

Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

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I. Introduction

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,^[1] the Implementing Regulation,^[2] and the Commission Notice on simplified procedure;^[3]
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

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

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

Allen & Overy LLP

*Your full name

Pieter Huizing

*Email address

Pieter.Huizing@allenoverly.com

* Organisation represented

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

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

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

- YES
- NO

*1.1.2 How many employees does your company have?

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

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

We are one of the leading antitrust and competition practices in the world and one of only a few firms that can offer truly global competition and antitrust representation. Our team consists of more than 100 specialists working across Asia, Australia, Europe and North America with deep coverage in all four continents. Highly regarded, we are ranked as a Global Elite firm in the Global Competition Review 'GCR 100'. We advise clients on merger control, antitrust policies, litigation and regulatory strategies and have acted on some of the most high-profile and complex cases in recent years.

*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.

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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:

* 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

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.

We consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses. However, we believe that there are various improvements that can be made to the simplified procedure, as set out in this response.

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

The treatment of this category of merger cases under the simplified procedure rather than the normal procedure has contributed to reducing the burden on companies. However, we do not believe that the 2013 Simplification Package has contributed to reducing the burden of notifying this category of merger cases. Moreover, we believe that there is scope for further simplification as indicated below.

(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

The treatment of this category of merger cases under the simplified procedure rather than the normal procedure has contributed to reducing the burden on companies. However, the 2013 Simplification Package may have increased the burden of notifying transactions falling under point 5c of the Notice due to the introduction of a requirement to provide internal documents under Section 5.3. Moreover, we believe that there is scope for further simplification as indicated below.

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

- YES
- NO
- OTHER

Please explain

The treatment of this category of merger cases under the simplified procedure rather than the normal procedure has contributed to reducing the burden on companies. The 2013 Simplification Package contributed to reducing the burden by excluding overlaps between the JV parents from creating “reportable markets”, but at the same time it increased the burden by introducing an internal documents requirement for JVs with limited overlaps between a JV and one or more parents. We believe that the burden of notifying should actually be removed for this category of transactions as indicated below.

(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

The treatment of this category of merger cases under the simplified procedure rather than the normal procedure has contributed to reducing the burden on companies. However, we believe that the burden of notifying should actually be removed or at least simplified further for this category of transactions as indicated below.

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.

(ii) Post notification:

- YES
- NO

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

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

- YES
- NO

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

We have been involved in several cases (falling under various categories) that we considered to be eligible for the simplified procedure but where the parties nevertheless decided to notify under the normal procedure because (i) there was no 100% certainty that the Commission would agree that the transaction technically fell within the scope of the simplified procedure and (ii) the parties wanted to avoid potential delays being incurred should the Commission require a normal filing following a filing under the simplified procedure. In this respect, we would welcome more discretion for the Commission to agree to a simplified filing even where technically there may be doubts as to whether or not the normal procedure should apply.

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

Based on our experience, we consider that the following types of cases are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure:

a. cases where there is a vertical relationship and one party has a market share exceeding 30% while the other party only has a de minimis market share, meaning that there will be no risk of foreclosure. For such cases, the Commission might consider introducing a threshold similar to that contained in point 6 of the simplified procedure notice, whereby the higher the market share on one market, the lower the market share must be on the other to satisfy the criteria for simplified treatment; and

b. cases where there is a vertical relationship and where the 30% market share threshold is exceeded because the downstream market is local (eg local retail markets) even though the market share on the purchasing market is limited. The Commission might consider introducing a threshold that focuses on the share of the purchasing market, not the downstream supply market, as done in the vertical block exemption.

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.

Given that such transactions will not have any appreciable impact on competition in the EEA, imposing a mandatory notification requirement is disproportionate. As also mentioned in our responses to the 2013 and 2014 consultations on the Commission proposals and White Paper Towards more effective EU merger control, we believe that full-function joint ventures located and operating outside the EEA and without any effects on EEA markets should not be caught by the notification requirement.

We also believe it is important for the Commission to remove the requirement under the EUMR to notify joint ventures which have no nexus to the EEA in view of the Commission's advocacy position towards other (developing) merger control regimes that for a large part are designed on the basis of the EUMR.

We believe that the burden to notify the transactions with an EU dimension falling under point 5a of the Notice should be removed throughout the EEA by considering such transactions as automatically compatible with the internal market. These transactions can then be exempted from the notification requirement and standstill obligation under the EUMR, while still giving companies the benefit of the one stop shop for transactions with an EU dimension by avoiding national filings.

- Transactions falling under point 5b of the Notice:

- YES
- NO

Please explain.

Given that such transactions will hardly ever give rise to competition concerns, imposing a mandatory notification requirement is disproportionate. It is very exceptional for transactions to give rise to competition concerns on the basis of potential competition or activities in closely related neighbouring markets. The likelihood of such concerns is too limited to justify the burden of having to notify transactions without any horizontal or vertical links.

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

YES

NO

Please explain.

Given that such transactions are very unlikely to give rise to competition concerns, imposing a mandatory notification obligation with substantial information requirements is disproportionate. In particular, the need to provide internal documents as well as market shares and other market information creates a disproportionate burden on companies.

- Transactions falling under point 5d of the Notice:

YES

NO

Please explain.

We believe that it is disproportionate to impose a mandatory notification obligation (with substantial information requirements) for such transactions. The assessment of an acquisition of joint control already includes an examination of the competitive effects that may result from the ability for a jointly controlling parent to influence the commercial behaviour of the joint venture. The change from joint to sole control rarely gives rise to competition concerns.

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

The 2013 Simplification Package in some respects contributed to the reduction of costs, in particular by bringing a greater proportion of cases under the simplified procedure and by clarifying that mere overlaps between the JV parents do not give rise to “reportable markets”. However, the Simplification Package also had the effect of increasing costs for transactions with reportable markets as it introduced an onerous obligation to provide internal documents (Section 5.3). Overall, we believe that the Simplification Package can be further improved to reduce the costs incurred by businesses when notifying the cases that fall under the simplified procedure.

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.

Yes, given that competition concerns are very unlikely to arise in relation to the categories of cases falling under points 5a, 5b and 5d of the Notice, we believe that the current mandatory notification requirement is not justified. Instead, these cases should be exempted from the obligation of prior notification to the Commission and from the standstill obligation. In designing the appropriate framework for exemption, two aspects are crucial:

(i) the exemption of transactions with an EU dimension should not result in potential national merger control filings in the EEA; and

(ii) there needs to be some form of deemed clearance so that there is no legal uncertainty as to the status of transactions that have an EU dimension but that were not notified because of the 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.

For those categories of cases falling under points 5c and 6 of the Notice, we believe that it would be appropriate to replace the current Short Form CO with a lighter, initial short information notice. Competition concerns are very unlikely to arise in relation to these categories of cases. Still, an exemption from notification may not be appropriate as this would effectively result in a market share filing threshold. Making merger filings subject to a market share threshold creates greater legal uncertainty, as market definitions can be subjective and market shares can be calculated in different ways. We therefore believe that a short information notice is more appropriate than an exemption from filing. It is important that the information notice does not require the provision of detailed market share data or internal documents but only basic information on the parties and the transaction. This will reduce the burden on companies, while allowing the Commission to identify the cases for which further examination is warranted. Such further examination should only be required in exceptional and justified circumstances.

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

- YES
- NO

Please explain.

A self-assessment system is successfully applied in the UK (and other countries). We therefore believe that it might be worthwhile further investigating whether such a system would be appropriate for certain types of cases. However, we believe that there are some important aspects of a self-assessment system that should be taken into account:

1. as also confirmed by Commissioner Vestager in her speech on 10 March 2016, a fundamental principle of EU merger control is that there should be no doubt whether you need to notify a particular merger. In this respect, applying simple filing thresholds and exemptions will create greater legal certainty than a self-assessment system;

2. a self-assessment system generally works best if it is easy for companies to conduct the assessment. It may be difficult for companies to assess the potential competitive effects of a transaction;

3. a self-assessment system may decrease deal certainty where there is no clarity on the need for a filing and prior clearance, and it may lead to disagreement between purchasers and sellers on whether or not the transaction should be notified;

4. companies should not be liable to penalties if they did not notify a transaction on the basis of a self-assessment conducted in good faith;

5. the system should ensure that transactions with an EU dimension will not be subject to national filings in the EEA, even where companies decide not to file on the basis of a self-assessment; and

6. the self-assessment system in the UK works well in part because of the proactive approach of the CMA's merger unit in bringing in relevant transactions. To achieve a similar effectiveness, we expect that substantial organizational changes may need to be made at DG COMP.

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.

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

In line with our response to question 6 above, we believe that the creation of extra-EEA joint ventures will not have any appreciable impact on competition in the EEA. Accordingly, the application of the mandatory notification requirement in such cases has been disproportionate and has not contributed to the protection of competition and consumers in Europe. Instead, it has created unnecessary costs for businesses and implementation delays. We believe that the same is true for the joint acquisition of control over pre-existing extra-EEA joint ventures.

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

While the one stop shop review has avoided potential review by one or more authorities at the national level, we believe that the creation of extra-EEA joint ventures should not be subject to any notification requirements in Europe, neither at EU level nor at the national level.

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

As we believe that the creation of extra-EEA joint ventures will not have any appreciable impact on competition in the EEA so that no EU review is required, we find the costs incurred by businesses when notifying extra-EEA joint ventures to be disproportionate.

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

The creation of extra-EEA joint ventures was already subject to the simplified procedure prior to the 2013 Simplification Package. Still, the Simplification Package may to some extent have contributed to the reduction of costs, in particular by clarifying that mere overlaps between the JV parents do not give rise to "reportable markets".

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.

As mentioned above, we believe that the creation of extra-EEA joint ventures and joint acquisition of control over pre-existing extra-EEA joint ventures should not be subject to any notification requirements in Europe, neither at EU level nor at the national level. To remove the burden to notify such transactions, we believe that these transactions should be exempted from the notification requirement and standstill obligation under the EUMR. However, they should still be caught by the EUMR as a transaction with an EU dimension (assuming the thresholds are met) so that national filings in the EEA are excluded.

(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.

As explained above, we believe that the creation of extra-EEA joint ventures should be exempted from the notification requirement and standstill obligation under the EUMR. However, they should still be caught by the EUMR as a transaction with an EU dimension (assuming the thresholds are met) so that national filings in the EEA are excluded.

(iii) Other.

Please explain.

IV.2. Jurisdictional thresholds

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

Article 1 of the Merger Regulation

Scope

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

2. A concentration has a Union dimension where:

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

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

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

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

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

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

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

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

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

4. [...]

5. [...]

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

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

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

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

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

- YES
- NO
- OTHER

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

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

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

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

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

In addition to Facebook / WhatsApp, we are aware of several transactions in the digital economy that were competitively significant and had a cross-border effect in the EEA but which did not meet the EUMR filing thresholds (eg Google / DoubleClick (COMP/M.4731), Cisco / Tandberg (COMP/M.5669), Nokia / Navteq (COMP/M.4942) and Google / Waze (examined by the OFT)). However, such transactions were generally still reviewed by the Commission after referral, or were subject to merger review in the EEA by one or more authorities at the national level. We are not aware of any cross-border transactions in the digital economy that were potentially problematic but still escaped any merger review in the EEA.

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.

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

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

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

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

We note that while there have been transactions in the pharmaceutical sector that were competitively significant and had a cross-border effect in the EEA but which did not meet the EUMR filing thresholds, such transactions were generally still reviewed by the Commission after referral, or were subject to merger review in the EEA by one or more authorities at the national level. We are not aware of any cross-border transactions in the pharmaceutical sector that were potentially problematic but still escaped any merger review in the EEA.

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.

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

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

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

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

We note that while there have been transactions in other sectors that were competitively significant and had a cross-border effect in the EEA but which did not meet the EUMR filing thresholds, such transactions were generally still reviewed by the Commission after referral, or were subject to merger review in the EEA by one or more authorities at the national level. We are not aware of any cross-border transactions that were potentially problematic but still escaped any merger review in the EEA.

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.

As a preliminary point, we believe that capturing “all competitively significant transactions having a cross-border effect in the EEA” should not be a goal in itself, certainly not capturing all such transactions directly at the EU level. The EU merger control regime is a process aimed at preventing transactions that are problematic from a competition perspective while limiting the administrative burden on companies as much as possible. The statistics already show that the vast majority of notified cases are unproblematic. It is important to maintain an appropriate balance between capturing any potentially problematic transactions and avoiding undue burdens on businesses. The Commission should therefore not pursue a system that is 100% watertight where this would create disproportionate filing requirements.

Whereas certain transactions with a cross-border effect in the EEA may not be captured directly at the EU level, we still consider the competition law objections of merger control in the EEA to be sufficiently safeguarded by:

1. the referral system, especially after making the proposed changes to this system;
2. the possibility of merger review by one or more authorities at the national level for transactions that fail to meet the EUMR filing thresholds; and
3. the Commission’s residual powers under Articles 101 and 102 TFEU to intervene in certain cases where transactions that escaped merger review give rise to actual anticompetitive practices.

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

- YES
- NO
- OTHER

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

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

First, as also explained in response to question 17 above, we do not believe that “Ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level” should be a goal in itself. Rather, there should be an appropriate balance, both (i) between review at EU level and the national level and (ii) between capturing any potentially problematic transactions and avoiding undue burdens on businesses.

Second, as noted by Commissioner Vestager in her speech on 10 March this year, a fundamental principle of EU merger control is that there should be no doubt whether you need to notify a particular merger. For the effectiveness and the proportionality of the EUMR it is crucial that legal certainty exists as to which transactions are subject to the notification requirement and standstill obligation. We notice that for many companies the current EUMR filing thresholds are already quite complex. We therefore believe that these thresholds should only be complicated further if there is a very convincing case for capturing additional transactions.

As mentioned above, we are not aware of any cases with cross-border effects in the EEA that were potentially problematic but that still escaped merger review at both the EU and national level in the EEA. Unless the Commission can point to a sufficient number of actual cases that did escape merger review while giving rise to potential concerns, we believe that it is not justified to further complicate the thresholds by introducing additional criteria.

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.

Please see our responses to question 17 and 18 above.

In addition, we believe that the introduction of a deal size threshold creates two fundamental issues: (i) inevitable legal uncertainty given that the consideration is often not agreed until the last moment of negotiations and considerations can be structured in different and complex ways; and (ii) the difficulty of precisely establishing the relevant “EU-nexus”.

We believe that any attempt to resolve these issues will require a significant complication of the filing thresholds, hence increasing the burden on companies and the Commission. Under the HSR merger regime in the US, additional criteria and rules are applied to address the various issues created by a deal size threshold. The HSR regime also has filing exemptions based on minimum turnover and asset values of the target to ensure sufficient US-nexus. This demonstrates that the introduction of a deal size threshold necessarily requires the introduction of various additional rules that add to the complexity of a merger regime. We do not believe that such a complication of the EUMR is justified unless the Commission can make a convincing case on the basis of actual, problematic cases that escaped any merger review in the EEA.

Still, if the Commission is intent on bringing additional transactions under its review, we would favour a system in which a deal size threshold enables the Commission to examine only those transactions that would otherwise be reviewed at the national level by one or more authorities in the EEA. Such a system has the benefit of maintaining the current, less complicated filing thresholds, while giving the Commission the opportunity to review certain cases at the EU level that would otherwise only be assessed by one or a few authorities at the national level. Such a system would need to be subject to safeguards preventing undue delays and limiting the time during which the Commission may decide to examine a case at the EU level.

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.

While we do not see a convincing case for introducing a deal size threshold, we note that if such a threshold were to be introduced, it should be set at a very high level.

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.

While we do not see a convincing case for introducing a deal size threshold, we would like to note that any complementary thresholds based on whether a transaction is "likely to produce a measurable impact within the EEA" and/or industry specific criteria seem unlikely to be workable in practice, may quickly become outdated and will in any event significantly complicate the filing assessment for companies.

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

- YES
- NO
- OTHER

Please explain your answer.

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.

While we believe that the current case referral mechanism contributes to allocating merger cases to the more appropriate competition authority, we support some of the proposed changes to the system as explained below.

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.

As explained in our responses to the 2013 and 2014 consultations on the Commission proposals and White Paper Towards more effective EU merger control, we agree with the proposed changes to the referral system. In particular:

1. eliminating the requirement to file a Form RS for an Article 4(5) referral removes duplication and should result in a quicker process;
2. we agree that in order to remove the risk of an inefficient patchwork of competences which can currently arise in Article 22 cases the Commission should have jurisdiction over the whole EEA once it chooses to accept the referral. This will also decrease the administrative burden on parties in that they only have to deal with one authority and increase legal certainty by reducing the risk of diverging decisions; and
3. we support the proposal to remove any perceived element of self-incrimination in the Article 4(4) process by amending the substantive test in Article 4(4).

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.

We submit that there is much room for improvement with regard to the merger review of transactions that are the result of a divestment remedy imposed by the Commission. Currently, such transactions may first be vetted by the Commission as part of the "suitable purchaser" assessment and may then fall within the scope of national rather than EU merger review so that a Form RS and subsequent notification is required to have the Commission review and clear the transaction.

On the basis of previous experience, we believe that there should be a one stop shop and single review round with regard to these transactions. The Commission is best placed to conduct this review given that these mergers result from divestment remedies attached to Commission decisions.

We consider that the following changes to the EUMR would avoid duplicating work and would allow for much more efficient review of these types of transactions:

1. give the Commission exclusive jurisdiction over transactions that result from a divestment remedy imposed by the Commission, where such transactions would otherwise be subject to merger review by at least one authority in the EEA;
2. exempt these transactions from the notification obligation; and
3. allow the Commission to conduct a full-fledged merger review of these transactions as part of the "suitable purchaser" assessment.

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?

We consider that there is currently scope to improve the EU merger control system. However, we do not agree with all of the proposals set out above. In particular:

1. we do not support the proposal to introduce additional flexibility regarding the investigation time limits, in particular in Phase II merger cases. We believe that having a fixed end date for EU merger review contributes to legal certainty and facilitates transaction planning. It also ensures that all parties are committed to ensure the merger review takes place in an efficient and timely manner. Even where further extensions are subject to the consent of the notifying parties, we see a risk that this consent in practice will always be given if the Commission indicates that it needs more time to clear the transaction; and

2. we support the proposal to modify Article 8(4) of the EUMR 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. However, it is established practice that any merger control remedies should be targeted at solving the competition concerns identified. We consider that allowing the Commission to enforce full divestiture takes the Commission's margin of discretion in constructing appropriate remedies too far. The Commission should only be given the power to require a divestment down to a level, short of full divestment, that alleviates the competition concerns.

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?

Yes, we believe that the following shortcomings of a technical nature could be resolved through revision of the EUMR:

1. We see scope for making the pre-notification procedure more efficient and more useful by making sure that Commission questionnaires contain a limited number of questions that focus on the substantive issues at an early stage. In our experience, the pre-notification stage may take longer than necessary because of repetitive questions or questionnaires that initially only focus on minor, formalistic points rather than the real issues of the case. We believe that this can be addressed by limiting the number of questions asked during pre-notification.

2. We believe that the way in which the Commission engages with third parties during a merger investigation can also be improved. In our experience, very long questionnaires may be used to obtain the views of customers and competitors. This may contribute to a bias towards the views of complainants, because the greater the burden on companies to respond to

Commission questionnaires, the more likely it is that companies with positive or neutral views do not make the effort to engage fully. Also, we note that questionnaires sometimes contain leading questions, and sometimes only allow for a “yes” or “no” answer, hence not leaving room for more nuanced opinions. To address these issues, it may be useful for the Commission to consider alternative ways of engaging with customers and competitors, for example by conducting interviews and having conference calls, with agreed minutes that can later be made available to all parties. This is done routinely by the CMA, and we believe it to be an efficient and effective way of obtaining the views of relevant third parties.

3. In our experience with Phase 2 investigations, the scope of Commission internal document requests has continued to increase over the last few years. We have occasionally faced difficulties in meeting the deadline imposed by the Commission to respond to wholesale document requests. It would be helpful if the Commission formulated realistic and consistent internal guidelines on how such requests should be crafted (bearing in mind the use that they intend to make of the produced documents) and what it is reasonable to request parties to provide (whether to require an index of documents and a privilege log; whether or not to allow parties to exclude from production all documents that are responsive to the search term “privilege”, etc.). We consider such guidance to be particularly important as internal document requests seem to have become an increasingly important part of the Commission’s review of complex mergers.

4. In our experience the Commission has not always taken a consistent approach in dealing with vertical relationships that exist purely between the parents of a joint venture. In some cases – in line with point 7 of the Notice – such links were not considered relevant except to assess possible coordination concerns. In other cases, we have been required to identify all vertical relationships between the activities of the various parents of the joint venture, whether or not they were being contributed to the joint venture or were in any way related to its business. It would be helpful if the Commission were to review the wording in Section 6 of the Form CO and Short Form CO with a view to clarifying this aspect.

5. Finally, we would welcome clarity on the treatment of acquisitions of control over a non-full function joint venture. The EUMR does not clearly spell out that the full-functionality requirement also applies to changes of control over existing joint ventures. While Article 3.4 of the EUMR states that the creation of a new joint venture constitutes a concentration only if it performs on a lasting basis all the functions of an autonomous economic entity, there is no similar provision mirroring this requirement with regard to existing joint ventures. We would welcome the introduction of such a provision.

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.

While time constraints may be experienced during Phase 2 merger investigations, we believe that creating more flexibility regarding time limits would likely increase the average length of merger investigations, reduce legal certainty and make transaction planning more difficult. A fixed end date for the review ensures that all parties are committed to ensuring the merger review takes place in an efficient and timely manner. Also, it is likely that even with further extensions the parties involved and the Commission would still experience time constraints towards the end of the investigation, despite having more time for the substantive review and assessment of commitments.

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.

In the context of our response to question 28 above, we see no reasons for amending the timelines of Phase 2 merger investigations.

V. Submission of additional information

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

Contact

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