THE EUROPEAN BEST FRIENDS LAW FIRMS

Response to the European Commission's evaluation of procedural and jurisdictional aspects of EU merger control 20 December 2016

13 January 2017

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ANNEXES

1. Introduction and summary

1.1 We are grateful for the opportunity to respond to the European Commission's proposals to amend the EU Merger Regulation. This response has been compiled by a working group formed of lawyers of the European "Best Friends" Law Firms (identified in **Annex 1**), although it does not purport to reflect the views of each of the firms (or their clients).

1.2 We have had the benefit of the submission of the European Competition Lawyers Forum (**ECLF**).[1] We fully agree with and support the views expressed in the ECLF submission.

1.3 In particular, we strongly support:

(A) The adoption of a revised super-simplified procedure for those cases which are least likely to raise competition concerns.

(B) The ECLF's proposal that a thorough and robust assessment of need is conducted before consideration is given to development of any new value-based thresholds.

(C) The ECLF's proposal that if the Commission nevertheless proceeds with a value-based threshold that those transactions which are only caught by the value threshold are also able to benefit from the revised super-simplified procedure. This strikes a sensible balance between the need (if such a need is identified) for the Commission to have jurisdiction over these cases whilst ensuring that the (vast majority) of non-issues cases can be dealt with efficiently. In the event that a case raises issues, the Commission will be able to request a Form CO or the parties can pre-empt this by engaging in pre-notification discussions and proposing to file a Form CO at the outset so as to avoid unnecessary additional delay.

(D) The ECLF's cautioning against the overreliance on internal documents. In particular, we have observed an increasing need to provide internal documents of the seller/target which effectively extends the requirements of section 5.4 of the Form CO. This can lead to practical difficulties and delays in particular in public transactions where interlopers have the right to review information sent to the purchaser (or its lawyers). The more relevant documents are those prepared by the purchaser and it should only be during an in-depth Phase 2 review that seller/target documents should be required.

(E) The ECLF's proposal that Article 4(5) can be used in a situation where the thresholds of only one Member State are met. This will help avoid conflicting decisions such as in *Eurotunnel/Sea France* where the French Autorité de la Concurrence cleared the transaction in 2012 (subject to certain behavioural conditions) but in 2013 the UK Competition Commission (as it then was)

[1] http://europeancompetitionlawyersforum.com/documents/base/ECLF-Response-to-the-EC-s-evaluation-of-procedural-and-jurisdi.pdf.

prohibited the transaction and Eurotunnel from operating ferry services at the port of Dover.[2]

1.4 In addition, we use this opportunity to:

(A) Provide an example Information Notice for use in super-simplified cases at **Annex 2**.

(B) Provide some additional thoughts on the proposed value threshold: (i) further supporting the ECLF's position that there is currently no evidence of need (Part 2); (ii) identifying an important legal issue which would arise were value thresholds introduced without further important and significant additional amendments to the EUMR (Part 3); and (iii) emphasising that the proposed value thresholds do not meet ICN guidance.

2. Further thoughts on value threshold: no evidence of need

2.1 The consultation document and the ECLF response focus primarily on *Facebook/Whatsapp* (deal value of $19 billion), with the latter explaining that this is not an example of a problematic case which did not meet the EUMR thresholds given that it was referred to the European Commission and was then cleared unconditionally.

2.2 We have identified a number of other reasonably high profile cases which proponents of a value threshold may claim support the implementation of a value threshold but which on closer analysis at best suggest that further investigation is required:

(A) *Nokia/Navteq* (2008) was a deal which related to navigable digital map databases. It had a value of $8.1 billion. It was a vertical transaction involving the upstream market for digital map databases and the downstream markets of navigation applications for mobile handsets, and mobile handsets. It was referred to the Commission under Article 4(5) EUMR (having met the thresholds in 11 Member States). It was unconditionally cleared by the Commission after a Phase 2 investigation.[3] Accordingly, this is not an example of a problematic case which escaped the Commission's jurisdiction.

(B) *TomTom/Tele Atlas* (2008) was a deal which also related to navigable digital map databases. It had a deal value of $4.1 billion. It was also a vertical transaction with the upstream being the digital map databases and the downstream markets the supply of portable navigation devices and navigation software. The case was also referred to the Commission under Article 4(5) EUMR (having met the thresholds in Germany, the Netherlands, Spain and Portugal). It was also unconditionally cleared by the Commission, again after a Phase 2 investigation.[4]

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[2] See http://www.autoritedelaconcurrence.fr/pdf/avis/12DCC154decision_version_publication.pdf; and https://www.gov.uk/cma-cases/eurotunnel-seafrance-merger-inquiry.

[3] Case M.4942 *Nokia / Navteq* (2 July 2008).

[4] Case M.4854 *TomTom / Tele Atlas* (14 May 2008).

Accordingly, this is also not an example of a problematic case which escaped the Commission's jurisdiction.

(C) *Google/DoubleClick* (2008) was a deal which involved online advertising – principally search advertising (Google) and ad serving (DoubleClick). It had a deal value of $3.1 billion. The transaction was principally a conglomerate merger with no significant horizontal overlaps. The case was also referred to the Commission under Article 4(5) EUMR (having met the thresholds in Germany, Greece, Portugal, Spain and the UK). It was also unconditionally cleared by the Commission, again after a Phase 2 investigation.[5] Accordingly, this is also not an example of a problematic case which escaped the Commission's jurisdiction.

(D) *Lenovo/Motorola Mobility* (2014) was a deal which involved smart phones. It had a deal value of $2.9 billion. The transaction gave rise to horizontal overlaps in the supply of smart phones and a vertical relationship through Lenovo's ownership of standard essential patents. The case was also referred to the Commission under Article 4(5) EUMR. It was unconditionally cleared at Phase 1.[6] Accordingly, this is also not an example of a problematic case which escaped the Commission's jurisdiction.

(E) *Facebook/Instagram* (2012) was a deal which involved social network platforms. It had a deal value of approximately $1 billion. The transaction gave rise to horizontal overlaps in the supply of photo apps and online display advertising. The case was subject to review under the UK merger control rules, and was unconditionally cleared by the OFT.[7] Accordingly this does not *prima facie* appear to be a problematic case which escaped the Commission's jurisdiction, given that a national authority reviewed and unconditionally cleared the transaction.

(F) *Google/Waze* (2013) was a deal which involved turn-by-turn navigation applications for mobile and tablet devices. It had a deal value of approximately $1.1 billion. The transaction gave rise to horizontal overlaps in this market. The case was subject to review under the UK merger control rules, and was unconditionally cleared by the OFT.[8] Accordingly this does not *prima facie* appear to be a problematic case which escaped the Commission's jurisdiction, given that a national authority reviewed and unconditionally cleared the transaction.

(G) *Cisco/Tandberg* (2010) was a deal which involved video communications solutions (VCS) and multi-point control units for use in video communications solutions. It had a deal value of $3.4 billion. The transaction was referred to the Commission under Article 4(5) EUMR (having met the thresholds in Cyprus,

[5] Case M.4731 *Google / DoubleClick* (11 March 2008).

[6] Case M.7202 *Lenovo / Motorola Mobility* (26 June 2014).

[7] Case ME/5525/12 *Facebook / Instagram* (14 August 2012).

[8] Case ME/6167/13 *Google / Waze* (11 November 2013).

Germany, Ireland, Portugal, Spain, the UK and Norway). The transaction gave rise to concerns given horizontal overlaps in VCS markets, in particular that the merged entity would have significant positions across the VCS space and may restrict interoperability with competitor systems. The transaction was cleared at Phase 1 subject to divesting a protocol developed by Cisco for its VCS to an independent industry body and other measures to ensure the continued interoperability of the merged entity's products and those of competing products.[9] Accordingly, this is an example of a problematic case which did not meet the Commission's current thresholds. That said, the case was reviewed by the Commission given the operation of Article 4(5). The ECLF's proposals for amendments to Articles 4(5) and 22 serve to enhance the Commission's ability to obtain jurisdiction over cases which are reviewed at the Member State level. Moreover, they would do so in a significantly less burdensome manner than the introduction of a value threshold that would inevitably catch many non-problematic transactions.

(H) *AbbVie/Pharmacyclics* (2015) involved the acquisition of Pharmacylics (a biopharmaceutical company and leader in haematological oncology, selling drugs including Imbruvica – which is approved for treatment of two blood cancers) by AbbVie a pharmaceutical company that discovers, develops and markets biopharmaceuticals and small molecular drugs. The deal value was $21 billion and the transaction was not notified anywhere in the EU. The transaction was, however, notified to the US Federal Trade Commission (FTC). After a voluntary "pull and re-file" the FTC allowed the waiting period to expire without issuing any objections.[10] Accordingly, this does not *prima facie* appear to be a problematic case which escaped the Commission's jurisdiction, given that a major national authority reviewed and cleared the transaction unconditionally.

(I) *Shire/Dyax* (2015) involved the acquisition of Dyax by Shire. Dyax was a biotechnology company, focused on the development of plasma kallikrein inhibitors for the treatment of hereditary angioedema (HAE) (a rare genetic disease). It had developed and had FDA approval for *Kalbitor* (ecallantide), a drug for HAE acute treatment in patients 12 years of age and older, and was developing a drug called *DC-2930*, a Phase 3 drug that demonstrated 90% reduction in HAE attacks compared with placebos. The development and trials of these drugs were focused on the US. Shire is a global pharmaceutical company with a focus on speciality biopharmaceuticals. Shire marketed two drugs for HAE treatment: *Cinryze* and *Firazyr*. The marketing of these drugs was focused on the US. Accordingly, some press commentary referred to the transaction as "*defensive*".[11] The transaction was valued at $5.9 billion and was not notified anywhere in the EU. The transaction was, however, notified to the

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[9] Case M.5669 *Cisco / Tandberg* (23 March 2010).

[10] https://news.abbvie.com/news/abbvie-announces-expiration-hart-scott-rodino-waiting-period-for-abbvies-acquisition-pharmacyclics.htm.

[11] https://www.ft.com/content/1871a558-8156-11e5-8095-ed1a37d1e096.

FTC and received early termination.[12] Accordingly this does not *prima facie* appear to be a problematic case which escaped the Commission's jurisdiction, given that the focus of the relevant potentially overlapping drugs was on the US market and the FTC cleared the transaction with an early termination.

2.3 The above shows that all of the cases which we have been able to identify as examples of possible problematic cases "slipping through the net" either did not slip through or were found to be unproblematic by respected authorities. Rather than providing support to the introduction of a value based threshold, these cases in fact strongly support the need for a robust study of need before developing any legislative proposals.

3. Further thoughts on value threshold: the "object of control"

3.1 One of the stated aims of the consultation is to try and capture acquisitions in the pharmaceutical industry where "*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).*" Such a transaction could conceivably be the acquisition of a pipeline drug which is in a (possibly very early) stage of development but has not yet been approved or marketed. Indeed, it may not be certain that the drug will ultimately even be approved or successfully marketed and monetised.

3.2 Currently these transactions would not be caught by the EUMR given the lack of (any) turnover. A value threshold could potentially catch these types of transaction. However, this raises the prospect of fundamentally altering not simply the jurisdictional thresholds themselves but also other aspects of the substance of EU merger control which have been developed over the years. An example of one such aspect is the meaning of "object of control" for the purposes of identifying a concentration within Article 3(1)(b) and (2) EUMR. Currently guidance on the "object of control" is set out at paragraph 24 of the Consolidated Jurisdictional Notice by reference to Case M. 3867 *Vattenfall/Elsam and E2 Assets* (22 December 2005). The paragraph states that "*[t]he acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e.* ***a business with a market presence, to which a market turnover can be clearly attributed***" (emphasis added).

3.3 The paragraph goes on to say: "*[t]he transfer of the client base of a business can fulfil these criteria* ***if this is sufficient to transfer a business with a market turnover****. A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if* ***those assets constitute a business with a market turnover****. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer* ***the turnover-generating activity***" (emphasis added).

3.4 Where a pipeline drug (or indeed any other product) is still going through development phases and has yet to be brought to market (and may ultimately never be successfully launched), there is no business to which a market turnover can be clearly attributed.

[12] https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20160333.

Accordingly, a desire to capture acquisitions of such assets does not simply require the introduction of a value threshold but could require a fundamental reconsideration of the meaning of undertaking, control and concentration. In light of this, and possibly other substantive issues, we echo the ECLF's call for a proper Impact Assessment before the development of any new value-based thresholds.

4. Further thoughts on value threshold: a possible role for the ICN?

4.1 As set out in the ECLF's response to the Commission's consultation, the EUMR's current notification thresholds have the benefit of being (a) clear and understandable, (b) based on objectively quantifiable criteria, and (c) based on information that is readily accessible to the merging parties. Accordingly, they are fully compliant with the ICN's recommended practices for merger notification procedures.[13] We would go further and add that the ICN guidance is notable in its silence with respect to deal value-based thresholds, instead focusing on asset and turnover tests which meet the three recommendations.

4.2 Given the already considerable burden placed on business from the need to navigate a global web of merger control with significantly varying concepts and jurisdictional thresholds, we would encourage the Commission to assist business by engaging with the ICN in an assessment of need for deal value-based thresholds (and the development of clear rules, if needed) before implementing any such thresholds at the EU level. In this regard, the Commission should also be able to engage in discussion with the Bundeskartellamt in respect of experience it will gain once its value-based threshold comes into force in the beginning of this year.

[13] See http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf, Part II "Notification Thresholds".