

Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

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I. Introduction

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

A. Purpose of the consultation

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

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

B. Background

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

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

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

The key proposals of the White Paper were the following:

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

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

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

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

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

Scope of the Evaluation

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

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,^[1] the Implementing Regulation,^[2] and the Commission Notice on simplified procedure;^[3]
2. Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover;
3. Functioning of the case referral mechanisms set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on case referral;
4. Certain technical aspects of the procedural and investigative framework for the assessment of mergers.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

[2] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.04.2004, p. 1, as amended.

[3] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, OJ C 366, 14 December 2013, p.5 and its Corrigendum to the Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 011, 15 January 2014, p 6 (the "Commission Notice on simplified procedure).

II. Practical Guide to fill in the questionnaire

Please respond to all questions that you have knowledge about. Feel free to skip those questions that you cannot answer or are unsure about.

Replying to the questions:

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:
 - show you a message indicating that your draft reply has been saved,
 - give you the link that you will have to use in order to continue replying at a later stage,
 - give you the possibility to send you the link by email (we encourage you to use this option).
- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

- The submission of the final reply can only be done by clicking the "Submit" button that you will find in the last section "Conclusion and Submission".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("Case Id"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

III. About you

Please provide your contact details below:

*1. Are you replying as:

- a private individual
- an organisation or a company
- a public authority or an international organisation

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

Norton Rose Fulbright LLP

*Your full name

Ian Giles
Jay Modrall

*Email address

ian.giles@nortonrosefulbright.com

* Organisation represented

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

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

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

- YES
- NO

*1.1.2 How many employees does your company have?

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

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

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*1.3 Where are you based?

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

*Please specify.

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

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

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

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

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

For registered organisations: indicate your Register ID number here:

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

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

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

YES

NO

IV. Questionnaire

IV.1. Simplification

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

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

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

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

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

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

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

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

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

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

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

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

Please explain.

The EUMR's one stop shop principle adds significant added value for businesses and consumers by allowing businesses to make a single notification under EUMR rather than multiple notifications under national rules (where relevant notification criteria are satisfied). As regards the simplified procedure, compared to the procedure prior to the 2014 reforms, this provides additional value in simplifying the process burden for transactions which ostensibly raise no competition concerns. Further value would be added by the reforms discussed below. However, it is critical that any reforms which lead to transactions no longer needing to be reviewed under EUMR (despite meeting qualification thresholds) still be retain the benefit of the exclusive jurisdiction of the EUMR (i.e. they are treated as having been exempted rather than EUMR not having been applicable): it would be a backwards step for these concentrations to fall subject to national clearance in EU member states, which could significantly increase the review burden.

Further simplification of the treatment of certain categories of non-problematic cases

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

- YES
- NO
- OTHER

Please explain

Transactions falling under point 5b of the Notice do not involve any vertical or horizontal overlaps – and therefore, provided the Commission is satisfied that the approach taken to market definition is satisfactory (and does not seek to disguise overlapping competitive activities), the review process should be as quick and painless as possible for notifying parties. The 2013 reforms did not significantly change the position in this respect for transactions falling point 5b of the Notice, although we note it was helpful that this category of transactions was not subject to the requirement to provide internal documents (under section 5(3) of the Short Form CO) that was required for other simplified procedure cases. There is scope to further reduce the burden on such clearly unproblematic cases.

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

- YES
- NO
- OTHER

Please explain

The Commission was apparently satisfied in increasing the market share thresholds in the 2013 Simplification Package that shares of these levels are unlikely to raise substantive competition concerns. In this respect, the burden on transactions falling under point 5c of the Notice could be further reduced, with the detail required for a Short Form notification still significant, and including a requirement for internal documents under paragraph 5(3) of the Short Form (which was added by the 2013 package - increasing the burden on business for this category of ostensibly non-problematic transactions). A further concern, in our experience, is that case teams may actively contest an assertion that the criteria of point 5c of the simplified procedure notice are met by seeking to apply the narrowest plausible market definition. Discussion and submissions in this context can be more onerous than compliance with the normal procedure would have been, and we would encourage a more pragmatic approach by case teams on this point in the absence of third party opposition to transactions.

(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

As with (i) above, it is to be commended that the requirement for internal documents under section 5(3) of the Short Form does not extend to joint ventures involving no or limited EEA activities, and that such transactions were brought within the simplified procedure under the 2013 reforms. On the other hand, this category of transactions is often the area where the Commission's jurisdiction to review at all is hardest for business to understand, and there is scope for the burden to be further reduced.

(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

As above, the simplified procedure and Short Form reduce the burden on this category of transactions where substantive competition concerns are highly unlikely (although the 2013 reforms did not make a material difference in this respect). We would suggest there is further scope to reduce the burden on business with respect to this category of transaction.

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.

It is our understanding that this has seldom been the case, although we are aware of one instance where this occurred. The change from simplified to full procedure is most likely, and justifiable, where there are questions about market definition which could lead to changes in the substantive analysis. Companies are well-advised that it may be more expedient to use the full procedure in the first instance regarding such cases - or to make use of pre-notification to determine the correct approach.

(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.

We would highlight the fact that changing to the normal procedure is substantially more burdensome for the notifying parties if it occurs post-notification than if it occurs pre-notification. As such it is incumbent on parties, and the case team, to resolve in pre-notification whether the approach to market definition which allows use of the simplified procedure is appropriate.

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

- YES
- NO

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

We have been involved in cases where the approach to market definition was open to debate and where a broader definition would have allowed use of the simplified procedure but we, and our clients, felt the likelihood of a narrower approach to market definition meant that the full procedure was preferable.

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

- YES
- NO
- OTHER

Please explain

- The Commission might introduce a mechanism to allow overlaps in lower value markets to be considered under the simplified procedure. The full Form CO review of markets which are of incidental significance to a broader transaction can appear disproportionate (including inter alia, multiple RFIs). Put differently, the EUMR treats transactions the same whether there is substantial, high-value overlap in a single market, or where the jurisdictional thresholds are met in non-overlap markets, but the parties have a high combined share in markets of far lower value which would not in themselves trigger EUMR jurisdiction.
- The current criteria under point 5c(ii) of the Notice does not recognise that where one party to a transaction has more than 30% market share, but the upstream / downstream market share of the other party is negligible, the merged party will have no incentive or ability to foreclose that market (either by input foreclosure or demand foreclosure). The Commission should consider whether a secondary market share threshold is appropriate for the related upstream/downstream market to ensure that transactions incapable of raising competition concerns due to a de minimis vertical overlap benefit from the simplified procedure. In this context we note the vertical agreements block exemption (330/2010/EU) recognises the need to consider both the upstream and downstream shares in assessing the potential for competitive harm.
- Case teams should consider the frequency with which transactions which marginally exceed the criteria for the simplified procedure result in substantive competition concerns. In such cases, there should be more flexibility and encouragement for case teams to advocate use of the simplified procedure, thus reducing the administrative burden on companies and the Commission. Such an approach could be applied as a matter of course, in the same spirit with which we would encourage the Commission to advocate use of waivers in respect of EUMR notification requirements.

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.

Notifications are made pursuant to point 5a of the Notice in the case of joint ventures with no activities, turnover or assets in the EEA. This requirement creates a significant burden for businesses for no apparent benefit, and moreover has created negative precedents with other jurisdictions outside the EU following a similar approach (and in certain cases, such as Korea and China, drafting more broadly so as not to distinguish full-function joint ventures). This is to the detriment of EU businesses operating both within and outside the EEA. In our view, transactions falling in this category should be deemed automatically compatible with the internal market if they meet the relevant EUMR criteria, and a similar approach required of national EU competition regimes.

- Transactions falling under point 5b of the Notice:

- YES
- NO

Please explain.

Notifications are made pursuant to point 5b of the Notice where there are no horizontal or vertical overlaps in the EEA. These situations raise no competition concerns and so such transactions should be deemed automatically compatible with the internal market if they meet the relevant EUMR criteria, and a similar approach required of national EU competition regimes.

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

- YES
- NO

Please explain.

The introduction under the 2013 Simplification Package of the obligation to disclose internal transaction-related documents where transactions fall under point 5c and 6 of the Notice is a source of increased costs for businesses, which is not obviously justifiable in the context of transactions which raise no substantive competition concerns. Case teams should be encouraged to waive the request for internal documents where other information suggests this is unnecessary for the Commission's assessment. Where it is clear that the market share methodology is robust, and the shares and/or increment incapable of raising substantive concerns, the Commission should seek to reduce the burden on business proactively.

- Transactions falling under point 5d of the Notice:

- YES
- NO

Please explain.

In our experience and understanding of Commission precedent, we have yet to see a case in which a switch from joint to sole control by an existing shareholder has been considered to raise substantive competition concerns. Such a transaction by its nature involves severing of links with pre-existing jointly controlling shareholders, while the EUMR analysis takes no account of the fact that joint control may confer less control than sole control - any competitive links are considered as if the jointly controlling shareholder had sole control of the joint venture. In our view, transactions falling in this category should be deemed automatically compatible with the internal market if they meet the relevant EUMR criteria, and a similar approach required of national EU competition regimes.

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

The 2013 Simplification Package has resulted in a moderate reduction in costs, but the changes it made should not be overstated. The 2013 Simplification Package expanded the requirement for production of internal documents under the Short Form CO, while increasing the thresholds for transactions to qualify for the simplified procedure. However, significant costs remain for notifying parties due to the work which must be undertaken in defining markets, providing data and internal documents accordingly, and generally managing the process under the simplified procedure, which remains a relatively onerous process in comparison with those in certain other jurisdictions.

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

- YES
- NO
- OTHER

If you replied yes or other, do you consider that there is scope for further simplification by, in particular:

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

- YES
- NO

Please explain.

In our view, exempting all the categories listed in question 2 from the prior notification and standstill obligations would provide substantial efficiencies for the Commission and merging parties, provided that such transactions do not as a result become subject to notification under the merger review laws of individual member states. Any such reform would therefore necessarily need to clearly establish that where the EUMR jurisdictional thresholds are satisfied but the new exemption criteria fulfilled, even in the absence of an EUMR decision, the transaction is within the jurisdiction of the EUMR and thus precludes review by national competition authorities. In this context, we note that some transactions could be subject to review in three or more member states, and so eligible for a voluntary EUMR referral request. To avoid subjecting businesses to this burden, concentrations with an EU dimension which meet the requirements for exemption should therefore be deemed compatible with the internal market. Though this exemption would ideally be applied to all of the categories in question 2, it is particularly important in respect of transactions falling under point 5a (joint ventures with no activities in the EU) and point 5d (where a company acquires sole control of a joint venture over which it already had joint control) of the Notice, and in addition under point 5b (where there are no horizontal or vertical links between merging parties).

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

- YES
- NO

Please explain.

We support the introduction of lighter information requirements for those categories of transactions which fall under the simplified procedure, either in addition to or as an alternative to the exemption of these transactions from the prior notification obligation and the standstill obligation. A lighter information notice could be based on the current case allocation request form - if the information notice required analysis of relevant markets and market shares, the difficulty of obtaining market data and consequent difficulty in establishing robust definitions would impose burdens on notifying parties.

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.

In our view, transactions falling within any of the categories listed in question 2 should be exempted from notification and the standstill obligation, as explained in our response to question 8.1. If the Commission were to introduce a self-assessment system, it would be important to provide businesses with legal certainty by providing a time limit for the Commission to open investigations into non-notified transactions. We would propose that this period begin when the parties publish details of the transaction in the national press / trade journals (which is the position under the UK voluntary regime). However, our recommendation given the mandatory status of the EUMR regime, and the importance of EUMR jurisdiction excluding application of national merger control rules within the EU, would be one of the options set out in 8.1 or 8.2 above.

8.4 Other

- YES
- NO

Please explain.

N/A

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.

N/A

Further simplification of the treatment of extra-EEA joint ventures

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

- YES
- NO
- OTHER

Please explain

As explained in our response to question 6(i), the requirement for notification of joint ventures with no EEA activities offers no benefit to EU consumers and wastes valuable business and Commission resources. Moreover, this approach with regard to extra-territorial joint ventures has become a precedent for other global competition regimes, magnifying the harm caused. Consequently, we would favour a system where such transactions are deemed 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
- NO
- OTHER

Please explain

While we recognise that the one stop shop principle is capable of creating value by preventing extra-EEA joint ventures from triggering notifications in multiple member states, the better solution would be to forestall this possibility by confirming that such transactions are automatically compatible with the internal market, so that no member state notifications would be required. From a business perspective, a single notification to Brussels is often preferable to multiple notification requirements to EU member states, but this does not change the essential fact that there is no justification for review of transactions within the EU where such transactions demonstrably have no effects within the EEA.

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

- YES
- NO
- OTHER

Please explain

Given that such joint ventures are very unlikely to affect competition in the EEA, we consider that the resources that are spent in notifying them are disproportionate to the need for appropriate review of concentrations with an EU dimension.

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

By bringing joint ventures with no material EEA-activities within the scope of the simplified procedure, the 2013 Simplification Package did reduce costs, but the procedure still involves disproportionate costs to notifying parties in the requirement to define markets, provide internal documents and comply with standstill obligations.

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.

Even taking into consideration these issues, we do not consider that excluding extra-EEA joint ventures from the scope of the Merger Regulation would cause increased risk of harm to competition. If an extra-EEA joint venture expands its scope to operate in the EEA, that new entry would positively contribute to competition. In this context, we note that the Merger Regulation does not regulate sole control of extra-EEA companies out of concern that they may in future operate in the EEA. To the extent that there is a realistic prospect of entry into EEA markets, this may reflect a global (or broader regional) market definition, in which case the frame for review of the transaction may change (e.g. due to market share overlaps leading to full procedure treatment).

As noted elsewhere in our response, we would propose that extra-EEA joint ventures should automatically be deemed compatible with the internal market, thus excluding the jurisdiction of national authorities.

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

- YES
- NO

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

For the reasons identified in our response to question 13(i), we believe the objectives of the Merger Regulation would be better served by excluding extra-EEA joint ventures from its scope than by these other proposals. A light information system might be considered as an alternative, as long as this represents a significantly reduced burden in comparison to the Short Form CO (e.g. equivalent to the case team allocation form).

(iii) Other.

Please explain.

N/A

IV.2. Jurisdictional thresholds

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

Article 1 of the Merger Regulation

Scope

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

2. A concentration has a Union dimension where:

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

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

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

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

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

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

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

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

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

4. [...]

5. [...]

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

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

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

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

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

- YES
- NO
- OTHER

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

N/A

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

N/A

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

N/A

- **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.

N/A

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

We are not aware of competitively significant transactions in the digital economy which were not subject to either the Commission's jurisdiction or review at member state level. We note moreover that the European Competition Network enables consultation of the Commission where transactions which have a cross-border effect on competition are caught by national merger control but not by the EU Merger Regulation. The merger control regimes in the UK, Spain and Portugal for example feature market share thresholds which could capture certain of these transactions. The Facebook/Whatsapp transaction is an example of a transaction which was caught and referred up to the Commission under national merger control rules, although ultimately cleared given the broad range of competitors active in the relevant markets. The particular concern is that non-revenue generating companies could be acquired in order to foreclose competition, but compelling evidence of such concerns should be necessary to justify interventions in such scenarios (and there is, as noted by the Commission, the possibility of applying Article 101 or 102 TFEU in such circumstances where appropriate).

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

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

- YES
- NO
- OTHER

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

N/A

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

N/A

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

N/A

- **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.

N/A

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

While not aware of specific transactions which fit this description, we would highlight that it is common for companies in the pharmaceutical sector to speculate on products (by acquiring ownership or other rights) before such products are launched. Though this activity may occur before products achieve revenues, and therefore before conventional merger thresholds are triggered, it is inherently speculative, and should not typically be considered a concentration of actual or potential competitors. Indeed, in many cases, such speculative acquisitions do not lead to any ultimate product launch.

We would note that speculative acquisitions of innovative technology are unlikely to involve any meaningful market share overlaps, which will create a significant obstacle to the Commission's traditional review procedures. We would further note that the threshold for substantive concerns in respect of acquisition of a potential competitor is (correctly) set at a high level, and is unlikely to be satisfied in cases of acquisition of products still in the developmental process. We would therefore not favour expansion of the scope of merger control to capture such transactions. Moreover, we would note the possibility of applying Article 101 or 102 TFEU in such circumstances where appropriate and there is evidence of strategies which are deliberately aimed at foreclosing competition.

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.

N/A

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

N/A

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

N/A

- **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.

N/A

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

Please see our response to question 15. It is our view that merger control is not a suitable tool for regulating speculative acquisitions of innovative technology.

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.

We recognise that the EU Merger Regulation's turnover-based criteria are capable of capturing transactions having minimal effect on competition and excluding others that could have anticompetitive effects on smaller markets. However, the turnover thresholds remain an appropriate means of selecting transactions for review because they are objective, provide clarity to business, and provide a means of assessing the importance of the undertakings concerned in the EEA economy, as well as the potential impact on competition of transactions.

The level at which the EUMR turnover thresholds have been established was intended to capture transactions capable of having a material impact on competition within the EU. Indeed, we note that the criteria under EUMR Article 1(2) have not changed since they came into effect in 1990, with the additional criteria of Article 1(3) added in 2004. The effect of inflation since the turnover thresholds were introduced has therefore significantly increased the Commission's jurisdiction over transactions over the past 25 years (the Article 1(2) thresholds being over 60% lower in real terms now than they were in 1990).

In this context, there is not an obvious policy justification for further expansion of the Commission's jurisdiction. As the Commission has noted, Article 4(5) of the EUMR provides a suitable mechanism for a unitary Commission review so as to avoid potentially divergent review by three or more member states - and we believe that this mechanism works well.

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.

N/A

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

We consider that the current jurisdictional criteria maintain appropriate balance between review at the national and EU levels, and that competitively significant transactions with cross-border effect in the EEA are broadly subject to appropriate review. Indeed, as noted above, the Commission's jurisdiction has expanded significantly as a consequence of the EUMR thresholds remaining static in the face of decades of inflation. Further expansion of its jurisdiction does not have a clear policy justification.

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.

In our view, the lack of a transaction value threshold does not impair review of competitively significant transactions at EU level. High-value transactions typically relate to businesses which have sufficient turnover or market share to trigger merger control thresholds in member states. Further, it is our opinion that the balance of merger control jurisdiction between the EU and member states is satisfactory: the introduction of a new deal size threshold would alter this balance, perhaps unintentionally.

Finally, we suggest that a deal size threshold would increase the complexity and uncertainty of the EU merger control regime. The test of the size of a transaction would have to take account of various issues, including: (a) consideration which does not have a fixed value (such as publicly-traded securities), or which is not readily determinable (e.g. where securities are not easily traded); (b) whether only the value of the assets changing ownership should be taken into consideration (e.g. shares or other assets belonging to other undertakings which already exercise sole or joint control over the target); and (c) whether the threshold should require a change of control, as defined in the EU Merger Regulation. These requirements show that a deal size test would be a step away from the objectivity of the current turnover thresholds.

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

We do not believe that the introduction of a deal size threshold would be appropriate for the reasons explained in our answer to question 19. If such a threshold were to be introduced, we suggest that it should be set at a high level such that only exceptionally high-value cases would be caught.

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.

We do not believe that the introduction of a deal size threshold would be appropriate for the reasons explained in our answer to question 19. However, if such a threshold were introduced, it would be important to include a requirement for local nexus, as any transactions that are unlikely to have a significant impact in the EEA should be excluded.

We note the current proposals for introduction of a deal value threshold in Germany and the uncertainty that these proposals have already created. The proposed German deal size threshold includes a local nexus test which asks whether one company generated € 25 million of turnover in Germany in the preceding financial year and whether at least one other is active or will presumably be active in Germany. This test is unclear as the meaning of “will presumably be active” is not further defined, and will likely be a source of uncertainty for businesses.

Regarding industry-specific criteria to assess local nexus, we feel that the Commission would necessarily be required to engage in a backwards-looking exercise which may not furnish relevant criteria for application to future transactions. There is also a risk that the Commission will be required to constantly update industry-specific criteria based on developing industry-specific trends, which would place a further burden on Commission resources.

Finally, we note that US merger review procedures exempt acquisitions of non-US shares or assets where the target does not have significant turnover or assets in the US. If a deal-size threshold were introduced in the EU, we suggest that the same approach be taken. In order to maximise efficiency and business certainty, we suggest that the simplified procedure apply to eligible transactions caught by a deal-size threshold.

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]:

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

Please explain your answer.

As noted above, we do not believe there is sufficient evidence of a policy justification for introduction of a deal value threshold under EUMR. In the event that the Commission chooses to introduce a deal-size threshold in the EUMR, we would make the following suggestions:

- The aggregate worldwide turnover threshold which currently applies should continue to apply to such transactions;
- There should be a required minimum level of aggregate EU-wide turnover on the part of the buyer (rather than any of the undertakings, as required by the current system). If the target has significant EU-wide turnover, then assessment should be made under the conventional criteria, as this sort of transaction would not fit the low-turnover cases which the deal-size threshold is intended to address;
- There should be a maximum level of worldwide turnover of the target business. As the rationale for a deal-size threshold is based on capturing deals where the competitive significance of the target is not based on turnover, in cases where the target has substantial worldwide turnover should be assessed according to the existing criteria. We would note the same point could be made with reference to a suggested ratio between deal value and worldwide turnover of the target, although a simple financial threshold may provide greater business certainty (given, as mentioned above, concerns about the ease with which deal value can be calculated in many cases).

We note that these criteria would be additional to, rather than alternative to, the requirement for a local nexus discussed in the answer in question 21.

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.

We consider that the current case referral mechanism does contribute to the efficient allocation of merger cases to the appropriate authority. In our view the system could be improved to further reduce the burden on businesses by seeking to align the time periods in cases involving referral questions with the standard review periods under EUMR. It is not appropriate in our view that transactions should face additional delay due to uncertainties about the best-placed authority to carry out the review.

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.

We believe that adopting the proposals in the White Paper would be a positive step towards reducing the burden on businesses.

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.

As mentioned above, resolution of referral issues in pre-notification would be a welcome development to reduce the delay faced by companies in implementing such transactions.

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?

1 Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.

We are in favour of making this reform.

2. Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.

We are in favour of making this reform, on the understanding that this would involve setting out the Commission's current approach in the wording of the Merger Regulation.

3. Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).

We are not in favour of making this reform - if the Commission seeks to align the scope of these provisions, it would be better to revert to the pre-2004 wording of Article 8(4) whereby the Commission would seek to "restore effective competition" rather than "restore the situation prevailing prior to the implementation of the concentration", as the former provides more flexibility to the Commission to permit, for example, minority shareholdings which would not harm competition.

4. Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.

We are in favour of making this reform, but would not apply such sanctions to parties who receive unsolicited confidential information from the Commission.

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?

Our main concerns, and those of our clients, relate to the burden on business of obviously non-problematic transactions. The reforms that the Commission is considering, notably to exclude transactions from the need for full review (while ensuring this does not inadvertently trigger reviews under national rules) are very welcome.

The Commission should be cognisant in considering ways in which it might expand its jurisdiction that its jurisdiction has been significantly expanded already over the passage of a time by the effects of inflation on static turnover thresholds. Any consideration of further jurisdictional expansion should be carefully considered in this context.

The Commission should also be cognisant of the precedent effect of any reforms it implements on the 100+ merger control regimes now in force around the world, many of which are modelled on the EUMR. To the extent parallel reporting obligations were created in numerous jurisdictions for transactions involving acquisitions of assets of companies with no or minimal revenues, this could create a very significant and unjustified burden on business.

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.

Phase 2 merger reviews are extremely intensive for the parties involved and the time limits which are imposed on parties are burdensome. However, in our view the Commission shows better flexibility with regard to its Phase 2 timetable in this respect than certain other authorities, and we recognise that cases which have progressed to Phase 2 are those in which there is a need for closer scrutiny of the competitive effects.

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.

It is an advantageous feature of the EUMR regime that Phase 2 can be cut short through early offer of remedies - a feature which is not available in all Phase 2 review processes (e.g. in the UK).

V. Submission of additional information

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

Contact

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