

# 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 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,<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.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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
- X an organisation or a company
- a public authority or an international organisation

\*The name of your organisation/ company/ public authority/ international organisation

The International Chamber of Commerce (ICC), Task Force on Premerger Control Regimes

\*Your full name

Patrick Hubert, Vice-Chair of the ICC Commission on Competition and Chair of the ICC Task Force on Merger Control Regimes

\*Email address

patrick.hubert@cliffordchance.com

\* Organisation represented

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

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

\* 1.1.1 Please indicate which type of public authority or international organisation it is:

- EU national competition authority
- Government or Ministry
- X International or European organisation
- Regulatory authority (other than a competition authority)
- Other public body

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

- X YES
- NO

\*1.1.2 How many employees does your company have?

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

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

The ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The mission of the ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization.

The ICC has three main activities: rule setting, dispute resolution and policy advocacy. Because its member companies and associations are themselves engaged in international business, the ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on relevant technical subjects. These include anti-corruption, banking, the digital economy, marketing ethics, environment and energy, competition policy and intellectual property, among others.

The ICC works closely with the United Nations, the World Trade Organization and intergovernmental forums including the G20.

The ICC was founded in 1919. Today its global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. National committees work with ICC members in their countries to address their concerns and convey to their governments the business views formulated by ICC.

\*1.3 Where are you based?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- X 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.

The ICC Global Headquarters is located at 33-43 Avenue du Président Wilson, 75116 Paris, France.

## 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 type="radio"/>	<input type="radio"/>	<input type="radio"/>	X	<input type="radio"/>	<input type="radio"/>

Please explain.

Members of the ICC Task Force on Premerger Control Regimes (the "Task Force") support the view that the one-stop shop EU level review of concentrations falling under the simplified procedure has been an overall success and has contributed to a more efficient merger control within the EU since it came into force.

The reforms discussed below in response to questions 2, 5, 6, and 8 to 13 would significantly add to that success, provided they are implemented in a way that ensures that any concentrations that are no longer reviewed by the European Commission ("Commission") retain the benefit of the one-stop-shop exclusive jurisdiction of the EUMR, e.g. by being deemed compatible with the internal market.

*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);

- X YES
- NO
- OTHER

Please explain

The simplified procedure treatment is less burdensome than the normal procedure for cases falling under point 5(b) of the Notice.

However, as transactions falling under point 5(b) of the Notice are likely to give rise to zero effects in the EEA (in the clear absence of any horizontal or vertical overlap or link), members of the Task Force advocate that they should be automatically compatible with the internal market if they meet the relevant criteria or be subject to a voluntary filing regime (see our response to questions 6 and 8 below).

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

- YES
- NO
- X OTHER

Please explain

The Task Force welcomes the fact that a greater number of parties were able to avoid the burden of the full notification procedure following the raising of the market share thresholds for point 5(c) transactions and the

creation of the safe harbour for concentrations involving only a small increment in market share under points 5(c) and 6 of the Notice.

However, we note that the increased efficiency has been outweighed by the administrative burden of preparing the new Short Form CO. In particular, the need to consider "plausible markets" under Section 7 of the Short Form CO and the requirement to produce internal documents under the new Section 5.3 for transactions involving reportable markets. Transactions qualify for simplified treatment because they are extremely unlikely to raise competition concerns. It is therefore unnecessary and disproportionate to require parties to expend resources by gathering internal documents.

In addition, members of the Task Force have experienced cases in which seeking to persuade the Commission that a transaction satisfied the criteria of point 5(c) 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. This is largely because the case teams have been reluctant to take a view on what in fact is the narrowest plausible market definition.

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

YES

NO

OTHER

Please explain

The simplified procedure treatment is less burdensome than the normal procedure for cases falling under point 5(a) of the Notice.

Nonetheless, the Task Force considers that the requirement to notify joint ventures having no nexus whatsoever to the EU is a significant generator of inefficiency in the EU filing process. This is particularly regrettable given the Commission's leadership role in the development of efficient merger control systems worldwide.

The Task Force is therefore of the opinion that, in order to eliminate redundant filing requirements for transactions that have no nexus to the EU, joint ventures located and operating outside the EEA with no effect on EEA markets should be exempted from review.

In order to ensure that such exclusion does not result in filings to numerous Member States, the Commission could exempt non-EEA joint ventures by way of a block exemption measure, which would automatically consider them to be compatible with the internal market (see our response to questions 6 and 8 to 13 below).

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

YES

NO

OTHER

Please explain

The Task Force notes that the simplified procedure is less burdensome than the normal procedure for cases falling under point 5(d) of the Notice.

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.

Members of the Task Force will provide examples of relevant cases in their individual responses to this consultation.

As a general point, the Task Force recognises that, relatively few cases notified under the simplified procedure have been transferred to the standard procedure by the Commission.

(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.

Member of the Task Force will provide examples of relevant cases in their individual responses to this consultation.

As a general point, the Task Force notes that a post-merger change to the procedure imposes substantially higher burdens on the notifying parties than a pre-merger change. 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.

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.

Members of the Task Force will provide examples of relevant cases in their individual responses to this consultation.

The Task Force notes that category 5(c) cases are the most likely to be notified under the standard procedure rather than the simplified procedure. This is due to the substantial time and resources that the parties commonly have to expend in persuading the Commission that the criteria for simplified treatment (e.g. the definition of plausible markets) have been met. Additionally, the information requirements that apply to reportable markets under the notified procedure are lighter than those applying to the simplified procedure for transactions falling

under point 5(c) of the Notice.

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

Please explain

Please see below other suggested categories of cases that are generally not likely to raise competition concerns.

- Vertical merger cases between parties where one company has a market share of over 30% while the other transaction party has an insignificant market share. The limited market share of the downstream/upstream party means that there is no incentive for the merged entity to foreclose demand or input. The Commission may consider introducing a mechanism similar to that in point 6 of the Notice for such cases.
- Cases where one party has have a high downstream market share in a market which is local in scope, while the other has a limited market share upstream in a market which national or wider in scope. In such situation, the merged entity has no ability to foreclose demand given that the local market in which it has a high market share accounts for an insignificant share of demand. The 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.
- Transactions where 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. A greater degree of discretion for case teams to accept simplified procedure notifications without the risk of this decision being subsequently challenged by the Legal Service may be useful in such cases.

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

YES

NO

OTHER

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- Transactions falling under point 5a of the Notice:

YES

NO

Please explain.

The Task Force has consistently argued for the elimination of the redundant filing requirements that presently arise for transactions with no conceivable nexus with the EU. This would save substantial and unnecessary costs currently incurred in respect of EU filings by EU businesses engaged in cross-border M&A activities.

Further, such reform would help to open the door to advocating for the implementation of similar changes in the numerous jurisdictions around the world that replicate the EU merger control regime and require notification of joint ventures with no conceivable nexus to the territory in question.

Our favoured approach to achieving this aim would be to provide that, for transactions involving the creation of a joint venture, or acquisition of joint control over an existing undertaking with no nexus to the EEA, an exemption from notification should apply (namely, such transactions would be deemed compatible with the internal market) (see our response to questions 8 to 13 below).

- Transactions falling under point 5b of the Notice:

YES

NO

Please explain.

In the clear absence of any horizontal or vertical overlap or link, such transactions are likely to give rise to zero effects in the EEA. We have identified only four cases in the 36 years since the entry into force of the EU Merger Regulation in which the parties had no horizontally - or vertically overlapping activities but serious competition concerns were nonetheless identified.

Two of these cases concerned potential competition (i.e. Case No COMP/M.4746 – Deutsche Bahn / EWS and Case No COMP/M.1853 – EDF/EnBW), once concerned and conglomerate effects (i.e. Case No COMP /M. 5384 – Intel/McAfee) and more concerned Article 2(4) spill-over effects (i.e. Case No COMP/M.1327 – NC/CANAL+/CDPQ/Bank America). Notably, the cases in question involved 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, the Task Force considers that requiring such transactions to be notified to the Commission, and applying a prohibition on implementation prior to clearance, imposes costs are disproportionate to the objective of preventing harmful effects on competition in the EEA.

Therefore, the Task Force advocates that such transactions should be exempted from the application of the EU Merger Regulation if they meet the relevant criteria (see further our response to question 8.1). If the Commission does not favour exempting such transactions from the EUMR filing and standstill obligations, the Task Force considers that a self-assessment system would be the next-best option (see further our response to question 8.2).

Any theoretical risk could be adequately addressed by the Commission with the residual power to "call in" such concentrations for review. Additionally, in case of uncertainty, the 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.

Finally, in order to preserve the one-stop-shop jurisdiction of the EU Merger Regulation over such concentrations and avoid numerous filings at national level, concentrations with an EU dimension that meet the relevant criteria for exemption should be deemed compatible with the internal market.

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

YES

NO

Please explain.

The Task Force notes that parties are faced with a significant administrative burden in supplying transaction related internal documents under the new Section 5.3 of the Short Form CO. In order to ensure that this burden is commensurate to the objective of preventing harmful concentrations, we advocate that the notifying parties should only be required to provide internal documents where review of such documents may serve a useful purpose and where specifically requested by the case team either during the pre-notification discussions or during the Phase I review.

Additionally, we note the excessively high volume of information required in relation to reportable markets under the simplified procedure. Under the normal procedure, the parties are only required to identify the relevant markets and provide market shares to show that these markets are not affected. Conversely, under the simplified procedure, parties are required to provide documents to support market share estimates as well as the contact details and market shares of their three largest competitors. Further, case teams often require subdivision of the identified relevant markets, thereby increasing the volume of information that the parties are required to provide,. The Task Force argues that, given the penalties for the supply of incorrect and misleading information, case teams should accept the best available market share estimates provided by the parties in relation to all of the identified plausible markets.

The Task Force would also urge the Commission to increase the threshold for horizontal mergers still further to a level which would cover all mergers where it is reasonable to presume that there will be no significant impediment to effective competition. Our proposal would be that this level should be raised to a combined horizontal market share of 25% (i.e. the level at which the Horizontal Merger Guidelines and the EU Merger Regulation consider a merger not to impede effective competition).

We consider that adjusting the threshold to this level would meet the objectives of the EU Merger Regulation given that, in practice, it is already assumed that concentrations with a resulting combined market share of 25% or less do not harm competition and, in any event, the Commission has the power to revert to a full assessment if it considers it appropriate.

Finally, members of the Task Force note that in cases where the notifying party is acquiring a controlling interest in an existing joint venture (replacement of a shareholder or entry of a new shareholder) or in cases involving a change from sole to joint control over an undertaking, the Commission's case teams habitually interpret "reportable markets" for the purposes of the Short Form CO as including markets in which the existing shareholder(s) and the target are active, even if the notifying party is not active on such market(s). The costs incurred by the notifying party in collecting and providing the information and internal documents in relation to such markets are disproportionate to the objectives of the EU Merger Regulation. We advocate that the Commission should therefore clarify that "acquiring parties" in the definition of "reportable markets" in Section 6.2 of the Short Form CO does not reference to any party that retains a controlling interest in the joint venture.

- Transactions falling under point 5d of the Notice:

YES

NO

Please explain.

In the experience of Task Force members, it is rare for competition concerns to arise in transactions involving a change from joint to sole control. Therefore, we advocate that a "super" simplified procedure should apply to such transactions. For instance, such transactions may be subject to lighter information requirements, with the option of further information being provided if requested by the Commission. This would be particularly relevant for cases where the prior acquisition of joint control was notified to, and unconditionally cleared by, the Commission. In such cases, it is unlikely that the Commission's substantive review will be substantively different. Additionally, decisions such as Case No COMP/M.7449 – SNCF/Eurostar, where commitments were given in connection with the original clearance decision, would be distinguished. (In that case, the commitments which were originally given by the parties had expired and were re-imposed by the Commission during the joint to sole transaction review.)

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

To the extent members of the Task Force are able to quantify these costs, they will provide information in response to this question in their individual responses to this consultation.

As a general point, the Task Force notes that the 2013 Simplification Package had an overall positive effect in increasing the number of transactions that fell within the simplified procedure. This contributed to reducing the administrative burden of notifying transactions as the Short Form CO is subject to fewer documentary requirements than the Form CO.

However, some issues have limited the progress made by the 2013 Simplification Package. As noted in our response to questions 2 and 6 above, the increase in the documentary requirements for both the Short Form CO and the Form CO have meant that it takes longer for businesses to prepare the notification. The Task Force therefore advocates for lighter simplified procedure documentary requirements.

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.

As outlined in our responses to questions 2 and 6 above, the Task Force advocates that transaction falling under point 5(b) of the Notice should be exempted from the EU Merger Regulation.

To avoid numerous filings at national level, concentrations with an EU dimension that meet the relevant criteria for exemption should be deemed compatible with the internal market.

If the Commission is concerned that some transactions may escape review, the Task Force considers that such risk would be adequately addressed by retaining the residual power to "call in" such concentrations for review. A self-assessment system would be appropriate in such circumstances.

Further, the Commission may consider including the following as additional criteria, supplementary to the criteria of point 5(b) of the Notice, that must be satisfied by the transaction for it to qualify for exemption: (i) absence of potential competition, (ii) absence of activities in neighbouring markets (i.e. conglomerate effects), or (iii) absence of activities of two or more parent companies in a market which is upstream, downstream or neighbouring to that of a joint-venture (i.e. spill-over effects).

- 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.

The Task Force does 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 5(a) and 5(b) of the simplified procedure notice, the Task Force considers that an exemption or self-assessment regime would be more efficient (see our response to question 8.3 below).

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.

The Task Force considers that a self-assessment system would be appropriate for at least three categories of case.

First, transactions falling under point 5(b) of the Notice. If the Commission does not favour exempting from EUMR filing and standstill obligations, the Task Force considers that a self assessment system would be the next-best option, for the same reasons that have been set out in response to question 8.1 above.

Second, the Task Force also favours a self assessment system for transactions falling under point 5(a) 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, "green field" 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 the Task Force recognises 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.

Fourth, self-assessment should be considered for "debt-for-equity" swaps undertaken as part of a wider restructuring or refinancing transaction. Such transactions are highly unlikely to raise competition concerns as the investing lenders are not interested in acquiring decisive influence over the relevant company. Moreover, implementation of such transactions is often time critical but the information required to make a filing is usually

not available until a very late stage in the process. The introduction of a self-assessment system for such cases would help to ensure that any administrative burden is commensurate to any possible anti-competitive effects of a transaction.

Regarding the way in which a self-assessment system should be implemented, the Task Force favours a self-assessment system in which the prescription period runs from the time that details of an acquisition are published 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.

The Task Force recognises that such a system "may cause some businesses to notify in any event just to obtain legal certainty" but consider that to be an advantage – in that costs are incurred only in relation to those transactions for which legal certainty is required or is otherwise unavailable – not a drawback.

#### 8.4 Other

YES

NO

Please explain.

See our responses to questions 5 and 6 for other suggestions for improvement to the EU Merger Regulation 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
- X NO
- OTHER

Please explain

Members of the Task Force have consistently advocated for the exclusion of joint ventures with no conceivable nexus to the EEA from the EU Merger Regulation.

The requirement to notify, even under the simplified procedure, places an unnecessary burden on EU businesses that engage in cross border M&A activities.

Members of the Task Force therefore advocate that such transactions, upon meeting specified criteria, should be deemed to be automatically compatible with the internal market.

10. Has this one stop shop review at EU level of extra-EEA joint ventures created added value for businesses and consumers?

- YES
- X NO
- OTHER

Please explain

Evidently, the Commission's review of concentrations with no conceivable nexus to the EEA creates no added value for either businesses or consumers in the EEA.

Furthermore, it creates a damaging precedent that has been implemented in other jurisdictions making it more difficult for EU businesses to engage in cross-border transactions worldwide.

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
- X NO
- OTHER

Please explain

Evidently, the costs of notification for such transactions continue to outweigh the potential for anti-competitive effects as noted in our responses above.

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

Although the volume of information required to be provided by the parties and the associated costs were reduced under the 2013 Simplification Package, the Task Force considers that the burden of complying with the notification requirements continues to outweigh the likelihood of harm to competition in the EEA.

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.

The Task Force strongly advocates for the exclusion of extra-EEA joint ventures from the scope of the Commission's jurisdiction. The requirement to notify, even under the simplified procedure, imposes an unnecessary and disproportionate cost on businesses.

As noted in our comments on the 2014 White Paper, such transactions do not give rise to any risk of harm to competition within the EEA.

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.

Further, we note that the EU Merger Regulation does not seek to regulate the acquisition of sole control of extra-EEA businesses on the grounds that such businesses might in the future begin competing in the EEA. We see no reason why the same approach should not apply to joint ventures.

Although the extra-EEA joint venture may also be captured by national thresholds, in practice, NCAs are much more ambivalent regarding review of such transactions than the Commission. Nonetheless, we would recommend that, for the sake of clarity and consistency, extra-EEA joint ventures should be automatically deemed to be compatible with the Single Market under a block exemption measure.

(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?<sup>4</sup>

- YES
- NO
- OTHER

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

Not applicable.

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

Not applicable.

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

Not applicable.

- **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

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<sup>4</sup> 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).

Merger Regulation? Please explain.

Not applicable.

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

Members of the Task Force will provide any examples of which they are aware in their individual responses to this consultation.

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?<sup>5</sup>

- YES
- NO
- OTHER

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

Not applicable.

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

Not applicable.

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

Not applicable.

- **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.

<sup>5</sup> An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.



Not applicable.

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.

Not applicable.

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

Not applicable.

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

Not applicable.

- **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.

Not applicable.

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.

Not applicable.

- **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.

The Task Force recognises that the current jurisdictional thresholds may not necessarily capture all transactions in which competition concerns could arise. However, we do not consider that there is sufficient empirical evidence of a significant enforcement gap. The Task Force considers that 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 already has its own transaction value threshold which will catch many relevant acquisitions in the pharmaceutical sector undertaking the pipeline products that might eventually be commercialised in Europe (e.g. AbbVie/ Pharmacyclis). Even if no national thresholds are met, referrals can still be made under Article 22 of the EU Merger Regulation. Therefore, such transactions do not 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. Admittedly, international companies are used applying value thresholds since they are applied in several jurisdictions, for example under the US Hart-Scott-Rodino Act. But for European companies without such habit, they will be complicated to apply; they may require 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.

The Task Force recognises 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 successfully captures such transactions (e.g. Facebook/ WhatsApp) and, therefore, we see no reason to introduce new thresholds to alter the balance of jurisdiction between the EU and Member States.

Furthermore, 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.

The Task Force does not consider that a transaction value threshold should be introduced. If such a threshold is introduced, we consider that it must be set at a very high level (e.g. several billions of Euros), 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). In addition, it is imperative that any thresholds retain a requirement for some kind of real EU nexus or some overlaps in the parties' activities (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.
- Other

Please explain your response and provide examples where appropriate.

The Task Force is of the view that the EU Merger Regulation should not seek to capture acquisitions of businesses that have no turnover 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 as is the case in the United States. The thresholds in point 5(a) of the 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 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 EU Merger Regulation. Moreover, in many instances the test would be inherently subjective (e.g. relying on intentions or predictions of future sales of the target) with a research and development pipeline that has not yet been commercialised). We do not consider that 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. The Task Force considers 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, 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, the Task Force favours some of the reforms proposed by the 2014 White Paper. Please see section 2.4 of our response to the 2014 White Paper consultation.

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.

#### **Article 4(5) referrals**

In the experience of the Task Force members, the cumbersome nature of the Form RS process deters many companies from taking advantage of the Article 4(5) referral possibility. Therefore, we warmly welcome the Commission's proposal made in the 2014 White Paper to abolish the requirement for a reasoned submission and to replace this procedure with a system under which the parties seeking a referral would only have to provide a Form CO notification to the Commission. This new procedure would effectively cut down the notification process by 15 working days, provide for a more expedient process and help reduce unnecessary duplication of work as most of the information contained in Form RS generally repeats that which is required by Form CO. However, to achieve such efficiencies, it is indispensable that the elimination of the Form RS procedure does not result in a lengthier and/or more cumbersome pre-notification phase, the duration of which is always unpredictable and a source of uncertainty for the notifying parties.

Mergers are often time-sensitive and the parties may be reluctant to engage in a time-consuming referral process. Therefore we support the Commission's proposal to reduce the consultation period to 10 working days. Additionally, we suggest that, where a NCA decides to veto an Article 4(5) referral, the NCA should accept the Form CO as it has been drafted by the parties for the purpose of the original notification. This would avoid the unnecessary administrative and financial burden of redrafting the notification form and the attendant delay to completing the transaction.

However, the Task Force notes that the 2014 White Paper fails to address another principal reason that dissuades notifying parties from using the Article 4(5) referral process. Namely, the fact that the Commission will review the transaction in all EEA Member States, while each NCA's investigation is limited to the economies of the relevant Member State. Therefore, using the Article 4(5) referral process may in fact result in a more burdensome process. Therefore, the Task Force advocates the introduction of a rule limiting the geographic scope of the Commission's review in the event of an Article 4(5) referral to the territory of the otherwise competent Member States.

Finally, the Task Force considers that the referral mechanism is hindered by the fact that the proposed transaction would need to be notifiable in at least three Member States. There appears to be no objective reason for setting the threshold at three, rather than two, Member States for cross-border transactions. The Task Force recommends lowering the threshold for triggering an upward referral to the Commission from three NCAs to two.

#### **Article 4(4) referrals**

In the experience of Task Force members, notifying parties will generally only consider filing a pre-notification Article 4(4) request if they are certain that some Member States will make a referral request post-notification to the Commission, therefore adding more costs and delaying the transaction. As, when making an Article 4(4) request, the parties are required to admit that the proposed concentration will pose local competition concerns, this Article is rarely used. No business would want to start the notification process with a "self incrimination" claim. We therefore strongly agree with the Commission's proposal to remove this requirement. Such reform is likely to encourage greater use of the Article 4(4) procedure, particularly where the affected markets are national in scope.

#### **Article 22 referrals**

We consider that the current Article 22 referral process has substantial disadvantages. In particular, such referrals are a source of unnecessary complexity, create legal uncertainty, substantial delays and costs for the

parties.

Pursuant to the 2014 White Paper, the Article 22 procedure would be amended to provide that only the competent Member State(s) have the right to request a referral to the Commission. If the Commission accepts the request, it would have jurisdiction over the whole of the EEA. If any of the Member States with jurisdiction over the transaction opposes the referral, all competent Member States would retain their jurisdiction and the transaction would continue to be subject to national regimes.

We support the proposal that only Member States with jurisdiction over the notified transaction should be able to make an Article 22 referral request. This is necessary to ensure that the notifying parties have a greater degree of legal certainty as regards the expected timeframe and to allow them to anticipate what substantive issues might arise in relation to the transaction.

However, the Task Force strongly disagrees with the proposed broadening of the geographic scope of the Commission's jurisdiction after referral. Under the proposals, notifying parties would be obliged to assess the transaction's substantive impact in each EEA country for every deal that triggers merger control thresholds in two or more jurisdictions. Further, additional information concerning territories of non-competent Member States would need to be produced. Given the difficulty of predicting when an Article 22 referral request might be made, such a change would place undue burdens on businesses.

In the experience of the Task Force members, the principal issue with the current Article 22 referral process is parallel review of the same transaction by the Commission and by Member States, sometimes leading to inconsistent decisions. This issue has not been adequately addressed by the 2014 White Paper proposals. Contrary to the one-stop-shop principle, notifying parties may, for instance, face the unsatisfactory situation whereby a transaction receives clearance in certain Member States before the referral occurs.

Additionally, businesses will continue to face the burden of preparing and filing multiple notification forms, complying with different language and timing requirements, and responding to numerous information requests. This imposes unnecessary financial and administrative burdens on businesses, particularly for non-problematic transactions (which are by far the majority)

Our primary recommendation is therefore that Article 22 referrals should be abolished. However, should the Commission decide to retain Article 22, we suggest the following amendments:

The Commission may accept a referral of a case where at least one competent Member State requests the referral pursuant to Article 22 and no Member State competent to review the merger under national law opposes the referral.

The Commission's invitation to a Member State to make a request commences the period during which other competent Member States are free either to join or to object to the referral.

The Commission maintains its discretion whether or not to accept a referral. However, a referral could only be accepted if the transaction is reviewable in three or more EEA Member States (to align Article 22 with Article 4(5)).

The Commission's decision to accept a referral gives it jurisdiction for all the territories of the competent Member States, unless one or more of those Member States has already cleared the transaction (in which case they are excluded from the jurisdictional scope of the Commission's review).

The periods between each stage of the current referral process should be reduced as follows:

- the period of 15 working days in which a referral may be made following notification of an NCA should be shortened to 10 working days;
- to minimise the risk of a prior decision of a NCA, the Commission should be required to transmit the request to the other competent Member States on the same day as it receives the request;
- the period within which other competent Member States may join a referral request should be reduced from 15 working days to 10 working days; and
- there should be no change to the period in which the Commission may conduct its review.

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 our response to question 24.

#### IV.4. Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).
- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.
- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

We agree that there is scope to amend the EU Merger Regulation. Please see our comments in relation to each of the SWD proposals below.

- **Article 4(1):** We welcome this 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".
- **Article 5(4):** We strongly welcome formal guidance in relation to the method for calculating a joint venture's turnover. In the interests of consistency, the Commission should address the discrepancy between on the one hand, allocating a portion of turnover to the undertaking concerned on a per capita basis if it exercises decisive influence in an undertaking jointly with third parties and, on the other hand,

allocating zero turnover to the undertaking concerned if it exercises negative sole control over an undertaking (where no third parties have a decisive influence).

- **Article 8(4):** We do not agree with this proposal. To ensure internal consistency, we would advocate that the Commission should seek to "restore effective competition" rather than require the transaction to be fully unwound. This would allow an acquirer to retain a minority interest providing that it poses no harm to competition and to prevent the imposition of disproportionate costs on businesses (which cannot be justified by reference to any competitive harm).
- **Article 5(2)(2):** We agree that transactions which have already received clearance from the Commission should not be subject to a reappraisal in the event of a further transaction between the same parties that breaches EU Merger Control rules.
- **"Parking transactions":** 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.
- **Use/ disclosure of non-public commercial information:** We agree that this would be sensible. However, we would advise against sanctioning parties that receive such confidential information as part of a market testing process. 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.
- Finally, and more strategically, as ICC has already advocated in its response to the white paper, the Task Force considers that a real European one stop shop should exist for notifying companies that find it appropriate, allowing them to file a request for clearance to only one competition authority when the EU thresholds are not met. The ECN should then take care of involving the interested national authorities or the European Commission, in such a way that the burden of multi-notification should be avoided within the EEA.

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?

Please see below a list of practical suggestions to enhance the efficiency of the EU merger control regime:

- Early engagement between the case team and the transaction parties in the pre-notification phase to determine the likely timeline, identify areas of interest, understand data availability and determine the scope of pre-notification. Engagement at the end of the pre-notification phase would be welcome to help identify areas which are likely to be subject to further review and to identify any further data that is likely to be requested.
- Reinforce good practice in relation to RFIs by focusing questions on areas of substantive concern,

limiting their number and scope, avoiding excessive data requests (particularly in relation to internal documents), consolidating queries and allowing flexibility in the format of responses.

- Focus third-party RFIs on their core business areas, use a single point of contact, limit the number of queries and include a "free comment" section.

More flexibility as regards the deadlines for answering to RFIs would also be welcome, particularly for third-party information requests. In our experience, the Commission frequently asks for large amount of complex information to be provided in short periods of time. As the Commission envisages extending the Phase II deadlines for more flexibility, it could also amend Article 11 of the EU Merger Regulation by expressly mentioning that the deadlines imposed to the undertakings are reasonable.

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.

Member of the Task Force will provide information on their relevant experience in this respect in their individual responses to this consultation.

As a general point, the Task Force notes that significant time constraints are frequent in a Phase II merger. We welcome the Commission's proposal to introduce greater flexibility.

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.

More flexibility is welcomed with respect to remedies discussions. The Task Force advocates that the guiding criterion should be the complexity of remedies, rather than the timing of the submission.

## 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.