Contribution ID: 183fae17-fa67-401c-b6c9-ef0cae76b491
Date: 13/01/2017 19:36:12

Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

Evaluation of procedural and jurisdictional aspects of EU Merger Control

I. Introduction

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

Clifford Chance LLP

*Your full name

Daniel Harrison

*Email address

daniel.harrison@cliffordchance.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.

Clifford Chance LLP is an international law firm with substantial experience of advising on mergers and merger notification procedure for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

*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.

```
Belgium, Czech Republic, France, Germany, Italy, Luxemburg, Netherlands,
Poland, Romania, Spain and the United Kingdom
```

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 one stop shop review at EU level for concentrations falling under the simplified procedure has substantial value for businesses and consumers. The reforms discussed below in response to questions 5 to 13 would significantly add to that value, provided they are implemented in a way that ensures that any concentrations that are no longer reviewed by the European Commission retain the benefit of the one-stop-shop exclusive jurisdiction of the EUMR, e. g. by being deemed compatible with the internal market (see further the response to question 8.1 below).

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

Simplified procedure treatment of cases falling under point 5b of the simplified procedure notice is obviously less burdensome than the normal procedure, primarily due to the absence of a requirement to provide internal documents. The 2013 simplification package did not materially affect this.

(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

In most cases, the simplified procedure does reduce the administrative burden to some extent and provides parties with certainty that they can expect swift clearance (as well as reducing administrative costs for the Commission). It is therefore appropriate for it to continue to apply to transactions falling under point 5c or point 6 of the Notice.

We have experienced cases in which seeking to persuade the case team that a transaction satisfied the criteria of point 5c on the basis of the narrowest plausible market definition – and agreeing on the scope of the narrowest plausible market definition – was, or would have been, more burdensome than notifying under the normal procedure. Burdens under the simplified procedure were also increased by the requirement that was introduced in 2013 for disclosure of internal documents for transactions involving reportable markets.

We have been involved in some transactions (details available on request) in which the amount of information that was required to be provided on reportable (but not affected) markets greatly exceeded the amount of information that would have been required for a filing under the normal procedure, as the case team required the relevant markets to be sub-divided in numerous (arguably implausible) ways, so that it could determine that there were no affected markets without having to take any view on what the narrowest plausible market definition really was.

(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

```
Simplified procedure treatment of cases falling under 5a is less burdensome
than the normal procedure, primarily due to the absence of a requirement to
provide internal documents.
```

(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

```
Simplified procedure treatment of cases falling under point 5d of the
simplified procedure notice is less burdensome than the normal procedure.
```

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.

As a general point, we recognise that the power to change to the normal review procedure is used relatively sparingly, and that without this power the Commission might require many more mergers to be notified under the normal procedure.

The cases in which we have been involved where there was a switch from simplified to normal procedure in pre-notification have tended to involve point 5c of the simplified procedure and, in particular, cases where the case team concluded that the scope of the "plausible alternative market definitions" that should be investigated was in fact narrower than presented by the notifying parties in the draft notification.

In one case (details available on request), we were asked, during pre-notification, to notify under the normal procedure because, while there were no affected markets, there were no reliable sources for the market share estimates and the case team therefore wished to carry out a market test to confirm the accuracy of the estimated market shares. However, the case team waived almost all the additional information that was required under the full Form CO, so that we were able to notify with only a minimal delay. This seemed to us to be a proportionate use of the Commission's power to require a filing under 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.

As a general point, post-notification changes to the normal procedure create substantially higher burdens and transaction risks for merging parties than pre-notification changes. It is therefore important that a requirement to switch to the normal procedure is imposed only exceptionally, and when there are good reasons why the case team did not identify during the pre-notification procedure the issues that triggered such a requirement.

The cases in which we have been involved where there was a switch from simplified to normal procedure post-notification have tended to involve point 5c of the simplified procedure and, in particular, cases where the case team concluded that the scope of the "plausible alternative market definitions" that should be investigated was in fact narrower than had been considered when accepting the notification under the simplified procedure.

For instance, in one transaction in which we were involved (details available on request), the notifying parties were required to withdraw the simplified procedure notification and re-notify under the normal procedure, as the case team concluded that the plausible alternative market definitions for the relevant edible products should be based on a distinction between certified sustainable products (CS) and non-CS products, notwithstanding that the Commission had never previously considered such a distinction in previous edible products cases, CS and non-CS products are physically identical and that all major suppliers were able to supply both CS and non-CS products.

In another transaction (details available on request) we were informed on day 13 of the review procedure that the case team had decided that the transaction was not eligible for the simplified procedure as, for certain vertical markets, the downstream markets had not been defined correctly. However, as the case team had already had sufficient information in the simplified filing form (which, as explained in response to question 6(iii) below, often requires more information on reportable markets than a filing under the normal procedure), it did not require the transaction to be re-notified or further data to be provided.

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

- (●) YES
- ( ) NO

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

We have been involved in a number of cases in which it was concluded that a filing under the normal procedure would be less burdensome. Such decisions are typically taken in part due to the lighter information requirements that apply to reportable markets under the normal procedure (see our response to question 6(iii) below) and in part because of the time and resources that are required to persuade case team members that the criteria of point 5c are met and, in particular, the scope of the narrowest plausible market definition.

In one case (details available on request), we notified under the normal procedure because we considered it likely to come under scrutiny by the case team even though the criteria for simplified treatment were met, in our view. This was primarily because the transaction was high profile (and liable to attract opposition by third parties for reasons unrelated to competition), there were numerous minor overlaps and one of the parties was contemplating a large transaction in the same sector.

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

We consider the following to be good candidates for categories of cases that should benefit from the simplified procedure:

• Cases where a market is vertically "affected" due to a market share of more than 30% on one market, but the market share of the other party on the upstream or downstream market is insignificant. In such cases, the de minimis market share on the upstream/downstream market will mean that the merging party has no incentive to foreclose, whether through input foreclosure or demand foreclosure. To address this, the Commission might consider introducing a threshold similar to that contained in point 6 of the simplified procedure notice, whereby the higher the market share on one market, the lower the market share must be on the other to satisfy the criteria for simplified treatment.

• Cases where high downstream market shares do not equate to a high share of the relevant purchasing market. This is a particular issue where the downstream market is local in scope (e.g. a local retail market) and the upstream market is national or wider (e.g. the production and supply of goods that are sold in those retail stores). Having a high market share in one local market out of hundreds, for example, confers no ability to foreclose demand as that local market accounts for an insignificant share of demand. The simplified procedure notice should reflect the approach taken in the vertical block exemption, which focuses on the share of the purchasing market, not the downstream supply market, and which has not, in our experience, given rise to difficulties in its application.

• Cases in which the thresholds are exceeded only marginally, or where there is significant doubt surrounding the plausibility of the market definitions on the basis of which the thresholds are exceeded. We recognise that thresholds must ultimately have absolute values, but it seems to us that it would be productive to allow case team members a greater degree of discretion to accept simplified procedure notifications in these circumstances, without the risk of this decision being subsequently challenged by the Legal Service.

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.

As the Commission will be aware from responses to the consultations in 2013 and 2014 on this point, there has been a broad consensus for quite some time that requiring notifications of joint ventures with no EEA activities – and applying the attendant prohibition on implementation – serves no useful purpose, wastes resources and detracts from the overall credibility of the EU merger control regime. In addition, it creates a precedent that has been replicated in numerous jurisdictions outside the EU, to the detriment of EU business that engage in multi-jurisdictional M&A. We therefore advocate a system whereby such transactions are deemed to be automatically compatible with the internal market if they meet the relevant criteria, while retaining the benefit of one-stop-shop EUMR jurisdiction ((see further our response to questions 8.3 and 13).

- Transactions falling under point 5b of the Notice:

- ○ YES
- ◉ NO

Please explain.

It is extremely rare for such cases to raise competition concerns, given the absence of competitively-related activities between the parties. We have identified only four cases in the 36 years since the entry into force of the EUMR in which the parties had no horizontally- or vertically- activities at all but serious competition concerns were nevertheless identified. Two related to potential competition (Case No COMP/M.4746- Deutsche Bahn / EWS, Case No COMP/M.1853 - EDF/EnBW); one related to conglomerate effects (Case No COMP/M.5984 Intel/McAffee) and one related to Article 2(4) spill-over effects (Case No COMP/M.1327 NC / CANAL+ / CDPQ / Bank America). Moreover, the cases in question concern large companies with dominant positions, such that their transactions would inevitably have come to the Commission's attention even if they had not been notified to it. Consequently, it seems to us that requiring such transactions to be notified to the Commission, and applying a prohibition on implementation prior to clearance, imposes costs that are disproportionate to the objective of preventing harmful concentrations. We therefore advocate a system whereby such transactions are deemed to be automatically compatible with the internal market if they meet the relevant criteria (see further our response to question 8.1) or are subject to a voluntary filing regime (see further our response to question 8.2).

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

- ○ YES
- ◉ NO

Please explain.

Please see our response to question 5. We consider that the introduction in 2013 of a requirement to disclose transaction-related internal documents in transactions falling under point 5c of the notice has introduced costs that are disproportionate to the objective of preventing harmful concentrations. We favour instead a system in which transaction-related documents are not required to be provided for all transactions with reportable markets, but may instead be requested by the case team in appropriate cases, i.e. where the information that is provided on reportable markets – which notifying parties have a duty to ensure is true correct and complete – indicates that a review of internal documents may serve a useful purpose.

We also consider that the amount of information that is required for reportable markets is excessive and results a situation in which more information is often required for a short form filing than for a filing under the normal procedure. In particular, under the normal procedure, non-affected markets can typically be dealt with by identifying the relevant markets and providing market shares to show that they are not affected. Under the simplified procedure, however, it is also necessary to provide documents, where available, to support market share estimates, as well as contact details and estimated market shares for the three largest competitors. This mismatch is exacerbated by the tendency of case teams to require the putative markets to be sub-divided more times for simplified procedure cases – so multiplying the amount of information that is required for each reportable market – in order to satisfy themselves that all plausible distinctions have been covered. In our view, if a notifying party has provided its best available market share estimates on all plausible markets identified by the Commission that should be accepted (given the penalties available for the supply of incorrect and misleading information) and no further information should be required.

Also, in cases involving acquisitions of sole to joint control, replacement of a shareholder or entry of a new shareholder, the definition of "reportable markets" in the Short Form CO is, on occasion, interpreted by case teams as including those that are pre-existing links between the target business and existing shareholders that will retain a controlling interest, post-closing, despite there being no competitive link between those markets and the activities of the party that is newly acquiring a controlling interest in the joint venture. Parties are therefore required to provide information and internal documents in respect of markets that are not affected by the concentration in question. This incurs costs that are disproportionate to the aims of the EUMR. The Commission ought therefore to clarify that the term "acquiring parties" in the definition of reportable markets in Section 6.2 of the Short Form CO does not refer to the party that is retaining a controlling interest in the joint venture.

- Transactions falling under point 5d of the Notice:

○ YES
◉ NO

Please explain.

It is very rare for transactions involving a move from joint to sole control to give rise to competition concerns. Accordingly, our view is that the Commission should consider implementing some form of super-simplified procedure for such transactions, e.g. derogations from the information to be provided, but with the Commission having the ability to ask for more information if warranted in a particular case. This would be particularly appropriate in cases where the prior acquisition of joint control was reviewed under the EUMR and cleared unconditionally, as the Commission's approach to the substantive assessment of competition issues arising out of a party's exercise of joint control does not materially differ from the way that it assesses the same party's exercise of sole control. Limiting this treatment to prior unconditional clearances would also allow cases such as Case No COMP/M.7449 SNCF / Eurostar (where the subsequent review allowed for re-imposition of commitments that had expired) to be distinguished.

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

We are unable to quantify the extent to which the 2013 Simplification Package reduced costs in terms of workload and resources spent.

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.

We consider that exempting the concentrations falling under point 5b of the simplified procedure notice from notification and standstill obligations would achieve substantial efficiencies, both for the Commission and for merging parties, while posing no significant risk of harm to competition in the EEA. We recognise the theoretical risk that this would allow potentially harmful transactions to escape review in cases in which the parties have no horizontally- or vertically-related activities at all (on any plausible definition of the market) but are either (i) potential competitors; (ii) active in closely related neighbouring markets; or (iii) parents of a joint venture that are active in markets susceptible to spill-over effects. However, as noted in our response to Question 6, cases in which significant competition concerns have arisen in the 36 years since the entry into force of the EUMR are extremely rare, and would inevitably have come to the Commission's attention even if they had not been notified as they involved large companies with dominant positions in their home markets. Consequently, it seems to us that requiring such transactions to be notified to the Commission, and applying a prohibition on implementation prior to clearance, imposes costs that are disproportionate to the objective of preventing harmful concentrations.

If the Commission remains concerned about this risk, we consider that it could be adequately addressed by retaining a residual power to "call in" such concentrations for review (i.e. a self assessment system, as described in 8.2 below).

Alternatively, the Commission might consider including an absence of potential competition, activities in neighbouring markets (conglomerate effects) or activities of two or more parent companies in a market which is upstream, downstream or neighbouring to that of a joint venture (spill-over effects) as criteria that must be satisfied to qualify for exemption, in addition to the criteria of point 5b of the simplified procedure notice.

We recognise that such an exemption would introduce an element of subjectivity and potential complexity into the jurisdictional criteria for notification, in particular as regards market definition. However, for most cases falling within this category, this would not pose problems, as there are no conceivable competitive links between the parties however the plausible alternative markets are defined. For those cases in which there is some uncertainty, merging parties should have the option of seeking jurisdictional guidance from the Commission as to whether the criteria are indeed met, and that no filing is required. This would be important, as we recognise that the Commission would retain the power to impose penalties for failure to file on merging parties that had incorrectly determined that their transaction met the relevant criteria.

Any such exemption regime must be structured to preserve the one-stop-shop jurisdiction of the EUMR over such concentrations. If transactions that are

exempted from EUMR filing requirements become subject to multiple national filing regimes instead, the resulting additional costs would considerably outweigh the efficiencies that would be available from such a reform. Concentrations with an EU dimension that meet the relevant criteria for exemption should therefore be deemed compatible with the internal market, in the same way, for example, as the State aid General Block Exemption (Regulation No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty) deems various categories of aid to be compatible with the internal market within the meaning of Article 107 TFEU.

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.

This proposal is essentially identical to the "transparency system" that was the subject of the 2014 EUMR consultation. Please see paragraphs 3.6 to 3.15 of our response to that consultation for our detailed views (available at http://ec.europa.eu/competition/consultations/2014_merger_control /clifford_chance_en.pdf). In particular, for the reasons set out in our previous response, we do not consider that merging parties would have appropriate incentives to make use of such a system (instead of submitting filings under the normal procedure) unless there is no automatic standstill obligation, a short prescription period and an information notice that does not require the provision of market share data or internal documents.

For transactions falling under the simplified procedure notice, we consider that an information notice system structured in this way would be an improvement to the current system. However, for transactions falling under points 5a and 5b of the simplified procedure notice (as well as the other categories of cases identified in response to question 8.3), we consider that an exemption or self-assessment regime would be more efficient, for the reasons set out in response to questions 8.1 and 8.3.

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.

We consider that a self-assessment system would be appropriate for at least four categories of case.

• First, for transactions falling under point 5b of the simplified procedure notice. If the Commission does not favour exempting from EUMR filing and standstill obligations, we consider that a self assessment system would be the next-best option, for the same reasons that we have set out in response to question 8.1.

• Second, we also favour a self assessment system for transactions falling under point 5a of the Notice (excepting joint ventures with no EEA activities, which we address in response to questions 9 to 13 below). We recognise that there have been some instances in which new, "greenfield" joint ventures – to which the parties were not contributing significant, pre-existing businesses – have given rise to a detailed Phase 2 investigation (e.g. Case No COMP/M.6314 – Telefónica UK/ Vodafone UK/ Everything Everywhere/ JV) or even a conditional clearance decision (Case No COMP/M.2903 – DaimlerChrysler/Deutsche Telekom/JV). However, such cases are extremely rare. Moreover, they have involved high profile cases involving a number of leading market players and/or complainants, such that they would inevitably have come to the attention of the Commission even in the absence of a notification requirement.

• Third, we consider that the Commission ought to examine the possibility of a self-assessment system for acquisitions of real estate assets. Such transactions make up an unusually high proportion of the simplified procedure decisions that are issued by the Commission every year. None has ever given rise to a significant competition concern. While we recognise that concerns are theoretically possible, the fact that they have not arisen in practice indicates that such transactions could be appropriately dealt with under a self-assessment system. In particular, we consider there to be a valid distinction between acquisitions of individual real estate assets and acquisitions of businesses that provide real estate services and/or manage a number of real estate assets. In our experience, and on the basis of the Commission's clearance decisions in the real estate sector, the former are not susceptible to give rise to competition concerns in practice.

Alternatively, we consider there to be sound arguments that such assets should not be viewed as undertakings simply because they generate rental income, or have the potential to do so. In this respect, we are aware that the Commission has taken the view that a real estate asset will be an undertaking if the leases on one or more of the units within the asset will be up for renewal within a period of several years from the date of the concentration. In our view, this is an excessively conservative approach. Put simply, such properties are productive assets, not (in and of themselves) businesses. The Commission's current approach means that acquisitions of

such assets are notifiable when jointly acquired from a third party, as in these circumstances the fact that the acquiring joint venture is not full function is not relevant (in accordance with paragraph 91 of the Consolidated Jurisdictional Notice, and in contrast with the useful guidance on real estate acquisitions in paragraph 96). The Commission might therefore consider revising its guidance to clarify that such "pure" real estate assets will not be considered to be undertakings for the purposes of the EUMR. At minimum, we consider that the Commission ought to clarify its approach in this area.

• Finally, we see merit in allowing self-assessment for "debt-for-equity swaps" undertaken as part of a wider restructuring or refinancing. Such transactions often need to be implemented very quickly, and cannot be notified until fairly late in the restructuring process as there remains uncertainty regarding the exact equity interests that will be held by the respective holders of debt. Moreover, such lenders will not have invested with the expectation or anticipation of acquiring decisive influence over the target, such that competition concerns are highly unlikely to arise.

Please see paragraphs 3.4 and 3.5 of our response to the 2014 EUMR consultation for our detailed views on the best way to implement a self-assessment system (available at http://ec.europa.eu/competition/consultations/2014_merger_control/clifford_chance_en.pdf). In particular, we favour a self-assessment system in which the prescription period runs (as it does in the UK) from the time that details of an acquisition are published by the parties or in the national business press or trade journals. The Commission might consider, in the alternative, having no automatically-triggered prescription period, and instead giving the parties the option to trigger such a period by submitting a short form information notice (of the type described in question 8.2) to the Commission.

8.4 Other

- (●) YES
- ( ) NO

Please explain.

See our responses to Questions 5 and 6 for other suggestions for improvement to the EUMR filing regime.

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.

Please see our responses to questions 8.1 to 8.4 inclusive.

Further simplification of the treatment of extra-EEA joint ventures

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

As the Commission will be aware from responses to the consultations in 2013 and 2014 on this point, there has been a broad consensus for quite some time that requiring notifications of joint ventures with no EEA activities – and applying the attendant prohibition on implementation – serves no useful purpose, is a waste of resources and detracts from the overall credibility of the EU merger control regime. In addition, it creates a precedent that has been replicated in numerous jurisdictions outside the EU, to the detriment of EU business that engage in multi-jurisdictional M&A. We therefore advocate a system whereby such transactions are deemed to be automatically compatible with the internal market if they meet the relevant criteria.

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

It is self evident that reviewing the effect on competition in the EEA of joint ventures with no EEA nexus creates no added value for business or consumers. On the contrary, it is value-destructive, as it creates a precedent that has been replicated in numerous jurisdictions outside the EU, to the detriment of EU business that engage in multi-jurisdictional M&A. In our experience, while the thresholds of a number of national merger control regimes of EU member states do capture such transactions in principle (having been based on the EUMR thresholds), very few of the relevant national competition authorities have a policy of actively advocating notification of such no-nexus transactions under their regimes, unlike the European Commission. Consequently, the one-stop-shop nature of the EUMR review creates limited benefits for such transactions in practice.

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

It is self evident that any costs incurred in notifying extra-EEA joint ventures are wasted, and therefore disproportionate, given that such transactions are incapable of giving rise to harmful effects in the EEA in practice.

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

The 2013 simplification package reduced the amount of information that is required to be provided for extra-EEA joint ventures. This has reduced the amount of unnecessary costs, but does not alter the fact that the remaining costs of complying with pointless notification and standstill obligations are also unnecessary.

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.

In our view, excluding extra-EEA joint ventures from the scope of the Commission's EUMR jurisdiction does not give rise to any risk of harm to competition. First, if an extra-EEA joint venture expands the scope of its activity so that it begins to compete in the EEA, that new entry will be pro-competitive. Second, the EUMR seeks to regulate structural growth, not organic growth of this type. In particular, the EUMR does not seek to regulate acquisitions of sole control of extra-EEA businesses on the grounds that such businesses might in the future begin competing in the EEA. There is no reason why acquisitions of joint control should be treated differently.

We recognise that excluding extra-EEA joint ventures from the scope of the EUMR would create unnecessary costs for merging parties if that meant that they were required to notify such transactions to numerous member states. This risk should not be over-stated, as national authorities of EU member states have, in our experience, been much more reticent than the Commission about inviting or accepting notifications of extra-EEA joint ventures. However, we do consider that the risk should be addressed to ensure that excluding extra-EEA joint ventures from the scope of the EUMR does not mean that they become potentially notifiable under national merger regimes of the EU member states. This could be achieved by exempting such transactions through a block exemption measure that automatically deems joint ventures meeting the relevant criteria to be compatible with the internal market. That would preserve the one-stop-shop jurisdiction of the EUMR, and exclude jurisdiction for national authorities.

(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.

```
In our view, any measure that falls short of excluding extra-EEA joint
ventures from the scope of the EUMR would not achieve the desired result of
eliminating unnecessary and disproportionate costs.
```

(iii) Other.

Please explain.

```
In our view, any measure that falls short of excluding extra-EEA joint
ventures from the scope of the EUMR would not achieve the desired result of
eliminating unnecessary and disproportionate costs.
```

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.

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.

Please see our response to question 19.

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.

Please see our response to question 19.

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.

We recognise that the current jurisdictional thresholds may not necessarily capture all transactions in which competition concerns may arise. However, we are not persuaded that there is sufficient empirical evidence of a significant enforcement gap. In our view, the current referral system adequately ensures that competitively significant transactions with a cross-border effect in the EEA are capable of being reviewed at EU level:

• In the absence of examples of high value deals that have escaped review at either EU or national level, it seems to us that the evidence of a need to introduce a threshold to capture such deals is lacking.

• In practice, businesses to which such high values are attached have sufficient turnover and/or market share to become reviewable in one or more Member States, as demonstrated by the example of Facebook/Whatsapp. Moreover, Germany will imminently have its own transaction value threshold, which will catch any relevant acquisition of a pharmaceutical sector undertaking with pipeline products that might eventually be commercialised in Europe, such as AbbVie / Pharmacyclis. Even if no national thresholds were met, referrals could be made under Article 22 EUMR. Such transactions will not therefore escape review.

• The question is then whether they should be reviewed by the Commission or by national authorities. Given that a high deal value does not necessarily mean that a transaction will have cross-border effects in the EEA (or, indeed, any effects within the EEA at all), we do not consider there to be sufficient justification for assuming that they should be subject to review at EU level. Instead, it should be left to the referral system to allocate such cases, as appropriate and depending on the circumstances.

• Such a threshold will introduce unnecessary complexity, subjectivity and uncertainty. The transaction value threshold under the US Hart-Scott-Rodino Act is an example of this. It is complicated to apply and frequently requires the purchaser's board of directors to determine the "fair market value" of the target assets – a test that is far removed from the objective simplicity of the EUMR's turnover thresholds.

• Such complexity and uncertainty will be significantly increased if, as appears to be proposed, the threshold would capture transactions in which the target has no turnover whatsoever in the EEA, as any assessment of whether the transaction has a sufficient jurisdictional nexus to the EEA is likely to entail a substantial degree of subjectivity.

.

We recognise that there are some categories of merger with cross border effects that may not be captured by the current EUMR thresholds. However, short of depriving national authorities of their national merger control jurisdiction in its entirety, the EUMR thresholds will never capture all transactions with cross border effects, no matter how much they are supplemented or re-designed. There will continue to be cross-border transactions that fall below the thresholds, and inconsistent treatment of some transactions due to variations in the jurisdictional thresholds of member states' national regimes. The referral system is well equipped for dealing with transactions of the nature contemplated here. The referral system is successfully capturing such transactions (as demonstrated by the example of Facebook/Whatsapp, and so we see no reason to introduce new thresholds to alter the balance of jurisdiction between the EU and member states. If there are concerns regarding the referral system or the circumstances in which parties are able to request a referral to the Commission, then these concerns should be addressed separately.

In addition, the introduction of a transaction value threshold in Germany provides a useful test case. It provides the Commission with an opportunity to decide whether such a threshold should be introduced on the basis of empirical evidence. We therefore suggest that the Commission monitors the operation of the new threshold in Germany for a period, in order to better evaluate its usefulness for the EUMR.

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.

We do not consider that the case for a transaction value threshold has been clearly made. If such a threshold is introduced, we consider that it must be set at a very high level, so as to maintain a proportionate balance of jurisdiction between the Commission and national merger control authorities of the EU (see our response to question 19). It is also imperative that any thresholds retain a requirement for some kind of real EU nexus/overlaps (see our responses to questions 21 and 22).

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

- [ ] A general clause stipulating that concentrations which meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance.
- [ ] Industry specific criteria to ensure a local nexus.
- [x] Other

Please explain your response and provide examples where appropriate.

In our view, the EUMR should not seek to capture acquisitions of businesses that have no turnover or assets in the EEA. Any transaction value threshold should be accompanied by a requirement that the target must have a minimum amount of existing turnover or assets in the EEA – the thresholds in point 5 (a) of the Simplified Procedure Notice would form a suitable nexus for these purposes.
We do not consider that this would result in important transactions escaping review. In practice, for any high value deal with a sufficient likelihood of cross-border effects the target, will have at least some turnover or assets in the EEA. It is this turnover that should serve as the appropriate territorial nexus.

All other alternatives involve the need to carry out a subjective and largely speculative assessment of whether a transaction is likely to have competitive effects in the EEA. This would import unnecessary and unwelcome cost and legal uncertainty into jurisdictional assessments under the EUMR. Moreover, in many instances the test would be inherently subjective (e.g., relying on intentions or predictions of future sales of a target with an R&D pipeline that has not yet been commercialised), and we do not consider that in such cases these problems could be cured by explanatory guidance.

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.
- [x] 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).
- [x] 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.).
- [x] Other.

Please explain your answer.

A combination of the above criteria would go some way to ensuring that a transaction value threshold captured only deals of particular EU-wide importance. We do not consider that any of them would be suitable or sufficient if applied in isolation, however, as each of the suggested criteria addresses a different way in which a transaction may have or lack sufficient EU-wide importance.

In addition, for the reasons set out in response question 18, we consider that any transaction value threshold should only catch acquisitions of targets with a minimum level of existing turnover in the EEA, in order to ensure a sufficient and objective test for territorial nexus.

If the Commission does introduce a transaction value threshold that is capable of catching acquisitions of targets with no, or minimal turnover in the EEA, it should also provide additional guidance on the concept of an undertaking to ensure that the reform does not result in numerous notifications of pure assets that do not amount to an undertaking for the purposes of competition law, i.e. a business engaged in the supply of goods or services on a market.

IV.3. Referrals

The division of competence between the Commission and the EU Member States is based on the application of the turnover thresholds set out in Article 1 of the Merger Regulation and includes three corrective mechanisms.

The first corrective mechanism is the so-called "two-thirds rule". Pursuant to this rule, notification under the Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, even if the general thresholds under Articles 1(2) and 1(3) of the Merger Regulation are met. The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) of the Merger Regulation or to the Commission under Article 4(5) if certain conditions are fulfilled. The initiative for requesting such a referral prior to notification lies in the hands of the parties. However, pre-notification referrals are subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5) of the Merger Regulation.

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the Merger Regulation under certain conditions (Article 22 of the Merger Regulation). Conversely, a Member State may, in cases that have been notified under the Merger Regulation, request the transfer of competence to the national competition authorities under certain conditions (Article 9 of the Merger Regulation).

In relation to the current case referral mechanism foreseen by the Merger Regulation, the White Paper proposals aimed at making case referrals between Member States and the Commission more business-friendly and effective.

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;

2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely

- an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
- and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and

3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

- YES
- NO
- OTHER

Please explain.

While the referral system functions effectively overall, we favour some of the reforms proposed by the 2014 White Paper. Please see section 5 of our response to the 2014 White Paper consultation (available at http://ec.europa.eu/competition/consultations/2014_merger_control/clifford_chance_en.pdf).

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.

Please see section 5 of our response to the 2014 White Paper consultation (available at http://ec.europa.eu/competition/consultations/2014_merger_control/clifford_chance_en.pdf).

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.

```
Please see section 5 of our response to the 2014  White Paper consultation
(available at http://ec.europa.eu/competition/consultations
/2014_merger_control/clifford_chance_en.pdf).
```

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?

```
•        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:  We
agree that this would be a useful reform. We suggest that it could be
achieved by adding to the list of circumstances set out in Article 4(1),
second paragraph: "a good faith intention to make a public bid" or "a good
faith intention to acquire decisive influence".
```

• Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures: We agree that this would be sensible, in order to put the Commission's current approach on a sound legal basis. However, we consider it somewhat illogical and inconsistent that, under the Commission's current approach, a portion of turnover is allocated to the undertaking concerned on a per capita basis if it exercises decisive influence in an undertaking jointly with third parties (paragraph 187 of the Consolidated Jurisdictional Notice), but no turnover at all is allocated to the undertaking concerned of it exercises negative sole control over an undertaking, i.e. the same quality of control, but with no third parties having decisive influence (paragraph 184 of the Consolidated Jurisdictional Notice).

• 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: We do not agree with this proposal. If internal consistency is required, we favour instead a reversion to the pre-2004 formulation of Article 8(4), which required the Commission to seek to "restore effective competition", rather than "restore the situation prevailing prior to the implementation of the concentration", so allowing for the possibility that an acquirer may retain a minority interest that poses no harm to competition. The current focus on restoring "the situation prevailing prior to the implementation of the concentration" (as opposed to the pre-2004 requirement to restore "effective competition") risks resulting in disproportionate losses for legally-implemented acquisitions, that cannot be justified by reference to any competitive harm. For our detailed reasons for this view, see paragraphs 6.7 and 6.8 of our response to the 2014 consultation.

• 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: We agree that this would be appropriate. We would, however, counsel against imposing such penalties on third parties that receive unsolicited confidential information from the Commission as part of a market testing campaign, such as copies of the parties proposed remedies, for their comments. If such an amendment is introduced, the Commission should confirm in advance with third parties that they consent to receive the relevant non-public commercial information and to become subject to the attendant risk of penalties in the event of improper disclosure.

[Dues to the character limit in the online questionnaire, the remainder of the response to this question is contained in the response to question 27 below]

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?

[continuation of the response to question 26:]

• Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer: We recognise that this would codify long-standing practice of the Commission. However, in our view the Commission should take this opportunity to reconsider its approach to parking transactions. Parking structures are valuable transactional tools: they facilitate the efficient allocation of risk between seller and purchaser, and so allow transactions to take place that would not otherwise be possible. While the Commission might understandably have reservations that giving carte blanche to the use of warehousing might prejudice the integrity of its review process, those concerns could be allayed or mitigated by measures falling short of an outright ban. In particular, it ought to be possible to address specific concerns through the Commission's jurisdictional guidance. For example, if a warehousing structure might, in theory, be used to ensure the elimination of a rival (albeit at considerable cost) by acquiring assets that do not themselves amount to a viable, standalone business and would therefore inevitably degrade in the hands of the warehouser if the ultimate acquisition is blocked, that concern could be addressed by the Commission taking the position that parking transactions are only possible if the criteria set out in Article 3(5)(a) EUMR are met, and that those criteria imply that the target assets are capable of disposal, and therefore must amount to a viable, standalone business. In addition, the experience of jurisdictions in which no standstill obligation applies suggests that allowing certain forms of warehousing would not have significant adverse effects. In the UK, for example, completion of an acquisition by a rival affects the authorities' ability to remedy a transaction's anticompetitive effects only in rare and exceptional circumstances. So a structure that leaves the target in the hands of a non-competitor bank in the event of insurmountable competition concerns is even less likely to cause problems in this respect. We note that there is nothing in the judgment of the General Court and the subsequent opinion of Advocate General Mazak in Cases T-279/04 and C-551/10 Editions Odile Jacob (the ECJ having refrained from ruling on the point in its final judgment) that would preclude such an approach.

• 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: We agree that transactions that have already been assessed by a national competition authority should not become subject to a potential reappraisal by the Commission in the event of a subsequent transaction between the same parties, falling within the scope of Article 5(2)(2) EUMR. Doing so undermines the valuable comity between the Commission and national competition authorities on which the EUMR is founded.

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.

V. Submission of additional information

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

Contact

COMP-A2-MAIL@ec.europa.eu