducted by Accenture and Exame Magazine. In 2008, the firm was distinguished as the best Portuguese Company to work for in Portugal.

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\*1.3 Where are you based?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxemburg
- Malta
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

\*Please specify.

Lisbon

## 2. Transparency Register ([Register now](#))

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the [Transparency Register](#) and subscribing to its [Code of Conduct](#). If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to register now, please click on the link in the title. Then you can return to this page, continue replying to the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement available on the public consultation website for information on how your personal data and contribution will be used.

For registered organisations: indicate your Register ID number here:

RL 626122920640-81

### \* 3. Please choose from one of the following options on the use of your contribution:

- My/our contribution can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).
- My/our contribution can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication. I am aware that I am solely responsible if my answer reveals accidentally my identity).
- My/our contribution cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

\*4. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

YES

NO

## IV. Questionnaire

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### IV.1. Simplification

In December 2013, the Commission adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself (the so called "Simplification Package"). In particular, the Simplification Package:

- Widened the scope of application of the so-called simplified procedure for non-problematic cases;
- Streamlined and simplified the forms for notifying mergers to the Commission.

Through the Simplification Package, which entered into force on 1 January 2014, the number of cases dealt with under the simplified procedure has increased by 10 percentage points from an average of 59% over the period 2004-2013 to around 69% of all notified transactions over the period January 2014 to September 2016).

According to the Commission Notice on simplified procedure ("the Notice"), the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

- i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);
- ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);
- iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);
- iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)
- v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). The Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure.

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:

- This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;
- Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

These proposals are still being assessed. Your response to the following questions will contribute to that assessment.

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

(1 = "did not create much added value"; 7 = "created much added value"):

	1	2	3	4	5	6	7
Your rating	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain.

The one stop review was an important and decisive step forward to a more efficient and less costly procedure, allowing companies to trade in different EEA States and obtain a single clearance for their mergers. Also, increasing the market share thresholds from 15% for competing companies and 25% for parties in a vertical relationship, to 20% and 30%, respectively, allows more mergers to enter the scope of the simplified procedure. In fact, the increase of 10% in the number of cases analysed under the simplified procedure, reaches the Commission's initial overall aim of 60% to 70%. This obviously contributes to an overall improvement in the mergers simplification objective.

Raising the thresholds for what constitute affected markets to the same levels as above has successfully reduced the need to provide detailed market information to fewer markets.

However, it should be noted that the notification thresholds remain difficult to assess by the parties. The assessment may require information that is costly and hard to obtain. So even at a preliminary stage, the burden for companies is still significant and challenging.

The "super-simplified notification" procedure for joint ventures active entirely outside the EEA, can be considered a good step towards a simpler and more cost efficient merger control, but we still have our doubts as to the inclusion of any of these situations, under the scope of the Merger Regulation, since they do not have any direct impact on the EEA markets, even if the turnover thresholds are met.

*Further simplification of the treatment of certain categories of non-problematic cases*

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

- YES
- NO
- OTHER

Please explain

Although it has obviously reduced part of the burden associated with the Form CO, mainly through the elimination of the pre-notification stage, the submission of these cases to the short Form CO, still requires the determination of all alternative relevant product and geographic markets on which the merger could have an impact. Bearing in mind the lack of overlaps, it remains an excessive demand to the companies in terms of data and investigation. We should be avoiding such a burden on notifying parties that is disproportionate to the competition risks at stake.

Since there are very few occasions in which a potential harm to competition could result from these mergers, we therefore recommend, instead of a simplified procedure, that these cases should be exempted from the merger control. If not, we understand that a self-assessment system (along with clear guidelines of the EC) would be entirely sufficient.

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

- YES
- NO
- OTHER

Please explain

Again, in this case, the increase of the market thresholds is a positive measure but the increase of information required, for instance, related to the market definition, is still below the level of simplification needed.

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);

- YES
- NO
- OTHER

Please explain

The shorter version of the Short Form CO, in which companies only need to describe the transaction and their business activities, and provide the turnover figures that the European Commission needs in order to establish jurisdiction, is a good step in the simplification path.

However, it should be considered that this type of joint-ventures is not within the EEA. Although that is a simplified procedure, we understand that it would saddle the companies with further burdens. The alleged gains and efficiency resulting from such additional burdens are not entirely clear.

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

- YES
- NO
- OTHER

Please explain

We understand that the simplified procedure reduced part of the burden associated to the ordinary notification procedure.

The European Commission retains a wide discretion whether to accept information waiver requests, and to revert to a full notification process.

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

- YES
- NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

No, in fact the mergers notified under the simplified procedure have not been converted to the normal review procedure. Regarding our experience and knowledge, very few cases notified under the simplified procedure have turned into the normal review process.

(ii) Post notification:

- YES
- NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

4. Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure?

- YES
- NO

Please explain under which category of simplified cases it fell and the reasons why the case was notified under the normal procedure.

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

- YES
- NO
- OTHER

Please explain

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

- YES
- NO
- OTHER

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- Transactions falling under point 5a of the Notice:

- YES
- NO

Please explain.

These cases of extra-territorial joint ventures that have no actual or foreseeable effects within the EEA should be outside the scope of the Merger Regulation. The Regulation thresholds based solely on the turnover or value of assets, not regarding the geographic location of the joint venture and its size might bring costs that are highly disproportionate to the competition concerns that may arise, within the EEA, in these cases. Even the “super-simplified notification” is less efficient than a proper Regulation amendment, as it is suggested in the White Paper.

- Transactions falling under point 5b of the Notice:

- YES
- NO

Please explain.

- Transactions falling under point 5c or point 6 of the Notice:

- YES
- NO

Please explain.

- Transactions falling under point 5d of the Notice:

- YES
- NO

Please explain.

7. To which extent have such costs (in terms of workload and resources spent) been reduced by the 2013 Simplification Package? Please explain.

Since companies may use a shorter notification form and the Commission clear such cases without a deep market investigation, there is a reduction of the undertakings' previous in-house work. The costs with lawyers and consultants (or other operators specialized in the processing of economic data) fees are also lower, minimizing the burden in preparing the notification and related costs.

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

- YES
- NO
- OTHER

**If you replied yes or other**, do you consider that there is scope for further simplification by, in particular:

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

- YES
- NO

Please explain.

We understand that non-problematic transactions should be exempted from the obligation of prior notification, particularly in the absence of horizontal or vertical relationship between the undertakings, i.e., the absence of "reportable markets".

If the EC provides clear guidelines for the definition and the scope of the exemption, it will be possible for the undertakings to easily assess where the transaction entitled to be notified or not.

If this option is not considered feasible for the EC, we stand up for even a more simplified short form CO, with less market, economic and internal data that usually require external, specialized and costly resources.

In addition, the EC should consider that the obligation of prior notification, and the necessary standstill obligation resulting therefrom, should be seen as a delay and cost for the undertakings that potentially result in a more detrimental position of the minority shareholders.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

- YES
- NO

Please explain.

As mentioned above, we support as a second option a substantial reduction in the range of information required. This information should be limited to the minimum necessary to determinate the jurisdiction and the markets in which parties perform, without requiring the presentation of any internal documents.

We are also concerned about the negative impact that the disclosure of some types of information may have, especially in technology markets, which develops very quickly. Also, the treatment and identification of confidential data in the notification form add several delays and costs to the procedure.

Even for the consumers, a longer procedure can be counterproductive, creating uncertainty. In addition to the workload and resources spent, the delay's cost may reach a chilling effect on legitimate non-problematical acquisitions.

Concerning the so called "targeted transparency system", proposed by the EC in the White Paper, it is possibly that the test of "competitively significant link" creates uncertainty itself and still catches a considerable number of unproblematic transactions.

Without prejudice to the remarks above, the EC should be in condition to determine if a merger control procedure is necessary or not to achieve the Merger Regulation's objective of preventing harmful effects on competition.

8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

- YES  
 NO

Please explain.

A key starting-point should always be present in the analysis: even in the simplified procedure, the costs, resources, and time required from each undertaking are significant

We understand that the introduction of a self-assessment system is the option that fits better with the current objectives of the EC Regulatory Fitness and Performance, and ensures a significant decrease of burdensome for business.

The Commission should clearly establish, based on experience, the cases in which companies are exempted from notifying, to be able to focus on the transactions that might cause competitive harm.

#### 8.4 Other

- YES  
 NO

Please explain.

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

We are aware of the risk of competition's distortion in the internal market that could result from the absence of control (or an effective control) of a merger with community dimension.

Mergers become more common and the number of those that actually represent harm for competition is very low. For that reason, in our view, the EC efforts should be focused to the review and detection of problematic transactions, which require an in-depth treatment. A system that "wants to get to everything" may end up not being efficient.

To mitigate part of the risk is important to create rules that are as simple and clear as possible and develop guidelines for the parties, aligned with the Commission's powers to investigate cases which have not been notified.

*Further simplification of the treatment of extra-EEA joint ventures*

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

- YES
- NO
- OTHER

Please explain

We support the Commission's suggestion of amending the Article 1 of the Merger Regulation so that a full-function joint-venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission's jurisdiction (even if the turnover thresholds are met).

10. Has this one stop shop review at EU level of extra-EEA joint ventures created added value for businesses and consumers?

- YES
- NO
- OTHER

Please explain

Please see our answer 2 above.

11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

- YES
- NO
- OTHER

Please explain

The obligation of notifying extra-EEA joint ventures is detrimental for the companies and for the Commission itself, since there is no risk of harm that justifies the necessary cost of such procedure.

12. To which extent have such costs been reduced by the 2013 Simplification Package? Please explain.

The creation of the "super-simplified notification" for non-EEA joint ventures have reduced the information required to the description of (1) the transaction, (2) the business activities and (3) the parties' turnover.

However, this solution is still not totally business friendly, as it implies (unnecessary) barriers to companies. As we already mentioned, the costs related to preparing such information and the notification should not be undervalued.

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

- The treatment of extra-EEA joint ventures is sufficiently simplified.
- There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

- YES
- NO

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

Bearing in mind the goals of the European merger control system, it seems to us that the right and more realistic option is the exclusion of extra-EEA joint ventures from the EC merger control regulation scope.

In the public consultation of 2014, various stakeholders argue and demonstrate that such kind of joint-ventures does not pose at risk or harm the competition the EEA. Even in the case that these external joint-ventures intent to expand their scope of activity and start their business in the EEA, this entry will have a positive impact on the market, increasing the level of competition in the European market.

(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

- YES  
 NO

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

Any type of simplification of the extra-EEA joint ventures' procedure is welcome, for the reasons set out above. Nevertheless, we understand that the exemption is the best practical choice.

(iii) Other.

Please explain.

## IV.2. Jurisdictional thresholds

The Merger Regulation only applies to concentrations of a Union dimension, which are those where the undertakings concerned meet the different relevant turnover thresholds set out in Article 1 of the Merger Regulation.

### *Article 1 of the Merger Regulation*

#### *Scope*

*1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Union dimension as defined in this Article.*

*2. A concentration has a Union dimension where:*

*(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and*

*(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,*

*unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.*

*3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Union dimension where:*

*(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;*

*(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;*

*(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and*

*(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,*

*unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.*

*4. [...]*

*5. [...]*

Recently, a debate has emerged on the effectiveness of these turnover-based jurisdictional thresholds, specifically on whether they allow capturing all transactions which can potentially have an impact on the internal market. This may be particularly significant in the digital economy, where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues. With significant numbers of users, these services may play a competitive role. Moreover, relevant business models may involve collecting and analysing large inventories of data that do not yet generate significant turnover (at least in an initial period). Therefore, players in the digital economy may have considerable actual or potential market impact that may be reflected in high acquisition values, although they may not yet generate any or only little turnover. Acquisitions of such companies with no substantial turnover are likely not captured under the current turnover-based thresholds triggering a notification under the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has been suggested to complement the existing turnover-based jurisdictional thresholds of the EU Merger Regulation by additional notification requirements based on alternative criteria, such as the transaction value. The perceived legal gap may not only concern the digital industry, but also other industry sectors, such as the pharmaceutical industry. There have been indeed a number of highly valued acquisitions, by major pharmaceutical companies, of small biotechnology companies, which predominantly research and develop new treatments that may have high commercial potential, and do not yet generate any or only little turnover.

Moreover, the question of whether there is a legal gap needs to be assessed in the context of the case referral system in EU merger control. Even in instances where a merger does not have Union dimension based on the turnover of the merging parties, the Commission may obtain jurisdiction through a referral. According to Article 4(5) of the Merger Regulation, the parties to a merger may ask for referral of a case from the level of Member States to the Commission before it is notified, if the case is notifiable under the national merger control laws in at least three Member States and if the additional criteria set out in Article 4(5) of the Merger Regulation are met. Also, according to Article 22 of the Merger Regulation, national competition authorities may request the referral of a case to the Commission after notification, if the specific conditions of Article 22 of the Merger Regulation are met.

This section of the questionnaire gathers your views on the existence of a possible enforcement gap of EU merger control, and what would be its possible dimension and relevance. Moreover, this section also requests your views on possible policy responses, if such were to be warranted.

14. In your experience, have you encountered competitively significant transactions **in the digital economy in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] A well-known example of these transactions is the acquisition in 2014 of WhatsApp by Facebook, which fell outside the thresholds of Article 1 of the Merger Regulation but was ultimately referred to the Commission pursuant to Article 4(5) thereof. Information on merger cases reviewed by the European Commission is accessible via the search function on DG COMP's website at [http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=2](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2).

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

Please see our comments to question 16 below.

- **If yes**, please give concrete examples.

Please see our comments to question 16 below.

- **If yes**, please estimate how many of those transactions take place per year.

Please see our comments to question 16 below.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

Please see our comments to question 16 below.

- **If no or other**, please explain your answer.

15. In your experience, have you encountered competitively significant transactions **in the pharmaceutical industry in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

Please see our comments to question 16 below.

- **If yes**, please give concrete examples.

Please see our comments to question 16 below.

- **If yes**, please estimate how many of those transactions take place per year.

Please see our comments to question 16 below.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

Please see our comments to question 16 below.

- **If no or other**, please explain your answer.

Please see our comments to question 16 below.

16. In your experience, have you encountered competitively significant transactions **in other industries than the digital and pharmaceutical sectors in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

The possible high deal value does not necessarily mean that the transaction will have cross-border effects in the EEA or will be competitively significant.

The turnover might not be the most accurate (in the right dimension /threshold) criteria to assess the need of prior notification, but should be assessed with other relevant criteria's (v.g. market share).

The value of the deal and/or the purchase price could trigger some misleading evaluation of the transaction. Some sectors, including the pharmaceutical and the technological/digital sector, might involve in certain cases a higher pricing valuation but nevertheless with no significant impact on the market.

This exercise should be taken in consideration by the EC since a plain criteria of the price/value of the transaction would catch without any significant added value or future expression in the relevant market.

According to the activity report of the Portuguese Competition Authority (PCA) for the year 2015, 25% of the merger cases involved notifications in at least one other Member State and during that year, PCA examined only 4 submissions under Article 4 (5).

- **If yes**, please give concrete examples.

One example was the acquisition of Alteo ARC and Alufin by Imerys, this year. Alteo ARC and Alufin are both part of Alteo of France, which is a fully integrated producer and supplier of specialty alumina used in abrasive and refractory applications. Alteo ARC operates two alumina plants in France and Alufin one plant in Germany. Imerys is a French based multinational mining company active in the production and supply of specialty alumina, among others. The concern was the possible inability, as a result of the transaction, of other suppliers from outside the EEA to compete and the consequent risk of price increasing.

Other example was the acquisition of Fender Musical Instruments by the TPG Group and Servco, operated last 2013. But in this case, all the undertakings are of the USA. TPG group is a leading global private investment firm, Servco operates in automotive retailing and parts service, home products retailing and commercial insurance brokerage and Fender is an active worldwide with a product portfolio that includes fretted instruments (like acoustic and bass guitars), guitar amplifiers, percussion instruments and accessories.

- **If yes**, please estimate how many of those transactions take place per year.

We don't have reliable data to estimate with precision but, according to the publicly available information on DG COMP and PCA'S website, no more than 5 cases per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

Both examples mentioned above were referred to the Commission under Article 4 (5). On the first (M.8130), the investigation concluded that the market shares of the merged entity in in the products in question would be modest and would continue operating alternative suppliers, including outside of EU. The second one (M.6981) was cleared by the Commission because there are no overlaps between the activities carried out by the parties.

- **If no or other**, please explain your answer.

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17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?

- YES
- NO
- OTHER

Please explain.

We understand that no changes would be required in order to avoid shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation. The present turnover criteria provided by the European Union Merger Regulation is accurate and give the right tools to the assessment of the relevant concentration.

The recent case of Facebook/WhatsApp has proved that the current merger control is working at an accurate and effective level. The transaction having potential cross border effects in the EEA outside the EC jurisdiction are properly covered in article 4(5) of the EUMR's, whereby if a concentration is capable of being reviewed under the national competition laws of at least 3 Member States the undertakings may inform the EC that the concentration should be examined by the Commission.

According to the 2009's Report on the functioning of Regulation No 139/2004, referrals were refused only in 4 cases under Article 4(5) in the period between 2004 and 2008.

We understand that an extension of the regulation turnover-based jurisdictional thresholds would not be necessary, that extension could be contrary to the EC objective of cutting red tape. However, EC should consider reviewing the current turnover thresholds in order to raise them to higher values, simplifying and decreasing the burden that a notification procedure could mean for a transaction that will not have a significant competitive impact on the market.

Article 1 and referral system ensure an appropriate distribution of the jurisdiction of Commission and Member-States. Lower criteria would lead to a disproportionate centralization of control powers.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
- NO
- OTHER

- **If yes**, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

- **If no or other**, please explain.

The existing thresholds, based on the turnover of the undertakings, are sufficient when combined with the Merger Regulation's case referral system to assure that competitively significant transactions with a cross-border effect in the EEA are reviewed at the appropriate level. The objective should not be to ensure that all competitively significant transactions with cross-border effects are reviewed at the EEA level, but to certify that jurisdiction is ultimately exercised by the authority or authorities' best placed to review the deal.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
- NO
- OTHER

Please explain.

It is not clear that high-value transactions are more likely to have cross-border effects on competition in the EEA than lower value transactions. In fact, the company's willingness to pay a high purchase price for a target with turnover below the thresholds may result in less relevant competition effects, since the high value may be more likely to reflect complementarities between the parties' businesses.

Applying a value threshold would raise several technical difficulties, including among others: (i) how to assess the "deal size" in transactions where the consideration includes securities whose value may fluctuate or not be readily determinable; (ii) Should only the value resulting from the transaction be taken into account or also other undertakings (such as the value of shares or assets held by other undertakings already exercising sole or joint control over the target); (iii) whether the deal size threshold would be met only where an undertaking acquires control over the target within the meaning of the EUMR. The competitive problems that the EC expects to arise from the Mergers that meet this value threshold, must be clarified, in order to properly assess the proportionality of this measure.

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

Our answer to question 19 was "no", we understand that there is no need to change the thresholds and add the criteria of the transaction value.

However, if the EC understands that this appears to be the way forward in this matter, we understand that the thresholds should be higher than the thresholds provided by the national merger control of the Member-States in order to maintain an accurate jurisdiction between the EC and the NCA.

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

- A general clause stipulating that concentrations which meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance.
- Industry specific criteria to ensure a local nexus.
- Other

Please explain your response and provide examples where appropriate.

Bearing in mind the above mentioned we understand that the EC should not establish criteria in order to capture transactions where the companies do not have yet any turnover.

22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

- YES
- NO
- OTHER

Please explain your answer.

If the EC follows this option, we understand that all the criteria that are provided above could benefit the assessment and capture significant EU-wide transactions. However, the EC should only pursue transactions where the undertakings already have a relevant turnover. Contrarily, the EC will examine and receive notifications that do not present any kind of significant impact on the internal market.

In both cases, EC should give adequate, clear, easy and objective guidance of such criteria.

### IV.3. Referrals

The division of competence between the Commission and the EU Member States is based on the application of the turnover thresholds set out in Article 1 of the Merger Regulation and includes three corrective mechanisms.

The first corrective mechanism is the so-called "two-thirds rule". Pursuant to this rule, notification under the Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, even if the general thresholds under Articles 1(2) and 1(3) of the Merger Regulation are met. The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) of the Merger Regulation or to the Commission under Article 4(5) if certain conditions are fulfilled. The initiative for requesting such a referral prior to notification lies in the hands of the parties. However, pre-notification referrals are subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5) of the Merger Regulation.

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the Merger Regulation under certain conditions (Article 22 of the Merger Regulation). Conversely, a Member State may, in cases that have been notified under the Merger Regulation, request the transfer of competence to the national competition authorities under certain conditions (Article 9 of the Merger Regulation).

In relation to the current case referral mechanism foreseen by the Merger Regulation, the White Paper proposals aimed at making case referrals between Member States and the Commission more business-friendly and effective.

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;
2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely
  - an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
  - and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and
3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

- YES
- NO
- OTHER

Please explain.

There are no doubts that the current case referral mechanism contributes to allocating merger cases to the more appropriate competition authority, reducing the unnecessary burden for undertakings (particularly those for the benefit of the parties under Articles 4(4) and 4(5)). However, is possible to relieve even more the burden on businesses.

24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating merger cases to the more appropriate competition authority and/or reducing burden on businesses?

- YES
- NO
- OTHER

Please explain.

We agree with the proposal that only Member-States with jurisdiction on the transaction should be able to use the referral request of article 22. The expansion of article 22 to other Member-States should be avoided, it would create additional costs, higher administrative burdens and reduce the legal certainty in the various aspects of the merger (time, decision, parallel review, criteria, etc.).

25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

- YES
- NO
- OTHER

Please explain.

In our opinion, the all "Form RS" concept could be eliminated. Even in the scope of Article 4(4), if the parties conclude that the transaction is likely to have its main impact in a distinct market on a Member State they should be able to submit a direct notification too, provided that the Member State is obliged to request the Commission to take a decision on its examination. Such a solution would allow a referral system more business friendly without calling into question the Commission's jurisdiction.

## IV.4. Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).
- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.
- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

As said in the 2014 SWD "If the Commission's initiative to develop jurisdiction over non-controlling minority acquisitions at EU level were to proceed, such a system would need to ensure an appropriate balance between the ability to review potentially anti-competitive transactions, while at the same time reducing administrative burdens to the minimum and fitting seamlessly with the existing systems of merger control at European and national level." We agree with this statement and refer that proportionality is key. The proposals mentioned above would, in fact, fill some gaps within the merger control system but should be careful not to compromise the objective of reducing the burden and overall simplification, to the notifying parties.

As to the mentioned proposals:

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid - We agree with that modification.

- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures - There is still some uncertainty around the joint venture turnover and its calculation, clarification would be useful. The guidance to be provided by the commission should consider and develop each kind of joint-venture, rights of control and their different implications in the calculation of the turn-over.

- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation) - This measure should be carefully assessed as it may, ultimately, circle around the review of non-controlling minority shareholdings. Our opinion about this issue is expressed in the answers above.

- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority - There is, in fact, no need to apply the EU Merger Regulation to cases where there is no real circumvention and the first step transaction has been reviewed and approved by an EU NCA.

- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes - In our opinion, greater sanctioning powers should always be carefully evaluated and limited, however, this measure could be beneficial to businesses submitting confidential information.

- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked - Again, greater sanctioning powers should always be carefully evaluated and limited. These powers must be granted in a rigorous manner, only when involving real deceit.

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

Improvements are always possible and we detected some shortcomings that could be rectified:

- clarification of the application of the full-function test to formation of JVs/acquisitions of joint control;
- particular issues with calculation of turnover, e.g. in commodity trading situations not covered by the guidance on financial institution turnover;
- application of the staggered transaction rules

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

- YES  
 NO  
 OTHER

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defence and to propose and discuss commitments.

We have not experienced such constraints.

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

- YES  
 NO  
 OTHER

Please explain.

We have not experienced any constraints in this matter.

## V. Submission of additional information

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Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. The maximal file size is 1MB. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

## **Contact**

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