

PROPOSALS FOR A MORE EFFICIENT EUROPEAN MERGER CONTROL

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Executive summary

This paper identifies three main avenues for the improvement of the ECMR. It first proposes to simplify the merger procedure and move in the direction of a properly framed voluntary notification system. It then proposes to change the timing of phase II mergers to allow the time of a serene and thorough debate. Last, it proposes to further the integration of the ECN in terms of legal tests and rights of defence, in particular regarding access to economic evidence.

Our proposals pursue a common objective. Our goal is to free resources on both sides of the antitrust community to focus and deepen our assessment on the most complex cases both in terms of efficiencies and potential harm. These cases become more common in the digital age and the variance of effects of these mergers, on balance, has increased. It is therefore in consumers' interests to concentrate more resources on these cases.

This paper argues that turnover thresholds are not correlated with harm and therefore do not lead to proper prioritization of enforcement in merger control in Europe. Thresholds could increase or decrease without changing the proportion of problematic to non-problematic mergers that are notified. Regardless of the change in thresholds, this proportion would remain low. We also argue that no other threshold, or combination of thresholds, would perform better. Therefore, there is no room for further incremental improvements to the system and only a move in the direction of a properly framed voluntarily notification system would significantly enhance the efficiency of merger control in Europe.

However, the Commission would need to be in capacity to effectively intervene, if necessary, against mergers that are not notified. Conversely, parties who do not notify need to know when it is safe to implement the merger. Therefore, we propose that parties planning to implement a merger of European interest disclose their intentions to

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the Commission by the submission of an electronic form equivalent to the HSR documents, containing readily available information about the merger. We also propose that parties ensure publicity of their intentions to the wider public or at least to their largest customers and suppliers. The completion of these two steps would start the period where the Commission is able to receive complaints and use its market investigation tools. At the end of this period, the Commission could decide to take no action, clearing the way for the implementation of the merger, or to open proceedings. This procedure is more efficient for all parties than a mere simplification of the simplified procedure. The Commission would not be required to draft a decision to clear the way for the implementation of the merger in all cases that are clearly not anticompetitive. The parties would not be required to enter in formal contacts with the Commission.

Moreover, we argue that the current time pressure during phase II mergers, and in particular after the SO has been sent, is counterproductive and against the interests of all parties. We therefore propose to allow adequate time for discussion in complex merger cases.

Last, we also propose to further the integration of the ECN in order to increase the efficiency of one stop shopping, and ensure convergence of the legal tests and the rights of defence, in particular; regarding access to economic evidence.

INTRODUCTION

1. On October 7 2016, the Commission launched a public consultation on the “Evaluation of procedural and jurisdictional aspects of EU merger control”.² This public consultation follows the publication of a white paper and a staff working document in 2014.³⁴
2. Our understanding is that the Commission seeks comments on three sets of issues:⁵
 - a. The relevance of the current notification thresholds,
 - b. The treatment of typically unproblematic cases,
 - c. Referral mechanisms.
3. This document intends to make a contribution on all these issues.
4. We believe that the first two issues are intrinsically related. We explain in our contribution that we do not see scope for an incremental improvement of the current approach based on notification thresholds. Such reform would not make it possible to focus more on problematic cases and less on unproblematic ones, which is what is needed. We also believe that, in the current context, where notification is mandatory, there is little scope for significantly alleviating the burden of notifying parties. Therefore, this paper argues that a more drastic innovation is needed, which would be equivalent to the 2003 antitrust reform.
5. Moreover, we also share the Commission’s objective to further the convergence of merger control, procedures and rights of defence within the EEA. We believe that our proposal aims at facilitating this convergence process.
6. In particular, in this paper we put forward for discussion the following proposals:
 - a. The European system of notification should be based on a robust system of voluntary notification that aligns all the parties’ incentives. There is, in our opinion, no other system that would allow focusing on the relevant cases. No system of thresholds can deliver this outcome. In fact, merger control has to move in the direction of the 2003 antitrust reform.
 - b. The time pressure in phase II mergers and in particular after an SO has been sent is counterproductive and contrary to the interests of all parties. We propose to alleviate this pressure to allow the time for debate post SO. We propose to give more time to parties to reply to the SO. We also propose to allow parties to submit additional analysis at any

² http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html

³ http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf

⁴ http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf

⁵ See the public consultation’s questionnaire:
http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf

time of the procedure, against extensions. Last, parties should not have to consider remedies until the debate on the effects of the merger, on balance, has been settled. We therefore propose to postpone the remedy discussion by allowing remedy proposals even late in the process, against appropriate extensions.

- c. The integration between the NCAs and the Commission has to be completed. First, this requires more automaticity of the one stop shopping in any case that is not obviously only of national interest. Second, this requires that the substantive test is not only adopted formally by Member States, but also that NCAs effectively move towards an effect based analysis of mergers, which would be aligned with European law.
7. This document first discusses what we see as the shortcomings of the current regime. It then puts forward potential problems that would emerge with a simple reform of the notification thresholds. Last, we make our proposal of an ambitious reform.

SHORTCOMINGS OF THE CURRENT REGIME

IMPERFECT PRIORITIZATION OF CASES

LARGE PROPORTION OF CASES NOTIFIED RAISE NO CONCERNS

8. Analysing the European Commission's own statistics, it is apparent that most notifications raise no concerns.⁶
9. Focusing on 2015 and 2016 only, one can see that, out of the 699 notifications received:
 - a. two thirds (467 cases) were notified under the simplified procedure and cleared unconditionally;
 - b. almost 90% of cases (626) were cleared unconditionally;
 - c. adding the cases withdrawn in phase I (14)⁷ to the phase I clearances with commitments (32) and all phase II mergers (19), it is a maximum of 9% (65 cases) of the total number of notified cases that were potentially problematic.
 - d. focusing only on clearances with remedies (32 phase I cases and 13 phase II) and prohibitions only (1 case), this number would be as low as 46 cases, i.e. 6.6% of the cases.
10. We are fully aware that the Commission allocates more resources to the cases it considers more problematic. Therefore, the mere count of cases is bound to overestimate the time the Commission spends on the non-problematic cases.

⁶ European Commission Merger Statistics <http://ec.europa.eu/competition/mergers/statistics.pdf>

⁷ While it is unclear whether these mergers were at all problematic, it is possible that the withdrawal followed signals from the Commission of a possible opening of proceedings.

11. Moreover, the Commission does not publish more precise statistics on the full time personnel it relies on to control mergers. For a more complete view, it would be helpful if the Commission could publish such data.
12. In the current situation, simple case counts are therefore the only available proxy for the amount of resources that the Commission dedicates to non-problematic cases.
13. Given the disproportionately large amount (626) of non-problematic cases versus those that raised at least some concerns (at most 65) assessed by the Commission in the last year and a half, it appears that the current notification thresholds fail to identify the relevant cases.
14. Even if the Commission spent ten times more time on each of the 65 potentially problematic cases than on each of the 626 remaining cases, it would still have spent more than half of its time on the non-problematic cases. This seems very high.
15. Even when excluding simplified notifications, 232 cases were notified to the Commission, from which only at most a quarter was potentially problematic.

THIS CREATES A DISPROPORTIONATE BURDEN FOR BOTH SIDES

16. This puts a disproportionate burden on merging companies. The short form CO is undoubtedly less detailed than the normal form CO. However, it still requires very detailed information on markets, turnovers, market definition, etc. It also requires a formal competitive assessment of the merger, even though less detailed than in normal procedures.
17. The short form CO does not compare in any possible way to the concise Hart-Scott-Rodino documents that are used in the USA. These documents are not only used to file for the prima facie least problematic mergers, but they are used for all mergers. Filing in some Member States, for instance in Germany, is also often seen as less burdensome as even the simplified procedure in the Commission.
18. Moreover, even in the context of the simplified procedure, pre-notification is practically required (at least on the question of whether a simplified procedure would be acceptable). Pre-notification in this context can also be lengthy. This is largely due to the fact that it is still the parties' responsibility to show an absence of significant overlap in any plausible markets. It is our experience that this sometimes requires computing market shares in segments that have never been considered as relevant markets in previous merger proceedings.
19. In addition, the Commission always has the possibility to revert to a normal procedure. It will systematically do so if the merger raises even the slightest possibility of anticompetitive harm. Therefore, the 467 cases mentioned above were indeed those that were ex-post regarded as entirely unproblematic. Otherwise, the procedure would have reverted to a normal treatment.
20. The resources dedicated to the entirely non-problematic cases are a waste for all sides. Therefore, the rationale for the notification of all the entirely non-problematic cases deserves to be questioned. The same probably applies to a large proportion of resources dedicated to many unconditional phase I clearances, i.e. 6.1(b) decisions.

INSUFFICIENT RESOURCES FOR THE PROBLEMATIC CASES

21. It appears that the Commission is required to spend a large proportion of its resources on purely administrative steps that actually require very little substantive assessment. This means that it cannot focus its resources on the cases that would actually really require them

the most. These are in particular cases with novel theories of harm and those that require a careful assessment of efficiencies, which are more and more frequent in the new economy.

22. Experience of the ambitious 2003 Antitrust reform shows that the quality of the analysis of the Commission increases when it can actually focus its resources where needed.
23. As a matter of example, the Commission reviewed the Facebook/WhatsApp merger in 2014.⁸ It identified three markets: “the consumer communications services”, the “social networking services” and the “online advertising services”.
24. The Commission conducted a very thorough review of the classical theories of harm, investigating whether the two companies were close substitutes, and whether the integration of the two companies was feasible and would give an advantage to Facebook in the markets it was active in.
25. The Commission argued that the offerings of the two companies were rather complements than substitutes, particularly due to multi-homing. Moreover, it is very easy to register to any competing services and download an application. On balance, the Commission decided that the merger did not raise competitive concerns.
26. The Commission analysed in great detail the classical theories of harm that would naturally emerge in such a merger case. However, it did so within very strict boundaries of fixed and pre-defined markets. It seems to us that this assessment does not fully take into account the fact that services that are complementary to each other today might very quickly evolve to become substitute, at least in some dimensions.
27. More importantly, the distinction between complementarity and substitutability in these markets is not necessarily decisive in the competitive assessment. Establishing anticompetitive effects of the merger does not require that WhatsApp develops functionalities that attract most customers away from Facebook. This would happen, for example, if WhatsApp would replace Facebook as the main social media. This is unlikely to happen given that customers largely multisource.
28. Nevertheless, WhatsApp could develop some functionalities that would be substitutes to Facebook. Thereby, while remaining overall largely complementary to Facebook for consumers, WhatsApp could attract some of the advertising flow away from Facebook to its advantage. To give a very hypothetical example just for the purpose of an illustration, it could do so by pushing through advertisements about restaurants at times when people discuss about meeting for a meal in town. Even when their respective products are pure complements, what matters for each company is the way the rent is shared between them. .
29. This type of theory of harm is not new. It is closely related to the theory of harm of the Commission, for instance, in Microsoft I and II, where the Commission has successively considered that network software, streaming software and internet browsers were the middlewares that would make operating software commodities.
30. If this theory, or variations of these theories, can be the basis for competitive concerns in Antitrust, they necessarily should also be concerns in merger control. They are even more relevant in the context of multisided markets. If one can foreclose a threatening rival, one

⁸ The non-confidential version of the decision can be found at http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

can generally achieve the same result by acquiring it. To the extent that these competitors would have brought value to customers (or to consumers on one side of the market), there is as much harm in foreclosing them as in acquiring them.

31. While such an acquisition can give rise to novel theories of harm, they can also generate a wide variety of novel efficiencies. Combining different assets and different types of data can also be the necessary condition for the emergence of entirely new products or processes that largely benefit consumers.
32. What this example shows is that in fast moving markets, the variety of both possible harm and possible efficiencies has dramatically increased. Therefore, public intervention has to be particularly cautious and proportionate. It has to take great care not to impose unnecessary constraints on businesses that delivered, and will continue to deliver, high quality products and constant innovation to consumers.
33. There is a thin line between these theories of harm of strategic acquisition and pure speculation. While efficiencies can emerge in various ways and settings, harm can only emerge under very strict circumstances and there is a large body of literature discussing whether these conditions were actually met, or not, in either of the Microsoft cases on both sides of the Atlantic. It is likely that these conditions were not met in the Facebook/WhatsApp merger, especially given the extent of multi-sourcing, absence of switching costs and easiness to download applications. It is in particular unlikely that WhatsApp really was the most likely, even less the only possible, emerging platform endangering Facebook's business model. In this context, the merger can hardly be seen as the strategic acquisition of the most threatening rival.
34. However, these types of concerns and theories of harm are likely to become more relevant in the modern economy. Efficiencies are likely to be increasingly large and hard to assess. The variance of the overall effects of big complex mergers is likely to be much larger in the areas of the modern economy than in the most traditional industries. It is therefore in customer's interests that the Commission is able to focus its resources on these cases rather than on the misnamed "simplified procedure" mergers

THRESHOLDS ARE TOO HIGH

35. While we have shown that the current level of thresholds triggers notifications that are irrelevant for the Commission and disproportionately costly for merging parties, there is also a risk that some potentially anticompetitive mergers might pass unnoticed.
36. Mergers like Facebook/WhatsApp or Microsoft/LinkedIn are often mentioned as examples suggesting that the thresholds in turnover might be too low. Another example that is frequently mentioned is an acquisition of early pipeline patents in the pharmaceutical industry.
37. We first note that ICT mergers have already been controlled and cleared by the Commission. We also note that there has been no evidence so far that a particular patent acquisition was anticompetitive. Early pipeline patents are by definition promising but there is no certainty that they would actually disrupt a market. The acquisition can in many instances allow bringing a molecule to the market sooner, as pure patentees often do not have the experience and financial means to transform an idea into a lifesaving drug.
38. Yet, we acknowledge the possibility that anticompetitive mergers may pass unnoticed. While there is little correlation between the anti-competitiveness of a merger and the high turnover

of the parents, there is an equally small correlation between the small turnover of the parents and the absence of significant harm of a merger. We have anecdotal evidence of “small” mergers (in terms of turnover or value) in a strategic market or involving strategic assets (such as bottleneck infrastructures necessary to enter a market) that would have warranted scrutiny and were not notifiable either at community or in the Member States were the concern could have emerged. Nevertheless, this could happen in any sector of the economy, not only in ICT or pharmaceuticals, but also in commodities. Therefore, while it is mostly apparent from the Commissions’ statistics that thresholds are way too low, one cannot exclude that they are also possibly too high to capture all potentially anticompetitive mergers.

THE ECN IS INCOMPLETE

39. The previous reform was meant to create an efficient one stop shop where consistent assessment of mergers could be done either by the Commission or by National Competition Agencies (NCA). While significant progress has been made, we believe that the ECN still has to deliver on all its promises.
40. We see that mergers fall within either of the four categories:
 - a. The merger is purely national and does not affect trade between Member States
 - b. There is direct nexus in one Member State only but cross-border trade is affected
 - c. There is nexus in several Member States but essentially in one
 - d. There is nexus in several Member States.
41. In a well-functioning system::
 - a. A purely national merger that does not affect cross-border trade is subject to national law only and has to be dealt within the Member State concerned.
 - b. A purely national merger that affects trade has to be dealt with by the NCA that is bound to apply European law. Such a merger is a European case by nature and the assessment, the procedure, and the rights of defence should be exactly the same as in a case in front of the European Commission.
 - c. A case of European interest that mostly affects one member state is probably dealt with better within this Member State. However, as in the case of the previous category, also here, the test, procedure and rights of defence should be identical to a case in front of the Commission. Moreover, the other affected Member States should have a right to have an opinion, and this should be warranted by the Commission.
 - d. When there is a significant nexus in several Member States, the case should fall within exclusive competency of the Commission, irrespective of its size and seamless procedures should be in place to ensure this outcome.

42. The previous reform has been a very significant step towards achieving this type of framework. However this process is not complete. The Commission itself mentions a series of issues that still need to be addressed in its 2014 Staff Working Document (2014 SWD):⁹

“However, the Report also found that a significant number of cross-border cases remain subject to reviews in three or more Member States (in 2007, 100 cases resulted in more than 360 investigations by NCAs). In addition, available data suggested that around 6% of the cases notified in at least three Member States gave rise to competition concerns. The 2009 report identified the procedural burden associated with a referral as a possible reason for the lack of referrals, as companies and their advisors criticised the referral procedures as cumbersome and time consuming. In some cases, companies may have opted against referring cases to the Commission in order to avoid its jurisdiction, even if the Commission would have been the “more appropriate authority”. This practice is known as “forum shopping”. Against this background, the 2009 Report found room to expand “one-stop-shop” review and suggested that additional concentrations could be reviewed by the Commission under the principle of the “more appropriate authority”.”

43. It is in our view apparent that concentrations are not necessarily at first notified to the most appropriate authority. First, it is not uncommon that a case is notified to the Commission and then referred to an NCA. Second, as the 2014 SWD mentions, it is also too common that a merger is not notifiable at European level, but ends up being notified in several member states. This could be due to forum shopping, as mentioned by the Commission.¹⁰ This could also be the consequence of a complex network of thresholds at national levels, which can result in a merger not meeting the European thresholds but meeting several national thresholds. We note that this would happen even more often if the Commission decided to increase its turnover thresholds unilaterally. The current referral process is a burden to companies. Some could ultimately find it easier and faster to file in several Member States rather than going through the referral process and get clearance from the Commission (or face scrutiny in the whole EU while the merger was only notifiable in a few Member States).
44. Another situation is even more problematic and is not mentioned by the Commission. Forum shopping does not only emerge as a consequence of different perceived applications of the substantive test. Even before that, forum shopping can be the result of a strategic decision based on national notification thresholds. Given their constraints on resources and different priorities, some Member States focus their enforcement on mergers and others on Antitrust. This results in a great heterogeneity in turnover notification thresholds. Unless particularly strict rules are enforced, it is therefore possible that a merger that would have met the European thresholds can be sliced not only into several acquisitions that are notifiable in several Member States, but rather in national concentrations that end up not being notifiable anywhere, or at least not in the Member States where the merger is actually potentially the most problematic. Even when rules aimed at avoiding this situation exist, it can be difficult for a Member State, or for the Commission, to control if a transaction between two parties took place in another jurisdiction over the two years period. In case the merger was genuinely not notifiable at European level in the current system, the result remains that the parties face scrutiny in a few Member States only, and not necessarily where the merger had the potentially most problematic effects.

⁹ 2014 Staff Working document paragraph 128 and, more generally section 4: http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf

¹⁰ See for instance paragraph 128.

45. These instances point to the conclusion that the economic context of the case should be taken into account directly when deciding whether a case should be assessed by the Commission or by an NCA, or even whether it should be assessed at all.
46. Last, section 2 of the Staff Working Document analyses in detail the substantive assessment. While in several very useful sections it reviews the Commission's practice, in Section 2.5 it also assesses the implementation of this substantive test by Member States. It emphasises the risks of diverging enforcement:¹¹
- "While most NCAs now apply the SIEC or a similar test in their substantive assessments, the ways in which such tests are further developed in guidance documents (such as the Commission's Horizontal and Non-Horizontal Guidelines) and the ways in which they are applied and interpreted by competition authorities (and ultimately reviewing courts) are equally important. Divergence in this respect may impact the substantive assessment and cause inconsistent outcomes. The same is true with respect to remedies, as Member States do not always follow the same approach."*
47. We can only agree with this analysis. We are not in a position to make a systematic assessment. However, we have anecdotal evidence that the legal tests and rights of defence are not equivalent in all member States and often do not match the standards set by European Courts.
48. Even when they have formally embraced the new substantive assessment, and in particular the SIEC test, Member States have very different interpretation of this test and some Member States still strictly and literally focus on the creation of dominant position, with a presumption at 40%. This has two immediate consequences:
- a. Some pro-competitive mergers face very high scrutiny by some Member States and unnecessary remedies might be imposed.
 - b. Some gap cases are missed at national level and this creates room for forum shopping indeed.
49. This absence of effective convergence is not acceptable when Member States actually control mergers of a European dimension (any merger which is not of type a in the previous categorization).
50. Moreover, the rights of defence differ greatly between Member States, in particular the right of an SO and of an access to file, including, what is most relevant to us, access to economic evidence. It is, at national level, sometimes difficult to have access to the economic evidence that has been produced during the administrative proceedings. While the practice of data rooms is well established in the Commission, which allows the parties to prepare the reply to the SO, this is more seldom the case in Member States. Moreover, in case of prohibition, access to economic evidence used in the decision is necessary for the parties to take an informed decision regarding the opportunity of an appeal and, then, to prepare the application. Such an access should be guaranteed, both at national and European levels.

ISSUES WITH A SIMPLE REFORM OF THE THRESHOLDS

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Paragraph 37 of the Staff Working Document.

51. We welcome the Commission's proposal to reinforce the efficiency of the ECN, even though we believe that the Commission is not going far enough. We believe that the Commission has a unique opportunity to complete the harmonization of competition enforcement in the internal market. In the next section, we put forward several ideas that the Commission could consider in order to achieve this. However, before doing so, this section summarizes our views on what seem to be the Commission's proposals currently on the table, especially regarding thresholds.

IN A SYSTEM OF THRESHOLDS, TYPE I AND TYPE II ERRORS ARE INTRINSICALLY LINKED

52. It is only natural that a simple system of thresholds generates both type I and type II errors. These errors are more or less frequent, depending on whether the variable on which the threshold is based is more or less correlated with potential harm. As we have discussed, turnover is very poorly correlated with harm and, hence, the current system generates an overwhelming number of type II errors, i.e. unnecessary notifications, as well as possibly a number of type I errors, i.e. potentially harmful mergers being unnoticed, even though these are harder to observe. Logically, reforms aimed at reducing type II errors have an implicit cost of increasing the number of type I errors. It is actually in the nature of the merger control system based on turnover thresholds that reducing one type of error mechanically increases the other:
- a. Setting a turnover threshold that would trigger merger control in nascent markets is practically equivalent to forcing a notification for each and every merger;
 - b. As there is no guarantee that mergers of companies with smaller turnovers are necessarily the least problematic ones, increasing the thresholds to levels that would significantly reduce the number of notifications will necessarily lead to harmful mergers escaping scrutiny.
53. The correlation of turnover with potential harm is so low that increasing (or decreasing) turnover thresholds is unlikely to change the proportion of clearly unproblematic cases, over the problematic ones, that have to be notified or, conversely, the proportion of anticompetitive mergers that escape scrutiny.
54. Increasing the thresholds also has a complex impact in the European system. Most of the mergers that would not be directly notifiable at European level anymore would end up being notified in one or several Member States. By unilaterally changing its thresholds, the Commission would then be shifting the burden to Member States. It would not make the burden disappear for public authorities. It would also not alleviate the burden on companies, rather the opposite, as they might have to perform a multijurisdictional filing instead of a sole Commission filing. Moreover, to the extent that some of these mergers would be notifiable in several countries, they might end up being either notified to the Commission anyways in the first place or ultimately referred to it. Increasing the thresholds is therefore no guarantee for the Commission to receive fewer cases. The Commission might actually receive an equivalent number of cases with more complex procedures. At least, referral from Member States will mitigate the effects of a unilateral increase of the Community thresholds.

ADDING MORE THRESHOLDS RAISES ADDITIONAL ISSUES

55. As the trade-offs in addressing different types of errors are well understood, some scholars and practitioners have proposed an approach with several thresholds. In our sense, these proposals do not address the core of the problem and also raise additional questions.

ADDING A THRESHOLD OF MARKET VALUATION DOES NOT ADDRESS THE ISSUE
AND RAISES PROBLEMS OF TERRITORIALITY

56. An attempt to solve the problem could be to both increase the turnover threshold, and to create a threshold based on market value of the merged entity (or of the target entity). This proposal is based on the premise that the increased threshold eliminates a number of superfluous mergers and that the second threshold will force notification of more problematic mergers. We believe that none of these premises are well founded.
57. First, as we explained earlier, there is no reason to believe that mergers just above the threshold are necessarily less problematic than those well beyond. This is because, as we explained, the turnover is very poorly related to potential harm. Moreover, as already explained, there is no guarantee either that unilaterally increasing the European threshold will reduce the number of mergers reviewed by the Commission.
58. Second, there is no reason to believe that market value is better correlated to potential harm than turnover. The value of some acquisitions in the ICT sector is sometimes mentioned. However, it appears that these mergers have both been controlled and cleared unconditionally in phase I (Facebook/WhatsApp), or subject to minor commitments (Microsoft/LinkedIn). There is therefore no evidence that a large market value for an acquisition indicates harm. Acqui-hires, i.e. the purchase of a start-up by an established company with the view of hiring its founder is also common and there is no evidence that this has ever been anticompetitive.
59. Moreover, some markets are more promising than others and this has to be reflected in market value, irrespective of the potential anticompetitive harm. Conversely, strategic anticompetitive acquisitions do not need to be costly. This can be because the market is of a smaller size, or because the bargaining position of the seller is weak (for instance because it has first been predated). Last, even determining the market valuation of an acquisition might not be obvious when the price is paid in options, for instance.
60. Therefore, increasing the turnover threshold and creating a market value threshold clearly does not address the issues we have exposed. More importantly, a market value threshold also raises obvious issues of territoriality.
61. Despite the defaults we have described, a turnover threshold at EU level has one virtue: it ensures that there is a nexus in Europe.¹² On the contrary, there is no guarantee that a large market value is sufficient to create a nexus in the EEA.
62. We understand that the issue of territoriality is widely discussed at the moment. AG Wahl in its opinion on Intel very clearly explains the issue of territoriality.¹³

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The only exception to the effectiveness of the thresholds is the case of full function JVs, where all parent companies are “undertakings concerned”. In this context, a full function JV has to be notified even when it will not operate in Europe, as soon as two of its parents pass the turnover thresholds.

“In that context, it is worth noting that several other provisions of EU law regulate the foreign conduct of entities which are neither nationals of an EU Member State nor physically or legally present in the Union, because of the effect produced by that conduct in the internal market. That is the case, for example, of a number of provisions governing transactions in financial instruments or other types of economic conduct.

That does not mean, however, that any effect, no matter how weak or indirect, could trigger the application of EU competition rules. In a globalised economy, conduct that takes place anywhere in the world, for example in China, will almost inevitably have some sort of effect in the European Union. Yet, the application of Articles 101 and 102 TFEU cannot be based on a link or effect that is too remote or purely hypothetical.”

63. European Competition law should apply to behaviours either implemented in the EEA or that have qualified effects. This later requires that a conduct has either “foreseeable, immediate and substantial effects” or “direct substantial and reasonably foreseeable effects”.¹⁴ We understand this to be deriving from established principles of public international law.

64. On this issue, AG Wahl concludes:¹⁵

“The wording of Articles 101 and 102 TFEU does not justify the application of EU rules by the Commission with respect to conduct that has no ‘qualified’ effect in the territory of the European Union. To hold the contrary would also be problematic under the rules of public international law. An over-reach of EU competition rules would risk encroaching upon the sovereign interests of other States and be legally and practically difficult to enforce. It would also considerably increase the overlaps in the jurisdictions of different States or polities and thereby create great uncertainty for undertakings and increased risks of conflicting rules (or judgments) applying to the same conduct. Lastly, but no less importantly, it may raise questions under the principle of good administration: what would be the interest in enforcing EU rules with respect to conduct that has no significant effect in the European Union? Would that be a valid and effective use of the European Union’s limited resources?”

65. We understand that these statements are meant in the context of Articles 101 and 102 TFEU. However, the same principles of public international law regarding territoriality should apply to merger control. Last, the same policy imperatives apply as well. Therefore, the Commission should not spend time and resources, and impose the obligation to notify, on two large commodity companies merging in China and India, a merger that is not implemented within the EEA.¹⁶

¹³ Advocate General Wahl's opinion in case C-413/14 P, Intel vs. Commission, paragraphs 298 and 299, available <http://curia.europa.eu/juris/document/document.jsf?text=&docid=184682&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=207954> at

¹⁴ Ibid, paragraph 301.

¹⁵ Ibid, paragraph 303.

¹⁶ For this reason, the relevance of the notification of JVs that operate far away from Europe is debatable. The Commission proposes to address the issue in its 2014 White paper. Our proposal will solve this issue as well.

66. Therefore, a market value threshold could not be implemented alone. It is clear that it would have to be complemented by other criteria ensuring a European nexus of the merger. A turnover threshold would not be appropriate, given that the market value threshold is meant to overcome shortcomings of the turnover thresholds. A threshold based on the number of European users would also not be appropriate to capture strategic acquisition of research projects. Measuring market value can already be challenging when the purchase is not paid in cash. Adding a second criterion is likely to lead to even more complex assessment that will ultimately be the source of high legal uncertainty, without any foreseeable benefits.

GIVING A NOTIONAL VALUE TO DATA RAISES THE SAME ISSUES AND IS UNFEASIBLE

67. Another possibility that is sometimes mentioned is that one should give a notional value to data. This proposal is built on the premise that the most problematic mergers are the ones related to data. It does not even intend to address the issue of the potentially strategic acquisition of pipeline products. It is also built on the premise that data is valuable in itself and in the same way for all market players. We believe that both presumptions are wrong.
68. First, as already explained, there is so far no evidence that simply possessing data can be the basis of a consistent and cogent theory of harm. There is no evidence that the potential for type I errors in the current system is larger in the ICT sector than in any other sector of the economy. Therefore, designing a system that targets this sector seems unnecessary.
69. Second, the value of big data does not lie in the amount of collected data. It lies in the firms' ability to collect accurate and relevant data and to process them in real time. This is the reason why the very idiom of "big data" is misleading. Data is not like oil, it is like wind. Wind flows and is accessible to many people. To make value of wind, one needs to be able to capture it and transform it into energy. Similarly, data is only valuable to undertakings that have the infrastructure necessary to process the data and use them for a valuable purpose.
70. Different types of data have different values for different people. There are decreasing returns to the accumulation of data, and only data related to the business model of a particular firm is relevant. Moreover, this data can be accessed by many different players in a simultaneous way: data is not a rival good. Google, Uber, Amazon and Facebook collect largely different types of data. They collect this data in the process of their operations and use them in a very different way. The fact that other players also get similar information bears no consequences on the cost of collecting these data. Overall, historical data is valuable only to the extent that it is the material that is used to teach algorithms. This is not dissimilar to any industry where learning is also part of the process of making valuable products. Testing windmills in real conditions with real wind allows gathering valuable experience. However it is the accumulated experience that is valuable, not the accumulated wind itself.
71. Last, giving a single and universal value to data is impossible. Even when a company that gathers data in the process of its operations is already able to convert this data into profits, it is in practice impossible to delineate the value of this data from the value of the processes that generate and treat this data. The value of the data is even more speculative in the not so uncommon situation where the company that collects data does not yet fully monetize this data. Data in this context is certainly not a currency. Its value intrinsically depends on how it will be used. In other words, giving value to the target's data is largely equivalent to the competitive assessment of the merger in the first place. For this reason, the value of data cannot possibly be the basis of a threshold.

72. Last, the issue of territoriality is also clearly raised for this approach. What is the value of the European data? Can European data be separated from the data collected and processed in the rest of the world?

UNCOORDINATED NATIONAL REFORMS ARE A FURTHER SOURCE OF CONCERNS

73. We have also noticed that some Member States, and most noticeably Germany, have already modified their notification thresholds. We are not specifically commenting on these changes, even though most of our previous comments on opportunity, proportionality and territoriality apply as well. We just want to point out that uncoordinated activism of NCAs in the field are particularly damaging for the completion of a modern and fully operational ECN. The Commission's role is to be the leader of the network, in full cooperation and open discussion with NCAs. Unilateral or bilateral initiatives, like in the example of the online booking cases or the opinion paper on big data, are creating more concerns and legal uncertainty for businesses. Businesses have to make their assessments of their legal risks using the information that is available. This task is already very difficult when there is no unified approach of the Commission and the ECN. This becomes a daunting task if Member States have different approaches, or if only some Member States have published a position. In this last situation, the approach chosen by either the first or the largest country is likely to serve as a basis of the self-assessment of companies. In practical terms, this approach is imposed on the other Member States and, ultimately on the Commission. Given that the European competition enforcement system is a source of inspiration for many countries around the world, the approach from a minority of countries ultimately spreads way beyond the EEA borders. Conversely, our understanding of the Community method is that, on issues of common interest, it is the ECN as a whole that has to be involved, with a clear leadership of the Commission.

OUR PROPOSALS FOR AN AMBITIOUS REFORM

74. In this section, we put forward a few proposals aimed at furthering the 2004 reform. These proposals are meant to be read as avenues for discussions between all the stakeholders. Our ideas are the following:
- a. The European system of notification should be based on a robust system of voluntary notification that aligns all the parties' incentives. There is, in our opinion, no other system that would allow focusing on the relevant cases. No system of thresholds, as discussed above, can deliver this outcome. In fact, merger control has to move in the direction of the 2003 antitrust reform.
 - b. The time pressure in phase II mergers and in particular after an SO has been sent is counterproductive and contrary to the interests of all parties. We propose to alleviate this pressure to allow the time for debate post SO. We propose to give more time to parties to reply to the SO. We also propose to allow parties to submit additional analysis at any time of the procedure, against extensions. Last, parties should not have to consider remedies until the debate on the effects of the merger, on balance, has been settled. We therefore propose to postpone the remedy discussion by allowing remedy proposals even late in the process, against appropriate extensions.
 - c. The integration between the NCAs and the Commission has to be completed. First, this requires more automaticity of the one stop shopping in any case that is not obviously

only of national interest. Second, this requires that the substantive test is not only adopted formally by Member States, but also that NCAs effectively move towards an effect based analysis of mergers, which would be aligned with European law.

MOVING TOWARDS VOLUNTARY NOTIFICATION

THE NECESSITY OF A DISRUPTIVE INNOVATION

75. As explained earlier, the main issue we see with the current system is that the bulk of the notified mergers is notified at a pure loss of resources for all parties. Here, all stakeholders would agree that these mergers should not be controlled at all because it is obvious that these transactions are simply not capable to restrict competition. Yet, because no system is in place to avoid notification of these cases, they impose a large burden to businesses. They also divert large resources, both on the Commission side and for private antitrust professionals. These resources should instead be used for cases where real issues of potential harm and efficiencies emerge.
76. Even if increasing the thresholds could, but not necessarily would, decrease the number of notified mergers, it would still be unlikely to modify the share of mergers notified that are unproblematic. This is because potential harm is very poorly correlated with size. Moreover, as explained, this would create many more instances of cases notified in several Member States. Increasing the turnover thresholds would increase the number of notification in Europe as a whole and lead to more referral to the Commission. Similarly, adding a threshold of market value would not make the system more efficient.
77. Overall, these thresholds would perform equally poorly in detecting potentially problematic mergers because they are all based on figures that are poorly correlated with harm. Moreover, combining several poor indicators normally does not suffice to create a good indicator. It therefore seems to us that the Commission is arriving at a *dead end* and incremental improvements cannot be made anymore. It is therefore time for a disruptive innovation.
78. As the large number of mergers in the simplified procedure indicates, very small market shares are much better indicators, even though highly imperfect, of lack of potential harm. However, computing market shares requires to define markets and to answer, at least partly, questions of closeness of competition, geographical markets, importance of imports, etc. These are complicated matters subject to interpretation. In fact, there is very little difference between market definition and competitive assessments as far as economists are concerned. Market shares are certainly not objective enough to form the basis of an exemption from notifying a merger.
79. In the current system of simplified notifications, when the Commission disagrees with the analysis of parties regarding market definition, it reverts to the normal procedure. If parties would decide not to notify at all because of their assessment of their market shares, and the Commission decides that their market definition was flawed, they would have failed in their obligations to notify a merger. This bears entirely different consequences, including the fact that the Commission has the possibility to open an investigation potentially months after the merger has been implemented *bona fide*. It is therefore necessary to imagine a system where such *bona fide* assessment, even partly flawed, does not bear such dramatic consequences. We believe these systems exist, both in Antitrust in Europe and in merger control in other countries, and even Member States.

80. Our main benchmark for comparison is the treatment of agreements after the 2003 reform where parties self-assess their agreements. They do so using case law, guidelines and the block exemption regulations. When they assess *bona fide*, they normally get it right. Even when they get it partly wrong on a particular point, there is no penalties directly associated to this. What would make their agreement valid or void is not the validity of their legal and economic analysis. It is whether their agreement is restrictive of competition, to the detriment of consumers, or not.
81. Assume that parties of an R&D agreement self-assess that all the conditions of the BER are met, including the fact that their market shares are below 20%. Assume that the Commission's assessment would find that, due to a different market definition, the parties actually have 23% market shares. Market definition for technology markets is a challenging and sometime very speculative task. Therefore, it is very possible to arrive in good faith to slightly different market definitions.
82. The parties are in no fault by having, in good faith, believed that they benefited from the BER. Their agreement does not become void, it will just be assessed under common rules and, very likely, it will still not infringe 101(1) and, in any event, it will benefit from exemption under 101(3). The likelihood that an R&D agreement is, on balance, harmful to consumers when parties have less than 20% markets shares is approximately null. It is also close to zero when they have market shares just above the threshold. Therefore, the likelihood of an infringement and, ultimately, a fine are very limited. The Commission is unlikely to enter into an in depth assessment of such a case. The system therefore concentrates on the only matter of relevance. It gives maximum freedom to parties to enter in *bona fide* agreements and for the Commission to intervene when it deems it necessary.
83. We believe that such a system is possible in the merger area. This system is based on voluntary notification. We are aware that such systems exist in other jurisdictions, like the UK or Australia. As a matter of comparison with the European system described earlier, out of the 107 phase I decisions made in the last two financial years by the UK CMA, only 66, i.e. 62%, were unconditional clearance. It is difficult to compare different antitrust authorities that operate in different contexts. However, in terms of order of magnitudes, the current UK system seems to operate a much better filtering *ex ante*. In particular, this filtering is even better than the one done in Europe, excluding the simplified mergers (as we have seen a maximum of 65 problematic cases out of the 232 normal notifications, i.e. 72% of unproblematic cases).

IMPLEMENTATION

84. The context in the UK is different from the European context, at least historically. Instead of proposing a mere transposition of the UK system to Europe, our goal is therefore to foster a discussion on the design of a system that is adjusted to the European reality. Overall, our proposal is very different from the current system in place in the UK. In our proposed procedure, merging parties still have to come forwards and publicly on their intentions to merge. However, the Commission has a limited period to intervene. Last, there is no formalistic jurisdictional threshold in our system, as there is also no formalistic jurisdictional threshold in Antitrust or in State Aid.
85. We intend to maintain some advantages of the current European system, which we find particularly important. The first one is the necessity of legal certainty. Undoing a merger is a

very costly process that would generate incredible losses¹⁷ Therefore businesses need to know when implementing the merger is safe, and this decision has to be irrevocable (unless of course information has been hidden or manipulated).

86. Second, and this is the second side of the same coin, the current system ensures that the Commission is aware of a transaction in the time frame that allows it to intervene. More generally, the notification system allows the Commission to inform competitors, suppliers and customers of a concentration in their markets, through the sending of early request of information to third parties. This raises awareness of stakeholders at a time when a complaint can be heard.
87. We will be, in our proposal, particularly careful to protect these two important features of the current system. It has to be emphasized again that our proposal is certainly not a final product. It should certainly be amended and precise implementation has to be designed. Yet, we wish to launch the debate.
88. We believe it is best for the understanding of our approach to compare our proposal to the current ECMR, at least as far as the articles are concerned.
89. The current Article 1 defines the scope of the regulation. The main goal of this article is to define which mergers have to be notified to the Commission, both to ensure territoriality and to limit the number of notifications. The cost of this system is not only that it triggers too many notifications, but also that it potentially misses problematic concentrations that potentially affect trade between Member States.
90. We propose to repeal Article 1 entirely. Once the first purpose of the turnover threshold becomes irrelevant because notification is voluntary, we also find it unnecessary to define a threshold for jurisdictional purposes. Territoriality relies on well-established principles of public international law. As explained by AG Wahl in its Intel Opinion, territoriality is an effects concept:¹⁸

“In fact, several Advocates General have already advised the Court to adopt an effects-based approach to jurisdiction in the field of competition law. The Court has not, to date, either endorsed or expressly rejected that approach.

Against that background, I believe that the Court should explicitly address that issue here and, in line with what has been suggested by the Advocates General mentioned in the previous point, adopt an effects-based approach to the application of Articles 101 and 102 TFEU.

Whether such an approach is anchored in a (broad) concept of territoriality, or instead involves some extra territorial application of the EU rules is not determinative. What is crucial is that, under certain conditions, effects is a jurisdictional criterion which, as concerns this kind of legislation, is generally acceptable under the rules of public international law and has been embraced by many jurisdictions worldwide. Indeed, many legal scholars take the view that any controversy regarding its acceptability is something that, by now, belongs to the past.”

¹⁷ Some agreements like non-full function production agreements and R&D agreements can also be very costly to undo. However, agreements are still generally seen as easier to undo than mergers.

¹⁸ Advocate General Wahl's opinion in case C-413/14 P, Intel vs. Commission, paragraphs 295 to 297.

91. In the same way as any agreement or abuse of dominance that affects trade between Member States falls within the Commission's competencies, the scope of the regulations should be any concentration that affects trade between Member States. There is ample case law that defines what markets are significant parts of the internal market and there is no need for a threshold.¹⁹ There is no automatic threshold for the community dimension in other tools of competition enforcement deriving from Articles 101 to 109 TFEU. There are no jurisdictional thresholds in Article 1 of Regulation 1/2003. We therefore propose to abolish this peculiarity of merger control.
92. As turnover thresholds are abandoned, there is no necessity for Article 5, which should simply be abandoned.
93. Article 2 and 3 would remain unchanged, and the core of our reform would concern Article 4. We will deal in the next section with the issues of the referral and the one-stop shopping. We therefore focus here on the procedure of voluntary notification.
94. Notification would still be allowed in our proposed system. Such notification would follow exactly the path of the current ECMR. There would however be a notification fee associated with a notification, to give proper incentives not to notify to parties who self-assessed and concluded that their notification was unproblematic. For consistency reasons, this fee would be payable following any decision under what is currently Article 6, in particular Article 6(1)a and 6(1)b. This notification could be proportional to the market value of the merger. It is unlikely that SMEs would notify mergers of community dimensions, but the fee could be waived for these firms nevertheless.
95. However, notification would not be required. Yet, to ensure the publicity of the process:
 - a. Parties will need to inform their largest (for instance 20) customers and suppliers for each product category of their project of acquisition. They would also be required to publish an announcement in the press and on their website.
 - b. Parties of a concentration would need to file an electronic information sheet to the Commission. This information sheet would contain only information readily available about the parent companies and the concentration, and would be similar to the Hart-Scott-Rodino form and their attachments. They will also submit a sworn statement that they complied with condition a.

¹⁹ Moreover, turnover thresholds do not necessarily ensure community jurisdiction either. If a concentration that meets the thresholds only creates concerns on, for instance, an outmost region or a small Greek island, there seems to be a legal debate on whether the Commission has jurisdiction to remedy these concerns. As already mentioned, the current system of notification imposes the notification of JVs even when they will operate solely far away from Europe. Our proposed system will allow to direct the notification to the relevant Member State in the first example and to avoid any notification at all in the second case.

96. Pursuant to this step, the Commission will have 30 working days to decide whether to enter or not into an information gathering exercise.²⁰ If the Commission decides to do so, it will benefit from all the possibilities to request information already contained in the current ECMR, in particular Articles 11 to 15 (including imposing time limits to the requests, stopping the clock and imposing fines).
97. At the end of this period of 30 days, the Commission could decide to take no action. If the Commission takes no action within this time limit, parties are free to close the deal and there will be no other legal basis for the Commission to challenge the acquisition (unless misleading or wrong information has been provided).
98. The Commission could as well decide to open proceedings, under what is currently an Article 6(1)c decision, therefore entering directly in phase II. This would also automatically trigger the payment of the notification fee. The rest of the procedure would follow as if the merger had been notified.
99. Because there is a limited period when the Commission can intervene, it is unlikely that any business would take any measure of implementation before the end of this period. Yet, in case it would, the new regulation would allow the Commission to make interim order (e.g. for instance prohibiting the integration of the merging business), in its decision to open proceedings. These orders would remain in place during the investigation. In any case, the Commission could require that the integration is undone. In case some critical information has been disclosed during the interim implementation of the merger, the Commission could additionally open a 101 infringement.
100. Last, the Commission would update its guidelines in light of this new regulation to provide safe harbours and, conversely, set out criterion where it would recommend notification.
101. In our sense, this system aligns the interests of all parties. First, parties to non-problematic mergers would not need to notify and would get the incentive not to do so due to the notification fee. The level should be appropriate to ensure this objective and yet not impose a disproportionate burden on companies. The example of the UK could serve as a basis.
102. Second, parties of a problematic merger would lose the possibility of a phase I clearance, in particular with remedies. They therefore have all incentives to continue engaging with the Commission as early as possible, as they do today. This is all the more true that a problematic merger is unlikely to be unnoticed due to the obligations of publicity.
103. Third, the system also disciplines the Commission. If deciding to open proceedings, the Commission has to do so with a decision. Parties will have the possibility, inter alia, to challenge this decision, either on territoriality or on any other grounds of procedure or substance.
104. The goal of our reform is certainly not to hamper the capacity of the Commission to bring cases against anticompetitive mergers. Therefore, our proposal should open a debate on the most appropriate way to ensure that (i) the burden for most parties is drastically reduced (II)

²⁰ The length of this period should be the topic of a wide debate and consensus. We take 30 days as a reference as this is the typical HSR waiting period in the USA. Moreover, the current phase I procedure in the Commission is of a comparable 25 working days.

the commission is not required to draft a decision to clear the way for the implementation of a merger.

105. We assume that it should be possible for the Commission to request the necessary information in the timing we propose, possibly by the mean of a decision stopping the clock. However, if this was seen as legally too risky, one could imagine extending the 30 days period of, for instance 10 to 15 working days, in case the Commission issues one Article 11(2) request. If the parties have not complied with a Commission request within this time frame, our understanding is that this would form the legal basis for an Article 11(3) decision that would suspend the 30 days period (pursuant to Article 10(4)).
106. This approach is preferable to allowing the Commission to request a notification. First, once the Commission requested a notification, it has to take a positive decision in case it does not wish to oppose the merger. Second, parties who are requested to notify will enjoy all the possibilities of firms who voluntarily notify, including the opportunity to offer phase I remedies. This unambiguously reduces the incentives to voluntarily notify. Paradoxically, giving the Commission the possibility to request notification does not balance the system but rather destabilizes it.

GIVING TIME FOR THE DEBATE POST SO

107. It is our experience that a phase II investigation takes place under very intense time pressure, in particular after an SO has been issued. This time pressure is sometimes contrary to the interest of all parties. This is the reason why extensions are often asked for and warranted, which rarely fully remedies the issues created by deadlines not favourable to a serene and thorough debate.
108. We fully understand that the duration of merger review is a very significant burden on companies. However, the current duration of a phase II investigation is rather limited also in comparison to other jurisdictions. Even simply complying with a second request in the USA can take well beyond six months. And this does not take into account the following court and administrative proceedings that would add at least a year to the merger proceedings.
109. The Statement of Objection is, in EU proceedings, the central document in which the Commission articulates its concerns. It is not uncommon nowadays that merger SOs compare, in length and complexity, to antitrust SOs. This document should not be where discussion ends. It should be when discussion starts and the SO should be the basis of an open discussion on the potential harm of a merger.
110. It is in practice impossible for parties to articulate their defence before they review the SO. Challenging the Commission's framework, and then converging to a commonly agreed framework for analysing the possible harm of the merger, is also a prerequisite for assessing whether efficiencies are sufficient or not. It is only once the effect of a merger on balance has been properly assessed that parties should contemplate whether they would want to propose remedies.
111. In the current proceedings, the first two steps are meant to happen within two weeks and there are also very tight deadlines for remedies discussions. During the two weeks, the parties have to reply to the SO, they have to review hundreds of pages of evidence, integrate the Commission's framework, challenge it, propose a new one and balance the efficiencies. In complex cases, economists can spend more than one week just in a data room analysing data. Then, once the reply has been filed, parties and the Commission have to prepare a

hearing and the Commission has to assess the reply and implement, if necessary, any of its internal checks and balances before starting any procedural steps that would enable it to take a decision. Time pressure on all parts of the proceedings is increasing over time and it is at maximum when the most important points need to be discussed. It has, for instance, become exceptional, if not impossible, to hold meetings between economists post-SO in merger cases.

112. For this reason, in practice, parties have to second guess what the Commission's concerns could be from the 6(1)c, or even third guess it from their earlier informal discussions. They have to try to balance their efficiencies against this preliminary background and also design remedies in parallel. Moreover, they have, at most, a single opportunity to reply to the Commission and, broadly, one shot to propose suitable remedies.
113. In other words, to use a bowling metaphor, the parties have to hit a strike and they have seconds to do so. This raises two issues. The most obvious one is that replying to a complex SO is a daunting task in such a time frame, especially if, in parallel one has to design remedies. However, we see the fact that parties have no right of a spare as being also a problem.
114. Post SO, the Commission has expressed concerns and cannot clear a merger unless these concerns are waived. Even not taking into account the timing for a reply, this is very difficult for parties to dispel all the doubts in one single submission. In case the Commission has put forward some economic or econometric modelling, parties will normally also reply with some economic or econometric modelling. This exercise will be based on assumptions. The parties' advisors will try to ensure robustness of their conclusions. However, it is possible, it is even likely, that assumptions are debatable, that other modelling choices could be discussed, etc. In other words, a single submission is normally not sufficient and agreeing on economic evidence, or even agreeing to disagree on some points, requires an open debate.
115. The current procedure ensures that the parties have a right to be heard. This is certainly crucial. This is yet very different from having the right to open a debate.
116. We believe that the procedure should be reformed in a way that would allow having such a debate.
117. We first are not entirely clear why parties should have a very tight deadline to reply to an SO, or even any deadline at all. This is all the more true that, formally, parties could withdraw their notification and start over the next day. Strict deadlines should be imposed to the parties to proceedings who might, otherwise, have a strategic interest in delaying these proceedings. This for instance justifies strict, even though less tight, deadlines for parties to respond to requests and SOs in Antitrust. However, contrary to Antitrust, the clock is playing against parties in merger proceedings. Deadlines, sometimes also very tight, imposed on the Commission are a reflection of this reality. However, if parties believe they need time to fully take into account the Commission's argument and address them, they should probably be given this opportunity. Moreover, there is no one size fit all. Some SOs bring forward very novel theories of harm on markets that have not yet emerged. Others are simpler. This should be reflected in the time parties are given to reply.
118. Having no deadline at all could be disruptive to the process. Moreover, adding the same amount of time to reply to an SO for all mergers might push the deadline too far in some cases and, yet, be too short in others. However, we believe that it could be possible to be more flexible and, for instance, agree upfront on the duration to reply to the SO just after the

SO has been issued, or, for instance, during the state of play meeting. It is our understanding that, in the US proceedings, there exist such discussions on the delays to respond to a second request.

119. Moreover, we also believe that, if parties want to bring new evidence or adjust their economic submissions after they have replied to the SO, for instance after a meeting with the Commission's case team, they should be allowed to do so in a manner that allows the Commission to assess their submission. This could be done by granting an extension in case of submission of arguments after the reply to the SO.
120. Last, we also believe that the remedy discussion should be postponed to the moment where the debate on the effect of the merger, on balance, has settled. There should be no penalty for late remedy proposals and the procedure should not give parties the incentive to propose remedies before the effects of the merger has been fully assessed. Parties should not have to make the choice between discussing the Commission's assessment of effects of the merger and proposing remedies. They should also be allowed to adjust the scale and scope of remedies. Therefore, we would argue that parties should be able to propose as many remedies as they wish at the time that suits them. However, any remedy proposal should automatically grant an extension of, for instance, 10 working days.

NEXT STEPS OF INTEGRATION BETWEEN NCAs AND THE COMMISSION

ONE STOP SHOPPING

121. We welcome the Commission's proposal to simplify the direct notifications of cases of European dimension to the Commission. Moreover, if the Commission fears a phenomenon of forum shopping, it should indeed try to address it.
122. We would invite the Commission to go even further in its proposal. As discussed earlier, unless the nexus is in one Member State only and the merger does not affect the internal market, it is a case of European dimension. In case a merger affects the trade between Member States and there is a disagreement, between various competition authorities, or between the merging parties and an NCA, the NCA asking for referral should have the burden to prove that it is better placed to treat the case in its national, but also European, dimension.
123. As we have already mentioned, turnover thresholds are poor indicators of competitive harm, but good indicators of territoriality. Therefore, unless an overwhelming share of the sales of both merging parties is made within one Member State, there should be a presumption that the nexus is significantly spread between at least two jurisdictions and should be subject to the Commission's scrutiny.
124. One could think to apply the existing two-third threshold, or a higher one. Crossing this threshold should not, however give rise to a presumption that a NCA is necessarily better placed. If one of the merging parties is active in France and in Belgium and has two thirds of its sales in France, it is likely to be a stronger player in Belgium than in France, by the virtue of the relative size of the markets.
125. The implementation of the system would be as follows. If parties self-assess and conclude that the merger should be subject to Commission's scrutiny, they will send the simplified electronic information sheet described in the previous section to the Commission. This will waive any obligation to notify the merger at national level. The information sheet will feed a secured database that will be accessible to the ECN members. In case an NCA requests the

referral of a particular case, it will have to send a reasoned request within a limited time frame such as 15 working days, for example. The Commission might or might not accept this referral. It might also decide to issue guidance about cases where it is more or less likely to accept such a referral.

126. In case the merging parties self-assess that a particular case should be subject to the scrutiny of a particular Member State, they should use the national notification procedure. However, to avoid the forum shopping mentioned by the Commission, parties will also have to file the electronic information sheet, to either the NCA in question or the European Commission. This will feed into the database and will allow for cross checking that the same operation is not notified in several Member States.
127. If the Commission assesses that one or several notified mergers at national level should be within its jurisdiction, it would have to possibility to inform within 15 working days the Member States of its intentions to look at the matter. It would then apply the procedure described below for any non-notified merger of European interest. At any point in time, the Commission could take a positive decision to send the case back to the original NCA where it was notified. After 30 working days of information gathering, it could either take no action, paving the way for the implementation of the merger, or open proceeding, entering directly in what is now a phase II investigation.
128. Therefore, by slicing the merger into smaller mergers notified at national level, or by notifying mergers of obvious European dimension to one NCA, or several NCAs, instead of the Commission, parties would lose the possibility of a phase I clearance, including with remedies.
129. Parties slicing or staggering mergers would also run the risk of seeing several operations requalified as one concentration within the meaning of EU law. We understand that the Commission already has this power under Article 5(2)(2) and mentions the issue of the implementation when a merger has been notified in a Member State.²¹ The reform would be an opportunity to clarify not only that the Commission can qualify as one concentration several operations within a two year period, but also in different jurisdictions. We also understand that the Commission is reflecting on the proper standard to use.

EFFECTIVELY ALIGNING SUBSTANTIVE TESTS AND THE RIGHTS OF DEFENCE

130. The Commission does not make any concrete proposals to foster convergence of the legal tests. It does not mention the rights of defence as an issue. We would propose, first, that the Commission ensures that there is a systematic right for a data room after each prohibition decision. This is a necessity condition to properly analyse the soundness of the assessment of economic evidence in the decision and to contemplate the possibility of an appeal.
131. We suggest that the Commission could also use all its soft law powers and act as a primus inter pares to NCAs and national court systems when it appears that their legal standards and the rights of defence differ from its own practice.
132. The Commission could also assess in an open manner the way each and every Member State effectively implements the new substantive test, and launch a public consultation on the results of its assessment.

²¹

See section 5.2.5 of the SWD.

133. On this basis, it could make bilateral or multilateral contacts to foster convergence in legal tests and ensure the right for a fair trial throughout Europe. It could also envisage using more often its powers to issue *amicus curiae* in cases. Last, the correct implementations of the SIEC tests and the rights of defence may be used in the decisions to accept or reject a request for referral from a Member State. We would argue that the Commission should not delegate its power to control acquisitions of European interest to national legal systems in case it arrived to the conclusion that they effectively use a different legal test and have a lower standard for the rights of defence, especially regarding the treatment of economic evidence.