

## 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**

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*Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on some procedural and jurisdictional aspects of EU merger control. The questionnaire does not necessarily reflect the views of the European Commission and does not prejudice its future decisions, if any, on further action on these aspects.*

## **A. Purpose of the consultation**

The purpose of the present consultation is to gather information on particular aspects of the performance of EU merger control. This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide feedback on their experience/knowledge of issues under scrutiny and what action, if any, should be taken in this regard.

Input from stakeholders will be used in a Staff Working Document to evaluate procedural and jurisdictional aspects of EU merger control. The Commission will carefully analyse the outcome of this consultation and previous consultations as well as the findings of the evaluation as a whole before deciding whether it should take further action.

## **B. Background**

Merger control constitutes one of the instruments of EU competition law. Its main objective is to ensure that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations.

In recent years (particularly in 2009 and from 2013 onwards), the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU Merger Control (the "White Paper", COM(2014) 449 final). The White Paper confirmed that EU merger control works well and that no fundamental overhaul of the system is needed, but envisaged specific amendments in order to make it more effective.

The key proposals of the White Paper were the following:

1. Introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition;
2. Making case referrals between Member States and the Commission more business-friendly and effective;
3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns; and
4. Fostering coherence and convergence between Member States with a view to enhance cooperation and to avoid divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

Based on the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system overall works well but welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification.

Recently, a debate has emerged among stakeholders and competition experts on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control. These jurisdictional thresholds are set out in Article 1 of the Merger Regulation and determine which transactions have a Union dimension and are reviewed, in principle, by the European Commission.

Some stakeholders have raised the question of whether the turnover-based jurisdictional thresholds allow capturing, under EU merger control rules, all transactions which can potentially have an impact in the internal market. This question may be particularly significant for transactions in the digital economy, but also in other industry sectors, such as pharmaceuticals, where acquisition targets may not have always generated substantial turnover yet, but nevertheless are highly valued and constitute, or are likely to become, an important competitive force in the relevant market(s).

Moreover, recent experience in enforcing the EU merger control rules has shown that certain technical aspects of the procedural and investigative framework for the assessment of mergers may merit further evaluation. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

### ***Scope of the Evaluation***

It therefore appears opportune to build upon the work undertaken so far in the context of the White Paper and prior consultations and complement it by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail:

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,<sup>[1]</sup> the Implementing Regulation,<sup>[2]</sup> and the Commission Notice on simplified procedure;<sup>[3]</sup>
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

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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

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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

Working Group of the Antitrust Committee of the International Bar Association  
(IBA)

\*Your full name

Catriona Hatton

\*Email address

catriona.hatton@bakerbotts.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.

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at <http://www.ibanet.org>.

\*1.3 Where are you based?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxemburg
- Malta
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

\*Please specify.

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## 2. Transparency Register ([Register now](#))

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the [Transparency Register](#) and subscribing to its [Code of Conduct](#). If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to register now, please click on the link in the title. Then you can return to this page, continue replying to the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement available on the public consultation website for information on how your personal data and contribution will be used.

For registered organisations: indicate your Register ID number here:

### \* 3. Please choose from one of the following options on the use of your contribution:

- My/our contribution can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).
- My/our contribution can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication. I am aware that I am solely responsible if my answer reveals accidentally my identity).
- My/our contribution cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

\*4. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

YES

NO

## IV. Questionnaire

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### IV.1. Simplification

In December 2013, the Commission adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself (the so called "Simplification Package"). In particular, the Simplification Package:

- Widened the scope of application of the so-called simplified procedure for non-problematic cases;
- Streamlined and simplified the forms for notifying mergers to the Commission.

Through the Simplification Package, which entered into force on 1 January 2014, the number of cases dealt with under the simplified procedure has increased by 10 percentage points from an average of 59% over the period 2004-2013 to around 69% of all notified transactions over the period January 2014 to September 2016).

According to the Commission Notice on simplified procedure ("the Notice"), the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

- i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);
- ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);
- iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);
- iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)
- v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). The Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure.

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:

- This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;
- Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

These proposals are still being assessed. Your response to the following questions will contribute to that assessment.

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

(1 = "did not create much added value"; 7 = "created much added value"):

	1	2	3	4	5	6	7
Your rating	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>				

Please explain.

The Working Group welcomes the Commission's initiative to review the impact of the Simplification Package. As a starting point, the one-stop shop review under the Merger Regulation creates efficiencies by - among other things - eliminating the need for multiple reviews of transactions fulfilling the Merger Regulation's thresholds. As such, the one-stop shop review has enhanced the overall efficiency of enforcement and created value for businesses and consumers.

The one-stop shop review at the EU level for transactions that fulfil the criteria for the simplified procedure has created further significant benefits by reducing the burden with respect to transactions that are unlikely to create any competitive harm. This has reduced time and costs for companies that are parties to transactions, and the Working Group believes that the Simplification Package has thus created added value for both businesses and consumers by expanding the categories of cases that may benefit from the simplified procedure. Indeed, statistical data confirms that a larger proportion of notified transactions - 10% more - have been handled under the simplified procedure following the introduction of the Simplification Package.

While the Working Group believes that the Simplification Package has contributed to refining the process for dealing with straightforward transactions, the Working Group believes that there are some areas where further improvements could be made. These are detailed in our responses 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

Treating cases that are unlikely to present any competition concerns under the simplified procedure significantly reduces burdens on companies compared to the normal procedure. The amendments to the simplified procedure in the 2013 Simplification Package overall enhanced the scope of transactions benefiting from simplified treatment and streamlined notification requirements and procedures in respect of the most benign cases.

However, in certain respects, the Simplification Package also increased certain burdens for parties to transactions treated under the simplified procedure by introducing certain new requirements, discussed in response to Question 6, below. Thus, while the simplified procedure continues to benefit companies compared with the normal procedure, the Working Group suggests that further refinements should be considered.

Transactions falling under point 5(b)

The application of the simplified procedure to transactions having neither a horizontal nor a vertical overlap is beneficial, and certainly reduces burdens compared with the normal procedure.

However, these transactions were also eligible for simplified treatment in the Commission's prior notice on the simplified procedure. Point 22 of the Notice further suggested that pre-notification may be dispensed with for this category of transactions, which, where appropriate, represents further cost and time savings compared with the normal procedure. The Working Group, however, believes that this dispensation with the requirement to pre-notify has not really been used in practice and further guidance could be provided in this respect.

(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

Transactions falling under point 5(c) or point 6

The Simplification Package expanded the number of transactions with limited horizontal overlaps and vertical links that qualify for the simplified procedure under point 5(c) or point 6 by increasing the applicable market share thresholds and by introducing a new threshold based on HHI deltas.. In addition the Simplification Package did helpfully clarify that in relation to the acquisition of joint control over a JV, relationships that exist only between the parents outside the field of activity of the joint venture are not considered horizontal or vertical relationships for the purposes of determining whether the simplified procedure should apply.

These amendments are to be welcomed, and clearly enhance procedural efficiency in the sense that a larger number of transactions that are unlikely to present any competitive concerns can use the simplified procedure, reducing burdens for companies and conserving Commission resources compared with what is required for the normal procedure.

(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

Transactions falling under point 5(a)

The application of the simplified procedure to joint venture transactions with no or limited activities in the EEA is beneficial, reducing burdens for companies and for the Commission compared with the normal procedure. These transactions were already eligible for simplified treatment in the Commission's prior notice on the simplified procedure. But the Simplification Package reduced information burdens for these types of transactions creating a de facto category of "super simplified" treatment. The Working Group welcomes this development and applauds the Commission for simplifying the notification requirements for such offshore joint ventures. However, the notification burdens remain significant in light of the fact that such transactions can have no conceivable impact on competition in the EEA and we provide further comments on their treatment below.

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

- YES
- NO
- OTHER

Please explain

Transactions falling under point 5(d)

The application of the simplified procedure to transactions involving a change from joint to sole control is beneficial, and certainly reduces burdens compared with the normal procedure. However, these transactions were also eligible for simplified treatment in the Commission's prior notice on the simplified procedure. The Simplification Package - importantly - confirmed that this category of transactions would continue to be eligible for the simplified procedure. Apart from this, the Working Group believes that its further impact on this category of transactions has been limited and further simplification could be achieved as we note in our comments below.

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

- YES
- NO

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

As this question concerns specific individual cases, not policy initiatives, we have chosen not to respond to this question.

(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 this question concerns specific individual cases, not policy initiatives, we have chosen not to respond to this question.

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.

As this question concerns specific individual cases, not policy initiatives, we have chosen not to respond to this question.

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

The Working Group welcomes the Commission's consideration of additional categories of cases that are not likely to raise competition concerns. In the view of the Working Group, the current categories covered in points 5 and 6 of the Notice are generally comprehensive.

However, the Working Group notes that point 5(c) applies to cases involving limited horizontal overlaps, where the combined market share of the parties to the concentration is less than 20%. However, the Commission's horizontal merger guidelines contain guidance on the level of market share below which the Commission is likely to find that a transaction is non-problematic and is 'not liable to impede effective competition'. That figure is set at 25% in the Commission's horizontal merger guidelines and in the recitals to the Merger Regulation itself. The Working Group thus suggests that the Commission consider whether there is scope to increase the horizontal market share threshold for transactions to qualify for the simplified procedure to 25%.

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.

Please see the detailed response to question 6 in our attached submission document.

- Transactions falling under point 5b of the Notice:

YES

NO

Please explain.

Other: See comments above

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

YES

NO

Please explain.

Other: See comments above

- Transactions falling under point 5d of the Notice:

YES

NO

Please explain.

Other: See comments above

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

The Working Group believes that the Simplification Package reduced the time and cost associated with notifying transactions by increasing the scope of the simplified procedure as explained above, and thus enabling more transactions that present little or no risk to competition to benefit from simplified treatment. This is confirmed by statistical data, indicating that the proportion of notified transactions that benefit from the simplified procedure has increased by 10% since the introduction of the Simplification Package in late 2013.

However, as noted in response to Question 6 above, the Simplification Package introduced certain new burdens, which limits the reduction in costs attributable to this reform. By reducing these burdens going forward the Working Group believes that further appropriate cost reductions will be realized.

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.

While the Working Group believes that certain transactions categorized under point 5(a) of the Notice, namely extra-EEA joint ventures, arguably do not fall within the scope of EU law under public international law and the effects doctrine, the Working Group submits that such cases should continue to benefit from benefit from the "one stop shop" jurisdiction under the Merger Regulation to the extent that national laws of EU member states continue to apply to such transactions via similar extraterritorial overreach. While remaining within the EUMR, however, such joint ventures should be relieved from the obligation to notify and should be deemed

approved automatically, for example, via a block exemption regulation. In addition, the Working Group believes that consideration should be given to whether the notification of certain transactions, including those resulting in a change from joint to sole control (point 5(d)) and those without an overlap (point 5(b)), could also be further streamlined.

Transactions falling under point 5(a) - Extra-EEA joint ventures

Extra-EEA joint ventures are those that will be active on markets outside of the EEA and which do not and will not foreseeably generate EEA turnover. These extra-EEA joint ventures fall within the scope of the Merger Regulation solely as a result of the EEA turnover of their parent companies' corporate groups, which are often themselves established outside of the EEA. Although as a matter of international public law, it may be argued that EU law should not be applicable to these transactions where they can have no plausible impact on competition within the EEA, they must still be notified to the Commission. The Working Group thus believes that requiring the notification of these transactions, even under the simplified procedure, is not clearly in line with ICN recommended practices, creates a disproportionate burden on parties and unnecessarily diverts Commission resources to matters that do not affect competition in the EEA. Beyond the wasteful effects of such an approach with regard to EU notification requirements, such an approach also creates an unhelpful international precedent that - given the influence of EU law as guidance to legislators in other jurisdictions - is likely to increase merger control burdens by increasing the notification requirements in multi-jurisdictional cases.

Nevertheless, the Working Group accepts the benefits of these transactions remaining subject to the Merger Regulation when the jurisdictional thresholds are met if otherwise the national laws of EU member states would - via similar over-reach - apply to these transactions, as this would enable them to benefit from the 'one stop shop' and be assessed at the Community level. At the same time, the Working Group recommends that the Commission deem extra-EEA joint ventures to be approved under a block exemption or similar mechanism. In other words, where certain criteria are met, parties to an extra-EEA joint venture could, with certainty, consider their transaction to be approved.

The Working Group believes that such an approach would significantly reduce burdens on companies, ease the burden on scarce Commission resources and would not create any material risk to competition in the EEA. It would also send a strong signal to other jurisdictions which may consider applying their laws to extraterritorial transactions which lack local effects that such transactions should not be subject to local notification requirements.

Transactions falling under point 5(b) - no overlap and point 5(d) - joint to sole control

The Working Group considers that a more streamlined approach could be applied to transactions falling under point 5(b) and point 5(d) of the Notice - i.e., transactions involving no overlap or vertical relationship, and transactions

involving a change from joint to sole control. These transactions are generally unlikely to result in harm to competition in the EEA, yet must be notified when the Merger Regulation's thresholds are met.

These transactions should remain subject to the Merger Regulation, as this enables them to benefit from the 'one stop shop'. However, there is significant scope to simplify the treatment of these transactions. Specifically, the Working Group recommends that the Commission consider either implementing a form of self-assessment, or alternatively introduce a light information notice in lieu of requiring a Short Form CO. This is further addressed in response to Question 8.2 (information notice) and 8.3 (self-assessment), below.

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.

As explained above, the Short Form CO is much less burdensome than the full Form CO used in the normal procedure. However, the Short Form CO still imposes heavy burdens on parties to transactions that presumably will not create harm to competition and are thus disproportionate for transactions that are incapable of impacting competition in the EEA.

One way that this burden can be alleviated is to replace the Short Form CO with an information notice in certain cases. This could include cases involving neither a horizontal overlap nor vertical link, or cases involving a change of joint to sole control. (As mentioned in response to Question 6 and 8, the Working Group believes that transactions falling under category 5 (a) (extra-EEA joint ventures) should be deemed approved without a notice or notification of any kind.)

The design details associated with the introduction of an information notice will be important to ensure that legal certainty is not sacrificed. The Working Group suggests that, conceptually, an information notice would require the parties to provide basic information - for example, about themselves, the transaction and the industries involved but that it would not include market data, in particular market shares (as this immediately creates burdens in light of the fact that it is not straightforward to identify "relevant markets"). The Commission would then have a limited amount of time, for example, 15 working days, in which to decide whether to investigate during which the suspension obligation would apply. If the Commission decided to investigate, parties would be obliged to submit a Short Form CO. On the other hand, if at the end of 15 working days the Commission declined to investigate or did not react, the parties could close the transaction with legal certainty. No decision would need to be published.

The Working Group believes that an information notice requirement for certain transactions could significantly streamline the burden on parties to transactions that are not capable of impacting competition in the EEA. At the same time, such a system could include safeguards that would enable the Commission to investigate if it considered further assessment necessary. Thus, such a system would reduce administrative burdens on parties and reduce burdens on Commission resources, without creating risks to competition in the EEA.

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.

As an alternative, a self-assessment system could also reduce burdens on parties and the Commission with regard to certain, non-problematic transactions that would otherwise be notified using the Short Form CO - namely, transactions falling under points 5(b) or 5(d) of the Notice. Self assessment can, however, reduce legal certainty and create additional complications (in particular in light of the referral system, the interaction that such cases would have with national requirements, the Commission's powers to intervene in certain situations etc.).

If the Commission were minded to introduce self-assessment for certain categories of transactions eligible for the simplified procedure, the Working Group suggests that certain procedures be introduced to guard against a loss of legal certainty as far as possible. In particular, the Commission should introduce clear guidance to help parties understand the cases in which the Commission is likely to intervene. This will help parties determine whether their case is appropriate for non-notification under a self-assessment scheme. In addition, to ensure that legal certainty is not sacrificed, parties should also have the opportunity to voluntarily notify their transactions to the Commission - even if their transaction qualifies for self-assessment.

In addition, any system of self-assessment would also need to be accompanied by a firm time limit after which the Commission cannot intervene. In the UK system, for example, the Competition and Markets Authority ('CMA') can intervene only within four months of the transaction being made public, or the time when the CMA was told about it.

Overall, assuming appropriate safeguards are put in place, the Working Group believes that a system of self-assessment would also be an appropriate way to reduce the disproportionate burdens of notification on clearly non-problematic transactions while not creating risks to competition.

#### 8.4 Other

- YES  
 NO

Please explain.

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

Risks and possible mitigation are discussed in response to Questions 8.1–8.3, above.

*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

The Working Group believes that the requirement to notify extra-EEA joint ventures with a Community dimension creates significant burdens for parties to such transaction, and diverts Commission resources from matters that can potentially impact the EEA. Correspondingly, the Working Group believes that the review of such transactions by the Commission has not contributed to the protection of competition and consumers in Europe. To the contrary, competition and consumers in Europe would be better protected if the Commission focused its scarce resources on matters that actually impact the EEA. In the Working Group's view, such transactions, if made subject to the application of the Merger Regulation for practical purposes (i.e., preserving the one stop shop-principle) should be deemed to be approved under the Merger Regulation.

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

As explained in response to Question 1, for most types of transactions, the Working Group believes that the one-stop shop review of concentrations creates value for businesses and consumers, where there would otherwise exist a burden of multiple notifications at national level. This extends to extra-EEA joint ventures that fulfil the Merger Regulation's jurisdictional thresholds.

The Working Group believes that extra-EEA joint ventures should be deemed to be approved under the Merger Regulation, which would also enable them to continue to benefit from 'one stop shop' review. An alternative scenario could involve an extra-EEA joint venture being subjected to multiple Member State-level notifications, which would be a potentially more burdensome and less efficient outcome. The Working Group believes that ideally the Commission and the national competition authorities would reach a consensus that - in light of public international law and ICN recommended practices and the fact that such transactions are truly non-problematic in substance in any event - such transactions are outside the scope of their respective merger control laws. Failing such a consensus, the 'one stop shop' review thus continues to be an important feature of the Merger Regulation, including for extra-EEA joint ventures.

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

- YES
- NO
- OTHER

Please explain

The notification of extra-EEA joint ventures requires the submission of a Short Form CO, which, while abbreviated compared with the full Form CO, still requires significant information – which imposes burdens of time and cost on the parties. The Working Group believes that extra-EEA joint ventures present no material risk to competition in the EEA (in fact they have no real nexus with the EU) and therefore considers that the costs incurred by businesses to notify extra-EEA joint ventures are disproportionate to the risk that such transactions actually present. In addition, there are further costs associated with the need to file notifications in jurisdictions outside the EU that model their laws in light of EU law and apply their laws to transactions that do not produce any effect in these jurisdictions. For this reason, the Working Group believes that the Commission should deem extra-EEA joint ventures with a Community dimension to be approved without the need for the parties to submit a notice or notification, and without the need for the Commission to issue a decision.

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

In the Working Group's view, the Simplification Package did reduce the cost of notifying extra-EEA joint ventures somewhat but did not go far enough. The Working Group notes that, for these transactions, the Simplification Package introduced a 'super-simplified' notification, requiring information concerning the transaction, the parties' business activities and turnover figures. In practice, however, experience has shown that the super-simplified approach – while welcome – has not reduced costs significantly because in practice information burdens are still material (including often on jurisdictional issues such as joint control and full functionality or questions relating to the market activities of the parties). The Working Group believes that the more appropriate approach would be to deem such transactions approved without the need for parties to submit a notice or notification, and without the need for the Commission to issue a decision.

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

- The treatment of extra-EEA joint ventures is sufficiently simplified.
- There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

- YES
- NO

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

As explained above, the Working Group believes that extra-EEA joint ventures could be deemed to be approved under the Merger Regulation without creating any risk to competition.

The Working Group appreciates the Commission's concern over specific risks that should be associated with simply deeming extra-EEA joint ventures approved under the Merger Regulation. However, the Working Group does not believe that these concerns present significant risks in practice. In the event that the scope of activity of the joint venture is expanded at a later stage, the Commission has tools to review that activity. For instance, future transfers of EEA businesses from parents to an extra-EEA joint venture would presumably be subject to the Merger Regulation if the thresholds were met, or alternatively could potentially be reviewed by national competition authorities in the EEA. This would enable the Commission (or NCAs) to review and approve expansions of extra-EEA joint ventures into the EEA. To the extent that a joint venture organically expanded into the EEA, this should not be caught by the Merger Regulation, as the Merger Regulation is designed to regulate changes to the structure of markets, not their day-to-day operation (similarly a straightforward foreign to foreign acquisition outside the EUMR, on the basis that the target, for example, has not sales in the EU or sales below the thresholds, would not be revisited if that target subsequently organically expanded its activities within the EU). In this respect, it is more appropriate that the Commission rely on Articles 101 and 102 TFEU to address concerns relating to future organic entry or expansion in the EEA. In either case, if the Commission were to simply deem extra-EEA joint ventures as approved without further investigation, the Commission would still have tools to address future 'expansion' into the EEA.

(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

- YES  
 NO

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

As explained in response to Questions 6 and 8 above, the Working Group considers that extra-EEA joint ventures present a unique category of cases that generally are incapable of plausibly impacting competition in the EEA in any way (Unless there is an intent of the acquiring parties to henceforth use the JV to compete in the EU). These types of transactions, if remaining subject to the Merger Regulation's jurisdiction where thresholds are met, should be deemed to be approved without a notice or notification from the parties, and without the need for the Commission to issue a decision. The Working Group believes that this could be accomplished through the promulgation of a block exemption or similar mechanism, which would alleviate the burden of notifying this category of transaction, while not sacrificing legal certainty.

The Working Group also believes that a light information notice system or self-assessment can reduce burdens. However, extra-EEA joint ventures present such an attenuated risk that they warrant a system in which they can be simply presumed not to significantly impede effective competition. Thus, a light information notice or self-assessment (beyond confirming that the transaction is truly an extra-EEA joint venture) is not necessary to protect EEA consumers in the unique case of extra-EEA joint ventures.

(iii) Other.

Please explain.

## IV.2. Jurisdictional thresholds

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

### *Article 1 of the Merger Regulation*

#### *Scope*

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

*2. A concentration has a Union dimension where:*

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

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

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

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

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

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

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

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

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

*4. [...]*

*5. [...]*

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

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

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

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

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

Please refer to the Working Group's discussion of jurisdictional thresholds at Section IV of our attached submission document.

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.

Please refer to the Working Group's discussion of jurisdictional thresholds at Section IV of our attached submission document.

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.

Please refer to the Working Group's discussion of jurisdictional thresholds at Section IV of our attached submission document.

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 refer to the Working Group's discussion of jurisdictional thresholds at Section IV of our attached submission document.

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 refer to the Working Group's discussion of jurisdictional thresholds at Section IV of our attached submission document.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
- NO
- OTHER

Please explain.

Please refer to the Working Group's discussion of jurisdictional thresholds at Section IV of our attached submission document.

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.

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

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

Please explain your response and provide examples where appropriate.

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

- YES
- NO
- OTHER

Please explain your answer.

### IV.3. Referrals

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

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

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

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

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

Those proposals essentially consist of:

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

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

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

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

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

- YES
- NO
- OTHER

Please explain.

The Working Group generally considers the case referral system to be a suitable system for allocating merger cases to appropriate competition authorities. However, in a number of cases, finding the 'right' authority poses procedural challenges, in particular as this process may have a significant impact on the timing of the review and decision-making process. Given the time-sensitive nature of many transactions, reducing the burden on the parties, especially but not exclusively from a timing point of view, can have an appreciable impact on their ability to successfully complete a transaction and realise its benefits. The Working Group therefore holds the view that there is room for improvements and welcomes the Commission's aim of making the process of referring cases from the NCA level to the Commission and vice versa more effective. Given the practical experiences gathered during the last decade, the Working Group believes that the system has achieved a level of maturity which allows the process to be streamlined and thereby made more efficient, resulting in less unnecessary burden on businesses.

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.

The Working Group generally agrees with the Commission's proposals and welcomes the Commission's willingness to consider the procedural challenge of effectively and efficiently allocating merger review cases to the best placed authority within the EU. Based on its experience, the Working Group recognises that parties already under the existing referral rules do request a referral in many cases that would benefit from a referral. The Working Group would therefore not necessarily expect the proposed changes to result in a significantly greater number of requests for referrals. Nevertheless, the Working Group believes that the modernization of the referral processes would result in a more efficient use of resources for the undertakings concerned, as well as for the Commission.

However, the Working Group does not agree with all of the Commission's proposed amendments as set out further below. Also, the Working Group suggests additional amendments to the current referral regime, in particular as regards the time limits for the NCAs and the Commission to decide on referral requests (see Q.25).

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 refer to the Working Group's discussion of referrals at Section V in the attached submission document.

#### 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?

Please refer to the Working Group's discussion of technical aspects at Section VI in the attached submission document.

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?

The Working Group welcomes the Commission's efforts to review and improve the provisions of the EUMR whenever appropriate. The Working Group generally welcomes the technical improvements that the Commission discusses in its 2014 SWD.

The Working Group considers that the EUMR and the Consolidated Jurisdictional Notice could be revised to clarify the rules applicable to the acquisition of joint control over previously solely-owned subsidiaries and existing joint ventures, and in particular the extent to which such transactions would only be caught by the EUMR if the subsidiaries and joint ventures were full-function.

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.

Please see the Working Group's response to Question 26 (c) above.

## V. Submission of additional information

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

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