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## Consultation submission

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**To** European Commission, Directorate-General for Competition – Unit A2

**From** Orrick, Herrington & Sutcliffe LLP

**Date** 13 January 2017

**Re** Public consultation “Evaluation of procedural and jurisdictional aspects of EU merger control”

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### **A. Introduction**

1. Orrick, Herrington & Sutcliffe LLP (“Orrick”) welcomes the opportunity to comment on specific proposals and issues raised in the questionnaire (the “Questionnaire”) for the public consultation on the “Evaluation of procedural and jurisdictional aspects of EU merger control” of 7 October 2016 (the “Consultation”).
2. Orrick is an international law firm that focuses on serving the Technology, Energy & Infrastructure and Finance sectors globally. We regularly advise clients on the applicability of the EU Merger Regulation (the “EUMR”) to M&A deals. The debate on the jurisdictional thresholds (questions 14 to 22) is particularly relevant to the Technology sector, an area where we handle hundreds of transactions each year.
3. We are making this submission as a result of our strong reservations concerning new thresholds for the jurisdictional assessment, in particular a threshold based on the transaction value.
4. As there is no evidence of an enforcement gap, such a threshold would be unjustified and would unduly impede business. Even if there were an enforcement gap, such a threshold would not be an appropriate response.

### **B. There is no evidence of an enforcement gap**

5. Our starting point is that no problem has been identified, so far, which would justify a broadening of the jurisdictional scope of the EUMR.

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***i) The burden of proof lies on the Commission***

6. The exercise of merger control must comply with the principle of proportionality. The downside of introducing a new jurisdictional threshold should be weighed against the necessity and efficiency of such measure. The Commission should, therefore, demonstrate a material problem, a measurable “enforcement gap”, before it considers expanding its jurisdiction by reforming the EUMR thresholds.
7. Orrick welcomes the Commission’s methodology of identifying such potential enforcement gap based on a legal and economic analysis of previous cases. In order to justify any new threshold, there should be evidence of a sufficient number of transactions that:
  - (a) were not reviewed by the Commission or another competition authority in the EU or EEA, and
  - (b) were revealed to have significantly impeded effective competition within the EU or EEA.

***ii) The Commission brought no evidence of an enforcement gap***

8. In our view, the Commission has not brought convincing evidence of an enforcement gap.
9. Regarding the acquisition of WhatsApp by Facebook (Question 14) and the acquisition of Pharmacyclis by AbbVie (Question 15), the Commission has not demonstrated why those transactions should fall within the scope of the EUMR. The Facebook/WhatsApp transaction was notified to the Commission and unconditionally cleared without the need for an in-depth investigation. It is unclear why the absence of EU notification was or would have been problematic.

***iii) There are no problematic cases in our experience***

10. We are aware of a large number of transactions in the technology sector which did not require EUMR filing. We are, however, not aware of any of those transactions raising any issues getting close to a significant impediment of effective competition in the EU. In our experience, transactions involving acquisitions of target businesses with a low or non-existent turnover in various sectors including the digital economy have proven to be unproblematic despite a “high” deal value, not least because the technology sector is highly dynamic.

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**C. The downsides of a new threshold**

***i) A cost to business***

11. The digital economy is a fast moving, fast evolving sector. The competitive landscape changes rapidly. The viability of successful new concepts and business models often depends on external financing and industry consolidation.
12. In this context, introducing a new, alternative threshold in order to expand the EUMR jurisdiction would impose a burden on the digital economy in terms of timing, uncertainty and costs associated with EUMR notifications.
13. It would also have a similar impact, but perhaps less dramatic, in other sectors.

***ii) Legal uncertainty***

14. Legal certainty is an important principle of European Union law. It is crucial that this is maintained in the context of the jurisdictional thresholds. The current "turnover based thresholds" provide such certainty: "turnover" is an objective, measurable and verifiable indicator of whether a notification is required.
15. Introducing a new threshold not based on turnover, in particular a threshold based on the value of the transaction, would jeopardise legal certainty. The concept of a "value of the transaction" is alien to the EUMR. The example of the U.S. system shows that a large and complex set of rules would be necessary to define the transaction value in a meaningful way. Questions would arise, in particular, in situations where the parties to a transaction do not agree on a fixed purchase price, for instance when the purchase price is made dependent on the future performance of the target company (e.g., earn-out clauses), when the consideration for an acquisition consists of elements other than cash (e.g. stock swaps) or when the concentration involves the creation of a joint venture.

**D. A transaction value threshold would not address the Commission's concerns**

16. Even if the Commission were able to prove the existence of an enforcement gap such as the one described in the consultation documents and that would justify an expansion of EUMR jurisdiction, introducing an alternative threshold based on the value of the transaction would not efficiently address such enforcement gap.

***i) Transaction value is not an efficient indicator of potential competition issues***

17. In the consultation documents, the digital economy (and to a lesser extent the pharmaceutical industry) is mentioned as the main source of concern in relation to the effectiveness of the current jurisdictional thresholds. The concerns relate to assets or technology such as “a significant user base”, “large inventories of data”, or research and development for new pharmaceutical “treatments” with high commercial potential.
18. However, whether the target would be able or willing to transform its assets and technology into revenue or to otherwise exert competitive pressure in the near future (absent the planned acquisition) cannot be derived from the transaction value. Unlike turnover, which is an objective criterion based on the measurable economic success of an undertaking, the transaction value is a subjective criterion that depends on the views and negotiation skills of just two market players (acquirer and seller). Many factors contribute to the transaction value, such as the sectors and markets in which the parties operate, the subjective interest of the acquirer, the parties’ negotiation skills, the subjective expectation as to whether competing technology will be developed by third parties, the method for setting prices (most notably if the price is at least partly defined post-transaction) and currency exchange rates. Therefore, a threshold based on the transaction value would not efficiently detect risks of competition concerns, unless (possibly) the level of transaction value triggering control is high (several billion euros).

***ii) Sector-specific concerns should not justify a wholesale reform***

19. Given the downsides of a new threshold and the need to comply with the principle of proportionality, an expansion of the EUMR jurisdiction should be limited to the identified level of additional intervention necessary. Before introducing a wholesale reform, the consequences of such reform on sectors other than the digital and pharmaceutical sectors should be evaluated.
20. Otherwise, the additional burden imposed on undertakings in other sectors likely would be disproportionate to the risk of the transaction leading to a significant impediment to effective competition.

**E. The implementation of a transaction value threshold would raise technical issues**

***i) Measuring the transaction value***

21. The concept of transaction value is vague and unclear. In practice, it would have to be translated into more operative and measurable criteria for the purpose of implementation.

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The criteria that efficiently reflect the value of a transaction might depend on the terms of the acquisition in each case.

22. If the Commission chooses a general reference to the “value of the transaction”, additional guidance would be necessary. If the Commission chooses one specific method for the measure of that value, for the sake of simplicity, the new threshold might not be efficient or proportionate.
23. The German example illustrates this issue. Germany plans to introduce a threshold based on the transaction value into its national merger control regime. The proposed threshold is based on the condition that “the value of the consideration for the concentration is more than 400 million euros”, along with additional conditions relating to turnover or activity in Germany and worldwide. The term “value of consideration” is defined as “all assets and services of a monetary value that the seller receives from the acquirer in connection with the concentration”. The “value of consideration” may seem a sensible choice due to its apparent simplicity, yet this may not fully reflect the full value of the transaction as it fails to take into account the value of interests that the acquirer already holds in the acquired business prior to the concentration. The Commission will have the opportunity to witness the implementation and potential shortcomings of such threshold in an EU Member State prior to proposing any reform of the EUMR thresholds.
24. In the United States, the “size-of-the-transaction test” requires a good-faith estimate of the expected value of the transaction where the value is uncertain. For example, this may be the case in the pharmaceutical sector where the acquisition value is based on a combination of a fixed price and royalty payments at a later stage. Whilst relying on good-faith estimates by the parties is perceived as unproblematic in the United States, introducing such practice into the EU merger control regime would require a cultural change as the jurisdictional assessment is based on verified turnover figures.

***ii) No efficient local nexus conditions***

25. A new threshold based on the transaction value would have to include appropriate local nexus criteria in order to: (a) ensure that workload is allocated effectively between the Commission and national competition authorities and (b) exclude transactions having no connection with the EEA.

***Compliance with the subsidiarity principle***

26. Instead of capturing only transactions that would not have qualified for national scrutiny, a new threshold based on the transaction value may cause a shift of cases from the national

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authorities to the Commission especially if Germany and other national jurisdictions introduce their own thresholds based on the transaction value.

27. The fundamental shortcoming of the transaction value is that it cannot, in an objective manner, be allocated geographically. Where the high value of a transaction is linked to the target's assets or technology such as "*a significant user base*", "*large inventories of data*", or research and development for new pharmaceutical "*treatments*" with high commercial potential, it will not be possible to assess the impact of such assets or technology within single EEA countries without going into the details of each asset or technology.
28. For example, if the target's "*significant user base*" is at stake, the most efficient test would be whether a significant portion of the EEA users are confined to one or two EEA states. If such user base generates little or no turnover within the EEA, additional turnover-based conditions would not be helpful in determining whether national competition authorities are better placed than the Commission to assess the case. Similar comments can be made in relation to "*large inventories of data*" or the research and development of a potential new pharmaceutical treatment.
29. For this reason, turnover level requirements would not constitute an efficient tool to ensure compliance with the principle of subsidiarity.

***A minimum link with the EEA***

30. In the event that a threshold based on transaction value is introduced, certain turnover levels such as those listed in question 22 would nevertheless be necessary to avoid capturing transactions with no connection to the internal market.
31. A "*minimum level of aggregate worldwide turnover of all undertakings concerned*" and a "*minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned*" may be necessary in order to ensure that only transactions involving an acquirer with substantial market power are caught, notably if the required level of the transaction value is low.
32. Requiring a "*maximum level of the worldwide turnover of the target business*" or requiring "*that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple*" may also be helpful criteria although these would add additional complexity to the jurisdiction rules.