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Evaluation of procedural and jurisdictional aspects of EU Merger Control

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Evaluation of procedural and jurisdictional aspects of EU Merger Control

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 prejudge 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

Baker McKenzie

*Your full name

Fiona Carlin

*Email address

fiona.carlin@bakermckenzie.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.

Baker McKenzie is a global law firm, with offices in 77 locations worldwide, including in 36 of the world's 40 largest economies. With its diverse capabilities and experience, the firm advises leading clients in most major industries. The firm has particular experience in banking and financial services; chemicals and petrochemicals; construction; consumer products; energy and utilities; entertainment and media; insurance; mining; oil and gas; pharmaceuticals and healthcare products; professional services; real estate; technology; telecommunications; tourism; and transport and infrastructure.

*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.

Brussels, Belgium

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	○	○	○	○	○	◉	○

Please explain.

The Simplified Procedure has created value for businesses, and this value has been increased by the expansion in the 2013 Simplification Package of the categories of cases that may benefit from the Simplified Procedure. In particular, raising the thresholds to 20%/30% for horizontal and vertical overlaps/links respectively has helped to reduce the overall burden on both companies and the Commission (as demonstrated by the statistical increase in Simplified Procedure cases). However, use of the Simplified Procedure is by no means a "box-ticking exercise", and our recent experience has been that a Simplified Procedure case can still incur considerable legal costs and administrative burden for clients. Circumstances that may give rise to increased cost include: (i) cases involving new, undefined or previously unconsidered plausible markets, (ii) industries with a veritable lack of reliable market data, or (iii) a hostile bid where the exact scope of a target's business is difficult to verify. In particular, the pre-notification procedure can still be relatively lengthy and complicated, with significant time spent on issues including: (i) demonstrating to the case team that the relevant provision of the Simplified Procedure Notice is met, (ii) clarifying complex transactional structures to the case team (in particular in JV cases), and (iii) ensuring that the case team is comfortable that its decision to use the Simplified Procedure is robust and that all legal and procedural requirements necessary have been fulfilled.

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

"Point 5b" transactions have been subject to the Simplified Procedure rules since 2000, and the 2013 reforms therefore did little to reduce the administrative burden on parties to such transactions. As such transactions are likely to give rise to zero effects in the EEA (in the absence of any overlap or link), our view is that they should be deemed automatically compatible with the EU Merger Regulation (without need for notification or formal decision) where it is patently clear that there is no overlap/vertical link. Absent such an automatic compatibility with the EU Merger Regulation, we consider that such transactions should at least benefit from a reduced administrative burden such as a light information notice (as discussed in Question 8.2).

(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 2013 amendments that raised the thresholds for "Point 5c" transactions and introduced a HHI safe harbour ("Point 6" transactions) have enabled a greater number of parties to avoid the burden of the full notification procedure, and this is welcome. However, the administrative burden on companies using the Simplified Procedure was increased by the 2013 reforms (in particular by the new Short Form CO, and by the requirement to produce certain internal documents under the new Section 5.3). Companies that had never produced documents to the Commission previously are now required to do so on transactions that will not raise competition concerns.

(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 "super-simplified" procedure introduced in 2013 and applicable to "Point 5a" transactions has benefits for companies, and we have good experience of using this procedure in certain cases to achieve results in a short time. However, as such joint ventures are unlikely to give rise to effects in the EEA, we submit that they should automatically be deemed compatible with the EU Merger Regulation without notification or formal decision (see Question 13 (i)). As the threshold for assets/revenues remains relatively high (EUR 100 million), the Commission could explore introducing an automatic compatibility with the EU Merger Regulation for joint ventures meeting a materially lower threshold. Absent such an automatic compatibility with the EU Merger Regulation, we consider that such transactions should at least benefit from a reduced administrative burden such as a light information notice (as discussed in Question 8.2).

(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

"Point 5d" transactions have been subject to the Simplified Procedure rules since 2000, and the 2013 reforms therefore did little to reduce the administrative burden on parties to such transactions. As a matter of EU law, it is unclear whether Article 101 TFEU applies between a parent and its joint venture. Although precedent indicates that it is applicable, recent commentators and national law judgments (i.e. in Germany) have pointed in the other direction, and this is consistent with the Commission's position in respect of parental liability. If this more recent approach is the correct analysis, then joint to sole control acquisitions should not be capable of giving rise to any effects in the EEA. If so, such transactions should escape from the EU Merger Regulation entirely. We suggest that such transactions should benefit from less administrative burden or be deemed automatically compatible with the EU Merger Regulation (without notification or formal decision). Absent such an automatic compatibility with the EU Merger Regulation, we consider that such transactions should at least benefit from a reduced administrative burden such as a light information notice (as discussed in Question 8.2).

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.

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

As a general comment, the Commission could extend the application of the Simplified Procedure by raising the horizontal market share threshold for its use to 25%. This is the figure used in the Commission's own horizontal merger guidelines (at paragraph 18) when considering the "limited market share" below which the Commission is likely to find that a transaction is "not liable to impede effective competition".

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.

The cost and burden of dealing with the Simplified Procedure for "Point 5a" cases is not proportionate for cases that should not give rise to any competitive effects.

- Transactions falling under point 5b of the Notice:

- ○ YES
- ◉ NO

Please explain.

The cost and burden of dealing with the Simplified Procedure for "Point 5b" cases is not proportionate for cases that should not give rise to any competitive effects. Even if such cases can take advantage of a "super-simplified" procedure and avoid pre-notification, there is still a certain administrative and financial cost that arguably should not be borne by the parties to such transaction

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

- ○ YES
- ◉ NO

Please explain.

The cost and burden of dealing with the Simplified Procedure for "Point 5c" and "Point 6" cases is not proportionate. In relation to these types of transactions, there is material risk that pre-notification RFIs and discussions with case teams searching for comprehensive data can drive up legal costs and the burden of compliance. Our recent experience has been that a Simplified Procedure case can still incur considerable legal costs and administrative burden for clients. Circumstances that may give rise to increased cost include cases involving new, undefined or previously unconsidered plausible markets, industries with a veritable lack of reliable market data, or a hostile bid where the exact scope of a target's business is difficult to verify. This is likely to be the case for "Point 5c" and "Point 6" transactions, where market shares and HHIs are pivotal. Costs can mount up in the process of demonstrating to a case team that the relevant provision of the Simplified Procedure Notice is met.

- Transactions falling under point 5d of the Notice:

- ○ YES
- ◉ NO

Please explain.

The cost and burden of dealing with the Simplified Procedure for "Point 5d" cases is not proportionate for cases that should not give rise to any competitive effects.

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

The real impact of the 2013 Simplification Package was to extend its scope, and thereby reduce the burden for a greater number of notifying parties. However, for cases that would already have fallen within the Simplified Procedure, the 2013 reforms did not decrease costs and burden for parties. In fact, with the exception of "Point 5b" cases, the burden increased. Since the 2013 reforms, parties are required to complete a new Short Form CO (with new data requirements and the need to consider "all plausible markets") and to produce internal documents under Section 5.3. This requirement for documents, in particular, effectively negates a large part of the benefits of the Simplified Procedure by requiring parties to spend considerable time, resources and effort in identifying, reviewing, checking, cataloguing and submitting disclosable documents.

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.

In our view, "Point 5b" transactions – i.e. those where there is clearly no horizontal overlap or vertical link – should be entirely exempted from having to notify to the Commission under the EU Merger Regulation, as should extra-EEA joint ventures. They should be deemed automatically compatible with the EU Merger Regulation without need for notification or formal decision. This would mean that, for example, pure private equity bolt-on transactions would not require notification if there were no risk of damage to competition. Such "exemption" from the ambit of the EU Merger Regulation would clearly only be available for transactions where no conceivable competition law issue could arise, whatever the formal theory of harm. Consequently, the risk of potential competition or conglomerate issue cases managing to escape scrutiny would be negligible and should not be overstated. In addition, the Commission retains residual powers under Articles 101 and 102 TFEU and, whilst these powers may be less than ideal for addressing structural concerns, they do remain available to the Commission and have been used in the past.

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.

We consider that, for categories of transactions unlikely to pose competition concerns, an information notice/form of 1-2 pages would be sufficient for the parties to provide the Commission with the information necessary to determine whether further investigation is required (if the model of an automatic compatibility with the EU Merger Regulation is not tenable). This lighter information requirement would be more welcome than the current Short Form CO, but less desirable than the automatic compatibility referred to at Question 8.1. It would still involve some legal cost, and some burden on the in-house legal team.

If introduced, we suggest that the submission of such an information notice should not require pre-notification discussions and that the transaction notified should be deemed compatible with the EU Merger Regulation unless the Commission informs the parties otherwise within a short time period (e.g., 15 working days).

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.

Although there would be significant benefits to parties in terms of overall reduction of legal cost and administrative burden, on balance we consider that introducing a voluntary or self-assessment system would result in a lack of legal certainty for the parties to transactions. There is clearly an implicit value and legal comfort in having received a Commission decision in respect of a transaction. One can imagine that the introduction of a self-assessment system could result in strategic disputes between the parties. Buyers may be reluctant to proceed without a notification (and the legal certainty of approval), whilst sellers may be difficult to convince to proceed with a notification. Unnecessary time and legal cost may be expended resolving such disputes.

8.4 Other

- ◉ YES
- ○ NO

Please explain.

One potential option might be a system of "informal consultation" with the Commission, in which parties could seek informal guidance from an appointed senior case handler. This guidance would be of significant use, in particular given the limited amount of jurisprudence from the European Courts regarding cases using the Simplified Procedure.

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.

As mentioned above, "exemption" from the ambit of the EU Merger Regulation (e.g., for "Point 5b" transactions) would clearly only be available for transactions where no conceivable competition law issue could arise, whatever the formal theory of harm. Consequently, the risk of potential competition or conglomerate issue cases managing to escape scrutiny would be negligible and should not be overstated. In addition, the Commission retains residual powers under Articles 101 and 102 TFEU and, whilst these powers may be less than ideal for addressing structural concerns, they do remain available to the Commission and have been used in the past.

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

Transactions having zero or unappreciable effects within a jurisdiction should not be subject to review simply because certain thresholds are met by the parent companies as a result of activities entirely unrelated to the joint venture. We submit that an appropriate nexus test should be introduced within the EU Merger Regulation so that transactions having no EEA effect are deemed automatically compatible with the EU Merger Regulation (see Question 13 (i) below). Absent such an automatic compatibility with the EU Merger Regulation, we consider that such transactions should at least benefit from a reduced administrative burden such as a light information notice (as discussed in Question 8.2). Article 101 TFEU would continue to apply to the parent companies in respect of any activities outside of the joint venture in the EEA.

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

In the absence of an EU one-stop-shop, the creation of extra-EEA joint ventures would have to be subject to the application of EU national merger control laws, duplicating expenditure of time and resources for businesses. However, this should not be a justification for continuing to require notification at the EU level (see response to Question 9).

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

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

The cost and burden of dealing with the Simplified Procedure for extra-EEA joint venture cases is not proportionate given that they should not give rise to any competitive effects in the EEA. The burden is rendered yet more disproportionate given that, in this era of developments in the information and technology sectors, joint ventures are becoming ever-more complex and technical and notifications therefore increasingly complex and time-consuming. Unnecessary notifications should therefore be avoided.

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

The 2013 Simplification Package did not decrease costs and burden for the creation of extra-EEA joint ventures, but in fact increased them. Since the 2013 reforms, parties are required to complete a new Short Form CO (with new data requirements and the need to consider "all plausible markets") and to produce documents under Section 5.3. This requirement for documents, in particular, effectively negates a large part of the benefits of the Simplified Procedure by requiring parties to spend considerable time, resources and effort in identifying, reviewing, checking, cataloguing and submitting disclosable documents.

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.

We do not consider that extra-EEA JVs should be "excluded" from the scope of the EU Merger Regulation, but rather that they should be deemed to be compatible with it. The EU Merger Regulation would continue to apply to such transactions, and automatic approval (without notification and formal decision) would be presumed. Parties to extra-EEA JVs would continue to benefit from the EU-level "one-stop-shop" and national merger control laws would not apply to such transactions. National competition authorities should be encouraged to take a similar approach to such JVs. Absent such an automatic compatibility with the EU Merger Regulation, we consider that such transactions should at least benefit from a reduced administrative burden such as a light information notice (as discussed in Question 8.2).

Concerns may be raised as to how future transfers of assets/shares/business into the joint venture from either parent would be dealt with. The transfer of EEA assets/shares/business into the joint venture from either parent would arguably be subject to a potential EU Merger Regulation or national merger control notification, so such transfers would not escape merger control scrutiny. Further non-EEA asset transfers should remain "exempt" on the same basis that the creation of the joint venture was "exempt".

The term "expansion" in relation to a joint venture's scope of activity is imprecise and should be clarified. It may include, for example, natural growth through exports. Merger control is designed to govern the structure, not the operation, of markets and, arguably, expansions in the natural course of business should not be caught by the EU Merger Regulation.

(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.

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Such transactions should be deemed compatible with the EU Merger Regulation, and any alternative form of intervention or regulatory requirement is inappropriate. Such transactions create no effects in the EEA, and Article 101 TFEU remains applicable to the activities of the joint venture's activities in the EEA.
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(iii) Other.

Please explain.

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None.
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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 pre-dominantly 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.

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 would highlight the importance of there being a nexus with the EEA before a transaction in this sector is caught by the EU Merger Regulation. Innovation in the pharmaceuticals sector is challenging, and often achieved through the use of JVs or other transactions. The effects of such innovation-driven transactions may not be achieved for years to come, or indeed ever.

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.

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.

The referral mechanisms work well to allow upward transfer to the Commission in suitable cases (either at the request of the parties, or by the NCAs in consultation with the Commission). The upward referral to the Commission of the Facebook/WhatsApp transaction following a pre-notification referral request by Facebook under Article 4(5) is a clear demonstration of the system functioning as intended. in addition, depending on the circumstances EU national merger control regimes may continue to apply.

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.

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We consider that the current criteria for determining EU dimension are clear-cut, well-established and provide for a bright-line test as to when the Commission has jurisdiction. The introduction of any other criteria risks creating a lack of clarity and a conflict of laws with those of the EU Member States.
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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.

```
Criteria based on net present value, share price or deal value are somewhat arbitrary given that they are based on opinions or volatile market prices over time, and values can change materially over a short period of time. It is also not inconceivable (i) that a deal value could be artificially set in order to avoid the EU Merger Regulation or (ii) that the true deal value could be not immediately apparent as the result of a complex post-transaction price mechanism for the benefit of the seller (e.g. a share of future but as yet undefined profits). In addition, relative values diverge across industries, and setting an arbitrary deal value threshold may have the perverse effect of increasing the burden for some sectors (e.g. pharmaceuticals) whilst allowing others (e.g. digital economy) to escape the intended scrutiny. The importance to parties of clear notification thresholds that offer a "bright line" of legal certainty cannot be underestimated. We are, of course, aware that deal value thresholds are used in a number of other jurisdictions, but this does not inherently mean that their use would be appropriate in the EU, where the thresholds determine jurisdiction as well as the need to notify.
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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.

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N/A
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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.

- [x] 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.

Although we do not consider that a "deal size" threshold should be introduced, should the Commission choose to pursue that approach we would highlight the following points.

- Any deal value threshold must be subject to an effects-based doctrine. Transactions having zero or unappreciable effects within a jurisdiction should not be caught simply by virtue of the fact that certain thresholds are met. A local nexus should be required for a deal to be notifiable.

- Any guidance on nexus should be clear, precise and draw a bright line test for when the EU Merger Regulation is applicable. The Commission will undoubtedly look to recent and proposed threshold changes in Member States including Austria and Germany when considering how such thresholds and guidance might operate in practice.

- Any deal size threshold should specify that, in order for notification to be required, it is reasonably foreseeable that the turnover threshold will be met within a specified time period - we suggest 2-3 years. It would not be sufficient to require notification if it is "reasonably foreseeable" that the thresholds will be met, without specifying a time period.

We would again comment that Articles 101 and 102 TFEU would continue to apply to the companies in respect of any effects in the EEA.

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

- (•) YES
- ( ) NO
- ( ) OTHER

- Please state if any of the following criteria would be appropriate to ensure the desired efficiency [multiple answers are possible]:

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

Please explain your answer.

Although we do not consider that a "deal size" threshold should be introduced, should the Commission choose to pursue that approach we would highlight the following points.

A maximum level of turnover threshold for the target should not be introduced, as it would introduce yet further complexity into an already complex jurisdictional threshold under the EU Merger Regulation and may be difficult to apply in practice.

Thresholds based on multiples should be avoided given that they are (i) based on opinions, (ii) highly subjective, and (iii) apt to change materially over short periods of time. Arguably, the use of a multiple-based threshold could have a chilling effect on M&A. We could envisage a situation where, for example, the Commission sets its threshold at a multiple of 10x. Company A bids a multiple of 9x but, on the final day of negotiations, the CEO of Target Company successfully obtains a further premium, raising the multiple to 10.1x. The deal suddenly becomes notifiable, but Company A wants to complete without any filings, and walks away.

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.

The referral mechanisms (particularly those for the benefit of the parties under Articles 4(4) and 4(5)) do reduce the overall administrative burden. However, the existing Form RS system is burdensome and duplicates much of the work required under the Form CO. Further, in certain cases Articles 9 and 22 increase the degree of uncertainty and the level of administrative burden. For example, under Article 9 a notifying party (having prepared and submitted a Form CO) is required either in pre-notification or in post-notification to deal with two or more agencies (usually the Commission and its own NCA). This naturally entails increased legal costs, a duplication of effort and additional burdens arising from two regulatory processes (even if ultimately an Article 9 referral request is not made as a result of representations made to the NCA). A similar position arises under Article 22 where, having already made one or more national notifications, the notifying party is faced with the prospect of preparing and submitting a Form CO and dealing with the Commission. In short, whilst the one-stop-shop mechanism of the EU Merger Regulation affords savings to parties facing notifications in, say, five or more jurisdictions (which then avail themselves of Article 4(5)), the burden for other parties under the referral mechanism is unquestionably high.

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.

Many of the proposals made by the White Paper would contribute to reducing the burden on parties and to facilitating the better allocation of cases between authorities. However, the proposal to expand the Commission's jurisdiction to the entire EEA for Article 22 referrals should be rejected, or least made subject to an "opt out" mechanism for Member States that object. Further, Commission jurisdiction should not be expanded to Member States in which filings were not triggered.

Our experience in recent cases has been that the Commission proceeds to examine multiple national and regional markets that were not previously (under national merger control laws) subject to review. A reference up to the Commission made in respect of some four or five Member States often leads to requests for information from the Commission in respect of a number of additional Member States.

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.

Commission competence in Article 4(5) referrals (i.e. referrals up from three or more Member States) should be limited to those jurisdictions making the referral. Our experience in recent cases has been that the Commission proceeds to examine multiple national and regional markets that were not previously (under national merger control laws) subject to review.

We submit that the Commission should consider eliminating the Form RS entirely. Under Article 4(4), a notifying party would prepare a draft notification (akin to a Form CO) and lodge that with an EU NCA. The NCA would then inform the Commission and the other Member States that a notification had been made, and provide them with electronic copies. The draft notification would contain all the relevant jurisdictional and substantive evidence to determine whether the effects of the transaction are largely confined to one Member State, even if the two-thirds rule is not automatically met. The Commission would then have an opportunity to object, but the draft notification would be fit for initial review by the Commission, thereby reducing the burden and costs for the parties.

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 scope to improve the current system, and have the following comments on the proposals.

• Modifying Article 4(1): We welcome the Commission's suggestion that it may be useful to adapt the criterion of "good faith intention" in order to allow the parties to notify before the level of shareholding required to exercise (de facto) control is acquired. The proposal makes sense if the acquiring party can demonstrate a clear commitment to carry out the acquisition by preparing everything necessary (internally and externally) to proceed (not necessarily immediately as suggested by the Commission but within a specific short-term timeframe).

• Amending Article 5(4): We agree that some uncertainty remains around the methodology for the calculation of turnover for joint ventures (and also with the attribution of market shares to and from such joint ventures).

Although guidance is contained in the Consolidated Jurisdictional Notice, we would welcome further clarification in this area. However, we would query the added value of incorporating this guidance into the EU Merger Regulation itself.

• Introducing additional flexibility regarding the investigation time limits: Some additional mechanism for time extensions could be beneficial for the merging parties. Even in Phase II, time periods are short, particularly when voluminous data and document requests have to be dealt with prior to the issuance of an SO, and in the formulation of remedies late in the process. However, any additional flexibility introduced should be based on strict and narrow requirements and limited in terms of both timing and scope. This flexibility should operate only as a negotiated extension with the consent of the notifying party. We would highlight that the interests of other parties, such as the seller and/or the target, may not be aligned with those of the notifying party.

• Modifying Article 8(4): We do not agree with this proposal, which would extend the Commission's competence to review non-controlling minority shareholdings. The Commission retains powers under Articles 101 and 102 TFEU to investigate any competition concerns, and in addition some of the EU NCAs retain merger control powers to control such cases.

• Tailoring the scope of Article 5(2)(2): Whilst the Commission's proposal here is not precisely clear, it should be welcomed if the intention is to remove the application of the EU Merger Regulation from cases where there is no real circumvention of the EU rules and the first step transaction has been reviewed and approved by an EU NCA. The following example is provided as illustration. Global Company A seeks to acquire Asset 1 in Germany with German revenues of EUR 121 million. Notification to and approval by the German NCA is obtained. 12 months later Company A seeks to acquire Asset 2 in Germany with German revenues of EUR 126 million. Whilst both transactions are individually notifiable separately (and only) to the German NCA, the current EU system requires a notification to the Commission on the second transaction if the two-thirds rule is not met. We would suggest that this requirement be dropped.

• Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer: We would welcome greater clarity in this area. In the absence of explicit permission for such transactions, legal certainty as to how to structure transactions would be an improvement.

• 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: Whilst greater sanctioning powers should only be adopted in a limited manner, such additional protections would benefit businesses involving in submitting confidential information to the Commission. We would therefore welcome this proposal.

• 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: Greater sanctioning powers should only be adopted in a limited manner, and our view is that the risk of such situations arising in practice is arguably close to hypothetical. However, we would

welcome this proposal subject to the caveat that the sanction be confined only to circumstances involving deceit.

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

We consider that possible steps to address current technical shortcomings in the EU merger control system could include:

- Amendment of the EU Merger Regulation to introduce maximum time limits for the pre-notification period. We consider that the introduction of such time limits would be of real and considerable benefit to notifying parties. Failing this, further best practice guidance should be provided to indicate specific time frames for pre-notification depending on the nature of the case. We would suggest that appropriate time periods for pre-notification might be: (i) Simplified Procedure cases: 10-15 working days, (ii) Normal Procedure cases with no affected markets: 30 working days, (iii) Normal Procedure cases with affected markets but all horizontal shares below 40%: 60 working days, and (iv) all other cases: a four to six-month overall limit.
- Explicit confirmation in the EU Merger Regulation that, where a transaction involving the creation or a further change to a full-function joint venture (such as the entry of a new shareholder) has been notified to, and approved by, the Commission, then Article 101 TFEU ceases to apply between the parent companies and the joint venture.
- Explicit confirmation as to the circumstances in which an upfront buyer condition can be imposed (e.g., three-to-two cases, where the U.S. agencies apply the condition in the same transaction, etc.).

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.

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

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain.

We query whether the additional 15 working day extension should be made optional, and subject to the consent and agreement of both the notifying party and the Commission (as is currently the case for the 20 working day extension). Clearly, the extension allows the Commission to gain time to conduct further market investigation, and for the parties to improve the remedies. But it is possible that there are clean cut remedy cases in Phase II, where the additional time is arguably not required. In those cases, the extension of the time period may not be in the parties' best interests and may risk the regulatory timetable running up against a long stop date in the contractual agreements between the parties or against applicable takeover timetable deadlines.

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.

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