

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

Fields marked with \* are mandatory.

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

### **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

Invest Europe

\*Your full name

Danny O' Connell

\*Email address

danny.oconnell@investeurope.eu

\* 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

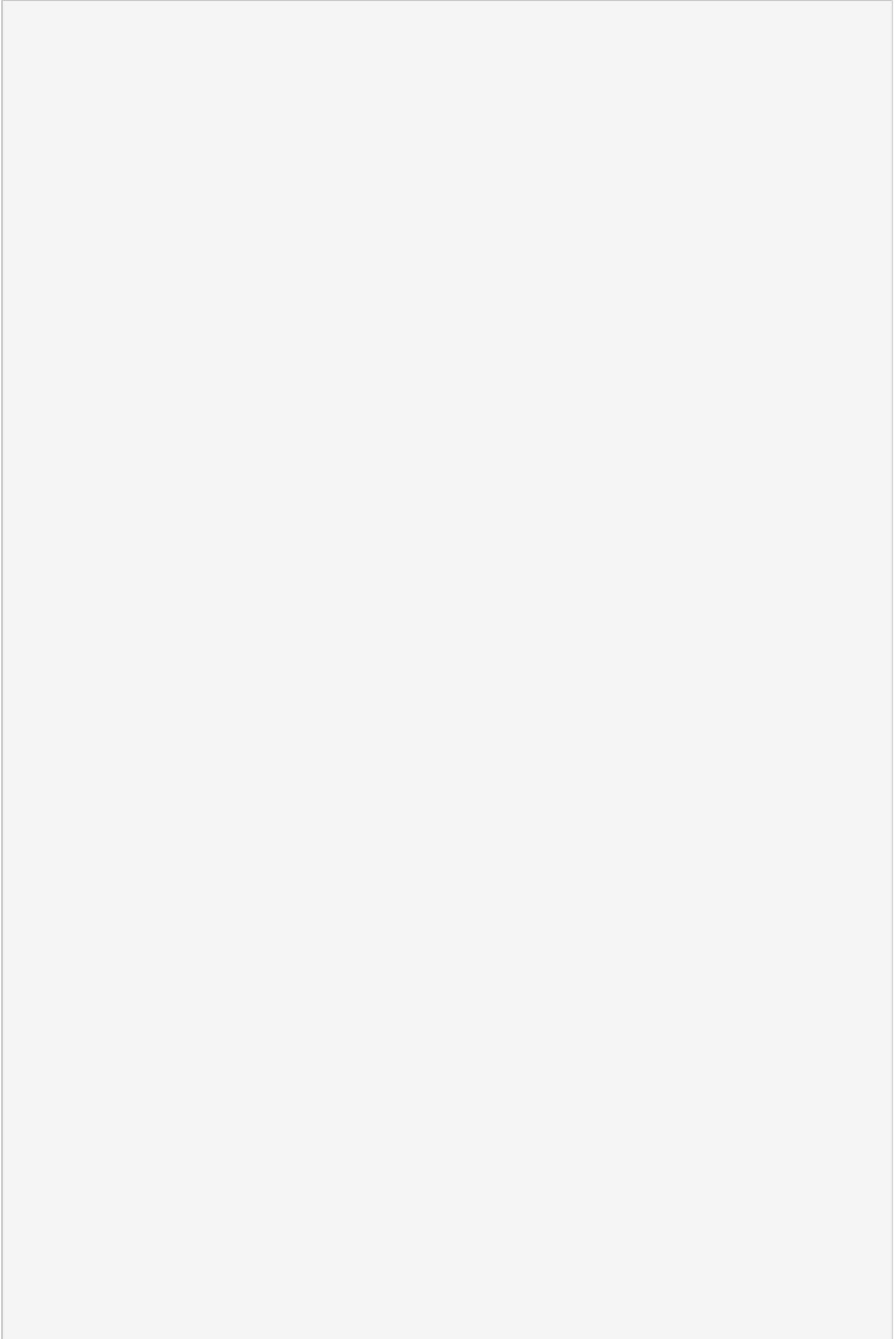
\* 1.1.1 Is it a multinational enterprise (groups with establishments in more than one country)?

- 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.



Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.

For more information please visit [www.investeurope.eu](http://www.investeurope.eu).

The European Private Equity and Venture Capital industry welcomes the opportunity to respond to the European Commission consultation on "Evaluation of procedural and jurisdictional aspects of EU Merger Control". For many years, Invest Europe (formerly the European Private Equity and Venture Capital Association) has been an engaged interlocutor with the European Commission and other European institutions, following closely the different discussions and initiatives affecting the European private equity ('PE') and venture capital ('VC') industry.

Our members cover the whole investment spectrum, including the institutional investors investing in a broad range of PE/VC funds, as well as the PE/VC firms raising such funds and the venture capital arms of European corporates. Our members invest in the full life-cycle of unlisted companies, from high-growth technology start-ups, to the largest global buyout funds turning around and growing mature companies, and thus we speak on behalf of the entire European PE/VC industry, investors as well as managers.

In this consultation response, we have focused solely on those aspects of the consultation which are of particular importance to the private equity and venture capital industry. These include:

- the importance of further simplification and reduction of red tape;
- and
- the absence of any need for a value test.

We stand ready to provide whatever further contribution to this work the European Commission might find helpful, including attending meetings and contributing further materials in writing.

\*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.

Bastion Tower, Porte de Namur, Brussels.

## 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:

60975211600-74

### \* 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 simplified procedure has created considerable added value compared to the pre-2014 situation, but in the view of Invest Europe there is still considerable potential for further simplification. We outline how this could be achieved in our responses to questions 7 and 8 of this consultation.

*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

Overall, the simplified procedure has reduced the burden on companies compared to the “normal” procedure in this respect. However, we believe there is still considerable potential for additional simplification for the treatment of such mergers, in particular considering that such mergers typically do not raise competition issues. Even a Short Form CO with very limited information requires a certain amount of time to be prepared, pre-notified, and then reviewed by the Commission, which impacts the deal time significantly. Ideally such mergers without any local effects on the EU should be reduced to a notice filing only, or be exempt from notification, while maintaining the application of the one-shop principle.

(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

Overall, the simplified procedure has reduced the burden on companies compared to the “normal” procedure in this respect. However, we believe there is still potential for additional simplification.

(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

Overall, the simplified procedure has reduced the burden on companies compared to the “normal” procedure in this respect. However, we believe there is still huge potential for additional simplification, in particular considering that such mergers typically do not raise competition issues. From our perspective, joint ventures with no, or only marginal, effects in the EEA should be excluded from the scope of the EUMR. We address this further in our response to questions 9-13.

(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

Overall, the simplified procedure has reduced the burden on companies compared to the “normal” procedure in this respect. However, we believe there is still potential for additional simplification. While the burden of information required has been reduced through the Short Form Co, cases of a change from joint to sole control of a previously recently (in the last 12-24 months) notified jointly controlled joint venture still requires duplication of merger review efforts.

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.

Invest Europe does not itself notify mergers.

(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.

Not applicable

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.

Invest Europe does not itself notify mergers.

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

We consider that acquisitions of joint control should benefit from the simplified procedure if none of the parents of the joint venture is engaged in the same product market as the joint venture or a product market upstream or downstream thereof. Point 5b of the Notice refers to the activities of the "parties." Consequently, in a joint venture situation, the simplified procedure does not apply if there is no horizontal or vertical overlap between the parents and the joint venture, just because there is an overlap only between the parents. However, for the purposes of the assessment of acquisitions of joint control such overlaps between the parents, which have no (horizontal or vertical) relation to the joint venture's activities, should be irrelevant. This issue is particularly relevant for private equity club deals, i.e., acquisitions of joint control by two private equity firms.

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.

While the simplified procedure has reduced the workload and resources spent by businesses when notifying transactions, Invest Europe submits that these costs continue to be disproportionate in certain cases where we believe that there is room for further simplification. Costs in this area are particularly disproportionate in relation to this objective of the EUMR as such joint ventures typically do not raise competition issues. Other than joint ventures that have a foreseeable impact on the EU, however negligible, the cost and effort required of companies to notify a joint venture to the Commission without any local effects are not proportionate to the objective of the EUMR. This is because such non-effect joint ventures already fulfil the EUMR's main aims of ensuring that competition is not distorted in the EEA and consumers are not adversely impacted.

- Transactions falling under point 5b of the Notice:

- YES
- NO

Please explain.

Costs in this area are also disproportionate in relation to this objective of the EUMR as such transactions typically do not raise competition issues.

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

- YES
- NO

Please explain.

Not applicable.

- Transactions falling under point 5d of the Notice:

YES

NO

Please explain.

Not applicable.

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

Invest Europe does not itself notify mergers.

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.

Invest Europe fully supports the proposal to exempt categories of transactions eligible for the simplified procedure from the obligation of prior notification to the Commission and from the standstill obligation, provided that the relevant transactions would not thereby become subject to notification under EU Member State merger review laws. Otherwise, this proposal could have the unintended effect of increasing the burden on companies rather than decreasing it. Some of such transactions could be subject to review under the laws of three or more EU Member States and thus be eligible for a voluntary referral request. To avoid such a circular result or increasing the burdens on business, it would be important to clarify that transactions qualifying for the exemption but meeting the EUMR thresholds would still be covered by the EUMR's one-stop-shop. If so, in particular, transactions covered by Point 5a of the Notice should benefit from such an exemption.

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.

Invest Europe supports the proposal to introduce a lighter information requirement for categories of transactions eligible for the simplified procedure. Such a lighter information requirement would be an alternative to or in combination with the proposal to exempt certain such transactions from the obligation of prior notification to the Commission and from the standstill obligation. This is provided that the relevant transactions would not thereby become subject to notification under EU Member State merger review laws if the Commission decides not to investigate such transactions and not to adopt a decision. The short information notice could be based on the current form of the case allocation request form. Invest Europe notes that any form of information notice requiring an analysis and description of antitrust markets and shares would continue to impose a significant burden on companies because of the uncertainty involved in defining such markets and the frequent difficulty of obtaining reliable market data.

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.

Invest Europe supports the proposal to introduce a self-assessment system for certain categories of transactions eligible for the simplified procedure, with the possibility that merging parties could decide not to proceed to notify a transaction and be excused from the standstill obligation, again provided that the relevant transactions would not thereby become subject to notification under EU Member State merger review laws. If the Commission would still have the possibility of starting an investigation where it considers appropriate, it would be important to ensure legal certainty by providing a clear and short time limit for the opening of such investigations. As an illustration, similar procedures in place in the United Kingdom provide for a time limit of four months regarding a reference decision (\*).

(\*). Section 24 of the Enterprise Act 2002, Guidance on the Competition Market Authority's (CMA) jurisdiction and procedure, January 2014 CMA 2, para 4.43, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384055/CMA2\\_\\_Mergers\\_\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf).

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.

Not applicable

*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

As noted above in response to questions 2 and 6, Invest Europe submits that the EUMR's treatment of joint ventures operating outside the EEA has not contributed to protecting competition and consumers in Europe in line with the aims of the EUMR as these are already fulfilled due to a lack of local effects, but instead has imposed significant burdens on companies subject to notification requirements in such cases. The same applies with respect to joint ventures with only marginal activities in the EEA, e.g., the joint acquisition of a hotel in the EEA by two investment funds.

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

Notwithstanding our response to question 9, Invest Europe acknowledges that the EU one-stop-shop for extra-EEA joint ventures can create value where an extra-EEA joint venture could trigger multiple Member State notifications if it were not subject to the EUMR. Invest Europe notes, however, that such cases are likely to be rare.

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

Invest Europe asserts that the workload and resources involved in businesses notifying extra-EEA joint ventures without any effect on the EU are wholly disproportionate to the need for an appropriate review of concentrations having an EU dimension, given the exceedingly low, if any, likelihood that such joint ventures could potentially have harmful effects on competition in the EEA.

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

Invest Europe believes that the costs involved in notifying extra-EEA joint ventures have been reduced by the 2013 simplification package, but is not in a position to quantify the savings involved compared to the pre-2014 situation.

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.

Invest Europe considers that the treatment of extra-EEA joint ventures is extremely disproportionate in relation to the EUMR's objective. Such joint ventures typically do not raise any competition issues.

Invest Europe therefore supports the further simplification of the EUMR treatment of extra-EEA joint ventures, including by means of an exemption from notification, a lighter information system or a self-assessment system /notification filing only. It would be important, however, to clarify that the EUMR one-stop-shop would continue to apply to such joint ventures.

Another approach to be considered in this connection would be to re-examine the concept of "undertaking concerned" for purposes of application of the EUMR turnover thresholds, i.e., the "target company" would also need to exceed a certain turnover threshold. Alternatively, there could be also a market share threshold for the target company. This approach would also eliminate the issue of joint ventures with little or no connection to the Union triggering EUMR filing requirements.

Excluding such joint ventures should not create risks for competition law enforcement as such joint ventures typically do not raise competition issues. In addition, exerting jurisdiction over such transactions can raise issues from the perspective of public international law. In order to avoid circumvention strategies, if the scope of the activity of the joint venture is expanded by its parents at a later stage, such situations could be treated as a new concentration, subject to certain thresholds. However, this should not apply if the joint venture expands its activities on its own (organic growth), i.e., without contribution of assets from its parents.

As already explained, a simplification in this area should not have the consequence of such transactions becoming subject to control in one or more Member States. Consequently, such an exemption would need to function similar to the block exemption regulations.

(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.

Please see answer to the rest of question 13 above. For legal certainty, we believe that a light information system/ notification filing system would be most beneficial, as this would give the EU Commission the possibility to request a full Short/ Form CO submission, or in the alternative to “clear” within a short time period transactions that will not have any impact on the EU.

(iii) Other.

Please explain.

Please see answer to the rest of question 13 above.

## 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.

Not applicable

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

Not applicable

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

Not applicable

- **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.

Not applicable

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

Invest Europe is not aware of any competitively significant transactions in the digital economy that had a cross-border effect in the EEA but fell outside the Commission's jurisdiction. Invest Europe notes that certain transactions that were not captured by the current turnover thresholds, such as Facebook/WhatsApp, did become subject to the Commission's jurisdiction, while other transactions, such as Facebook/Instagram, were reviewed at the Member State level. Invest Europe is not aware of any transaction considered significant from an antitrust perspective that was not subject to review by at least one competent EEA authority. Invest Europe notes that the ECN already provides a mechanism for the Commission and other interested authorities to be consulted where a transaction considered to have cross-border effects in the EEA is caught by the merger review rules of one or more Member States but not by the EUMR. Further, such transactions are typically not pursued by PE firms. However, the PE industry would be affected by a new deal size threshold.

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.

Not applicable

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

Not applicable

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

Not applicable

- **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.

Not applicable

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

Invest Europe is not aware of any competitively significant transactions in the pharmaceutical sector that had a cross-border effect in the EEA but fell outside the Commission's jurisdiction. The challenge in the pharmaceutical sector, as the Commission is aware, is that it is not possible to pre-determine which products will be successful prior to their launch. Companies may speculate that products in development may have a significant market impact, and may acquire ownership or rights to such products before they are launched. However, to the extent this occurs prior to such products achieving meaningful revenues (at which point such acquisition would be captured by conventional merger control thresholds), the activity is inherently speculative and would not be likely to lead to a combination of actual and potential competitors within the conventional merger control framework. As such, expansion of merger control jurisdiction to attempt to capture such transactions appears unjustified, and would not yield any significant added value or result in better enforcement of merger control rules. Further, such transactions are typically not pursued by PE firms. However, The PE industry would be affected by a new deal size threshold.

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.

Not applicable

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

Not applicable

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

Not applicable

- **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.

Not applicable

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

Invest Europe does not consider that there is an enforcement gap under the present regime. To the extent that there are transactions that have cross-border effect but that are not notifiable to the Commission, they will typically instead be reviewed at a national level (e.g. in Germany) and can of course be referred up to the Commission if appropriate. Facebook/WhatsApp is actually an example of the current system working well in that respect.

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.

Invest Europe is not persuaded that the current turnover-based jurisdictional criteria in the EUMR involve shortcomings requiring changes to the EUMR's definition of concentrations having an EU dimension. The EUMR's turnover-based criteria were adopted because they are objective, relatively easy to apply and constitute therefore an appropriate proxy reflecting the significance of the undertakings concerned to the EEA economy and the potential for combinations of such parties to have an effect on competition. It was understood that these thresholds would capture a large number of transactions having little or no effect on competition, while potentially excluding some transactions that could have anti-competitive effects, for example in small or local markets.

Article 4(5) EUMR provides a further protection against transactions having potential cross-border effects in the EEA falling outside EU jurisdiction. Where a transaction does not have an EU dimension, Member States are free under EU law to define which jurisdictional thresholds best reflect the potential of a transaction to affect competition in its territory. Article 4(5) reflects a realization that review by the Commission may be appropriate where a transaction would be subject to review in three or more Member States. The Facebook/WhatsApp case, as well as many others in the digital economy and pharmaceutical sectors, indicate that this mechanism works well.

Invest Europe considers that the combination of the pre-notification referral under Article 4(5) with the post-notification referral under Article 22 is sufficient to address any concerns regarding a possible enforcement gap, and that all competitively significant transactions are already captured under today's framework, either at national level or at EU level.

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.

Not applicable

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

Invest Europe does not believe that the current EUMR thresholds, combined with the EUMR's case referral system, provide inadequate assurance that competitively significant transactions with a cross-border effect in the EEA are reviewed at the appropriate level. Invest Europe respectfully submits that the goal of EU merger review has never been to ensure that all competitively significant transactions with cross-border effects are reviewed at the EEA level, but rather to strike an appropriate balance between review at the EU and national levels so as ensure that competition in the internal market is not distorted. It is always possible that a small number of cases will fall outside of the system. However, Invest Europe would respectfully wish the Commission to evidence that there is a real enforcement gap before expanding the merger control regime - otherwise it may simply end up reviewing many more cases that do not raise concerns on the off chance of catching the one that does. A balance needs to be struck between the desire of having certainty of catching every competitively significant transaction and the burden on business of over-extending a regime that is perceived to be broadly working well.

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.

Invest Europe is not aware of evidence that high-value transactions that do not meet the turnover thresholds are any more likely to have cross-border effects on competition in the EEA than lower value transactions. Indeed, a company's willingness to pay a high purchase price for a target with turnover below the EUMR thresholds arguably implies less of a competition issue rather than more, since the high value may be more likely to reflect complementarities between the parties' businesses. Further, a high transaction value is not an indication of future market power also for other reasons. While it is true that in the area of internet platforms positive direct or indirect network effects can lead to an increase in market concentration, it is also true that there are a number of factors in the digital economy that can prevent such concentration. In particular, such factors include low entry barriers, multi-homing (i.e., a parallel use of networks by users) and innovation-driven competitive pressure (possibility of disruptive changes).

Invest Europe notes that the introduction of a deal-size threshold in the context of the EUMR would raise numerous technical questions, including (i) how to assess the "deal size" in transactions where the consideration includes securities whose value may fluctuate or not be readily determinable, (ii) whether only the value of securities or assets whose ownership will change as a result of the transaction should be taken into account, and (iii) whether the deal size threshold would be met only where an undertaking acquires control over the target within the meaning of the EUMR. Determining the "deal size" can therefore be a complex undertaking. Examples of such complexities include purchase price adjustments (e.g., earn-out mechanisms) and the assumption of liabilities. The deal size at the time of signing can therefore differ from the deal size at the time of closing of a transaction. A deal size threshold may therefore not be in line with the "Recommended Practices" of the International Competition Networks according to which "notification thresholds should be clear and understandable."

Invest Europe notes that, to the extent a transaction involving payment of a high price were to raise substantive antitrust issues, such issues would likely revolve around the potential for the transaction to impede potential competition rather than actual competition. That follows from the fact that the buyer is presumably willing to pay a premium for what it sees as the future value of a business that is not currently generating significant (or any) turnover. Given the higher burden for the Commission to raise objections based on alleged impediments to potential competition, and the relatively few cases that raised such issues, Invest Europe respectfully recommends that the Commission elucidate the type of competitive issues that transactions caught by the proposed threshold (and not the existing thresholds) are expected to raise. This exercise would be helpful in assessing whether the addition of a new deal-size threshold would be proportionate to the perceived risks that are not being addressed by the current regime. In any event, Invest Europe notes that it would likely be necessary for the Commission to review the

current Form CO and notices on assessment of horizontal and vertical mergers, which are less clear on the information required to assess the impact of notified transactions on potential competition or the theories of harm the Commission may apply in such case.

Finally, another problem with a deal size threshold at the EU level could be that Member States would be tempted to also include similar, but lower, thresholds. Hence, there may be a proliferation of deal size thresholds across the EU with the effect of additional bureaucratic burdens and transaction costs for businesses. The Commission should consider the potential burden that the proposed requirement would impose on business and the Commission staff in light of the number of transactions that could be caught. Based on public information (\*), the number of global transactions in the \$500 million-\$1 billion band in 2014 and 2015 were 1,151 and 1,082 respectively. For the first three quarters of 2016, the amount of transactions is 651. The number of global transactions in the \$1 billion-\$5 billion band in 2014 and 2015 were 302 and 319 respectively. For the first three quarters of 2016, the amount of transactions is 188.

The number of global transactions in the over \$5 billion band in 2014 and 2015 were 46 and 77 respectively while for the first three quarters of 2016 the amount of transactions is 61 (although many of these transactions would presumably have been caught by existing thresholds). We include detailed information on a sub-set of this merger and acquisition data in the Annex.  
(\* Source: Pitchbook.

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.

If a deal-size threshold is introduced into the EUMR jurisdictional criteria, Invest Europe submits that it should be set high enough to make clear that only exceptional transactions would meet the threshold. Invest Europe notes that the transactions referenced by the Commission as potentially suggesting the need for such a threshold are valued at around € 19 billion / USD 20 billion.

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.

Invest Europe respectfully posits that if a deal-size threshold is introduced in the EUMR, it would be important to complement such a threshold with an appropriate local nexus test to ensure that transactions that are unlikely to have a significant impact in the EU are excluded. Any such local nexus test should be objective and easy to apply. Invest Europe notes with concern that the local nexus test proposed to be implemented in Germany is likely to create significant legal uncertainty.

If the scope of application of a deal size threshold would be limited to certain industries, this may have the positive effect of exempting other industries from this additional burden. Invest Europe understands that the Commission considers that under the current rules there may be an enforcement gap in the digital economy and maybe also the pharmaceutical sector, but not in other industries.

Invest Europe notes that the US system exempts acquisitions of non-US shares or assets where the target does not have significant turnover or assets in the US (currently about USD 78 million). Invest Europe encourages the Commission to consider following a similar approach in case it decides to pursue the inclusion of a deal-size threshold. Invest Europe also encourages the Commission to clarify that the simplified procedure, including the proposed improvements discussed in this consultation, would apply to transactions caught by virtue of a potential new deal-size threshold.

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 state if any of the following criteria would be appropriate to ensure the desired efficiency [multiple answers are possible]:
  - A minimum level of aggregate worldwide turnover of all undertakings concerned.
  - A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.
  - A maximum level of the worldwide turnover of the target business, in cases where the latter does not meet the Union-wide turnover thresholds (with the aim of only covering highly valued transactions where the target has a strong potential for instance to drive future sales but not cases where the target already generates significant turnover but outside of the EEA).
  - The requirement that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple. (Example: transaction value = EUR 1 billion, worldwide turnover of the target = EUR 100 million, ratio/ multiple = 10. The aim of this requirement would be to identify transactions where the valuation of the target company exceeds its annual revenues by several multiples, which could signal high market potential of the target.).
  - Other.

Please explain your answer.

Please see answer to question 19 above. In addition, it could be considered that transactions which are caught by a future size of deal threshold will only be subject to lighter information and notification requirements, e.g. only an initial short information notice and shorter review periods. We also note that some form of foreign-to-foreign exemption would be necessary to avoid catching transactions with little nexus to the EEA.

- A minimum level of aggregate worldwide turnover of all undertakings concerned.

If the Commission decides to pursue introduction of a deal-size threshold in the EUMR, Invest Europe is of the view that the existing aggregate worldwide turnover threshold should still apply to such transactions. Invest Europe notes that this aggregate worldwide turnover threshold is not an alternative to a local nexus requirement as discussed in question 21, but a complement to such a threshold.

- A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.

If the Commission decides to pursue introduction of a deal-size threshold in the EUMR, Invest Europe believes that it would be appropriate to also require a minimum level of aggregate Union-wide turnover. Invest Europe submits, however, that such a threshold should apply to the buyer, not “at least one” of the undertakings concerned. The rationale of including a deal-size

threshold, as Invest Europe understands it, would be to capture transactions in which the size of the deal indicates a competitive significance for the target that is not reflected in its turnover. A transaction in which the target has a significant Union-wide turnover but the buyer does not would not fit this profile, and it would seem logical to apply the existing turnover thresholds. Invest Europe notes that this aggregate EU-wide turnover threshold is not an alternative to a local nexus requirement as discussed in question 21, but a complement to such a threshold.

- A maximum level of the worldwide turnover of the target business, in cases where the latter does not meet the Union-wide turnover thresholds (with the aim of only covering highly valued transactions where the target has a strong potential for instance to drive future sales but not cases where the target already generates significant turnover but outside of the EEA).

If the rationale of including a deal-size threshold would be to capture transactions in which the size of the deal indicates a competitive significance for the target that is not reflected in its turnover, it seems inappropriate to apply a worldwide turnover threshold to the target business. If the target has significant turnover, it would seem logical to apply the existing turnover thresholds. Invest Europe notes that this aggregate worldwide turnover threshold is not an alternative to a local nexus requirement as discussed in question 21, but a complement to such a threshold.

- The requirement that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple. (Example: transaction value = EUR 1 billion, worldwide turnover of the target = EUR 100 million, ratio/ multiple = 10. The aim of this requirement would be to identify transactions where the valuation of the target company exceeds its annual revenues by several multiples, which could signal high market potential of the target.).

Invest Europe would need to consider carefully how any such ratio would work and would need confidence that it did not have unintended consequences when parties come to negotiate deal value.

### **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.

Invest Europe agrees that the current case referral mechanisms contribute to an appropriate allocation of merger cases, but submits that there is room for improvement in these mechanisms to reduce burdens on business.

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.

Invest Europe agrees that the proposals in the White Paper - in particular eliminating the two-step process for a voluntary referral under Article 4(5) of the EUMR - would be an appropriate means of reducing the burden on business.

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.

Invest Europe would question whether Article 22 now serves any purpose given it was introduced to deal with the situation where Member States did not have their own national merger control system and needed a mechanism to ask the Commission to review potentially anti-competitive transactions. That only applies to Luxembourg. Invest Europe also considers that it is wrong that a Member State can request or join a referral when it would not itself have competency under its national law to review a transaction. Similarly, if the Commission retains Article 22 then the making of a referral should not expand the scope of the review to the entire EEA unless the relevant geographic market is itself EEA-wide. The Commission's jurisdiction should be limited to the territories of those Member States requesting the referral.

#### 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?

Invest Europe disagrees with the Commission's proposal to modify Article 8(4) to allow it to require the dissolution of partially implemented transactions. Such a reform would only logically follow were the Commission to extend the merger control regime to catch acquisitions of minority non-controlling shareholdings. Either the EU regime applies only to acquisitions of control or it does not.

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?

Not applicable

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.

Not applicable

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.

Not applicable

## 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.

**6259ef94-1c86-4242-90e5-b4635ce6447e/Annex\_-\_PitchBook\_MandA\_BasicInfo\_2016.xlsx**

## **Contact**

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