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Evaluation of procedural and jurisdictional aspects of EU Merger Control

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Evaluation of procedural and jurisdictional aspects of EU Merger Control

I. Introduction

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

A. Purpose of the consultation

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

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

B. Background

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

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

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

The key proposals of the White Paper were the following:

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

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

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

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

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

Scope of the Evaluation

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

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

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

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

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

II. Practical Guide to fill in the questionnaire

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

Replying to the questions:

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

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:

  - show you a message indicating that your draft reply has been saved,
  - give you the link that you will have to use in order to continue replying at a later stage,
  - give you the possibility to send you the link by email (we encourage you to use this option).

- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

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

III. About you

Please provide your contact details below:

*1. Are you replying as:

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

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

Simmons & Simmons LLP

*Your full name

Koen Platteau

*Email address

Koen.platteau@simmons-simmons.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.

Simmons & Simmons LLP is an international law firm with 18 offices in Europe, the Middle East and Asia. Simmons & Simmons applies considerable expertise in all business sectors but focuses on: asset management and investment funds, financial institutions, life sciences and technology, media and telecommunications (TMT). It also focuses on the energy and infrastructure market.

*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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Louizalaan 143, 1050 Brussels
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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	○	○	○	○	◉	○	○

Please explain.

The one-stop-shop review is without a doubt to the benefit of companies, in particular in case of transactions qualifying for the simplified procedure. It saves companies from the hassle and burden of having to notify in one or more EU Member States.

Furthermore, the information requirements under the simplified procedure are considerably lighter than under the Form CO. We have welcomed the further widening of the scope of the simplified procedure for non-problematic cases by the 2013 Simplification Package. This has allowed many more cases to benefit from the simplified procedure and therefore, has reduced the administrative burden for our clients. In 2015, 66% of all cases notified to the Commission were reviewed under the simplified procedure.

However, although the information requirements under the simplified procedure are considerably more limited than under the Form CO, they are disproportionate for some types of transactions. The preparation of a filing is a burden in terms of costs and time, especially when combined with the de facto mandatory pre-notification phase. Further, the 25 working days-time limit for review implies a delay for the timing of the transaction, which, again, may be disproportionate for some transactions. Given the fact that some of the simplified cases have no or only a very limited impact on competition in the EEA, we consider that even the burden of a simplified procedure is disproportionate.

Therefore, we consider that there is scope for further simplification. In particular, it is our view that the red tape can be further reduced. Full exemption from notification or a lighter information requirement than the current Short Form CO would be welcome. Moreover, the Commission should consider curtailing the review period for cases under the simplified procedure. Further, such cases should all be exempted from pre-notification, unless the parties would consider it appropriate to engage in pre-notification with the Commission to discuss certain issues.

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

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The 2013 Simplification Package did not have a big impact for these types of
cases. They already benefitted from the simplified procedure.

As the information requirements under the simplified procedure are more
limited than under the normal Form CO, the treatment of these cases under the
simplified procedure has reduced the administrative burden for companies.

However, as such concentrations have no impact on competition in the EEA, the
Commission should consider exempting these types of transactions from the
notification obligation.
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(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 2013 Simplification Package reduced the burden on companies by raising the thresholds for transactions with a horizontal and/or vertical overlap. This caused an increase in the number of cases qualifying for a simplified procedure. This change needs to be welcomed.

On the other hand, the new Short Form CO increased the administrative burden. In case of reportable markets, the parties have been submitted to additional information requirements by the introduction of a new Section 5.3. (internal documents). For transactions falling under point 6 of the Notice, additional information requirements have been included in Section 7. The Commission should review whether the scope of the current Short Form CO is appropriate for these concentrations, and whether the administrative burden can be reduced.

(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

These transactions already benefitted from the simplified procedure before the 2013 Simplification Package. Hence, the 2013 Simplification Package did little to reduce the administrative burden for these types of transactions.

Given the limited scope of the activities of the JV's in the EEA, if any at all, the Commission should consider whether the administrative burden for these types of transactions cannot 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

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These transactions already benefited from the simplified procedure.
Therefore, the 2013 Simplification Package had little positive impact on
these types of transactions.

In our view, such transactions do not really alter economic reality and
therefore, are not capable of giving rise to any effects in the EEA. Hence,
the Commission should consider exempting these types of transactions from the
notification obligation.
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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.

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Not applicable.
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(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.

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Not applicable.
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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.

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Not applicable.
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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

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We consider that the simplified procedure captures those categories of cases
which have no or limited impact in the EEA. Hence, in our view, there are no
other categories, which should benefit from the simplified procedure.
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6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

- ○ YES
- ◉ NO
- ○ OTHER

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

- Transactions falling under point 5a of the Notice:

- ○ YES
- ◉ NO

Please explain.

The current turnover thresholds capture a large number of concentrations because of the turnover of the parents, while the joint venture has no or only negligible activities in the EEA. If the joint venture has no or only limited activities in the EEA, impact on competition will in any event be limited. In such cases, we consider that the burden of even a simplified procedure is disproportionate.

Therefore, we believe that there is room for even further simplification for these types of cases. The Commission could reduce the red tape on the basis of an exemption or by replacing the Short Form CO by a short information notice and by curtailing the review period.

- Transactions falling under point 5b of the Notice:

- ○ YES
- ◉ NO

Please explain.

In case of concentrations which have no impact at all on competition in the EEA because there is no horizontal or vertical overlap between the activities of the parties, the filing obligation delays the transaction even if the review process goes smoothly and is swift. In addition, the whole notification process and information gathering exercise is a cost for the undertakings involved.

Given the lack of effect of these types of transactions on competition in the EEA, we consider that the notification is merely red tape. We consider that the red tape can best be reduced by exempting these transactions from the notification obligation.

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

- ○ YES
- ◉ NO

Please explain.

The new Short Form CO increased the administrative burden. In case of reportable markets, the parties have been submitted to additional information requirements by the introduction of a new Section 5.3. (internal documents). In addition, for transactions falling under point 6 of the notice additional information requirements have been included in Section 7.

Given the limited impact of these transactions on competition in the EEA, we consider that the current Short Form CO is too burdensome on the parties. The Commission should review whether the extent of the current Short Form CO is appropriate, and whether the administrative burden on the parties cannot be reduced.

- Transactions falling under point 5d of the Notice:

- ○ YES
- ◉ NO

Please explain.

In our view, such transactions do not really alter economic reality and therefore, are not capable of giving rise to any effects in the EEA. In view of the lack of effects of these types of transactions on competition, we consider the burden of the current Short Form CO disproportionate. Hence, the Commission should consider exempting these types of transactions from the notification obligation.

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

We have welcomed the further widening of the scope of application of the simplified procedure for non-problematic cases as well as the simplification of the notification forms by the 2013 Simplification Package. This has allowed many more cases to benefit from the simplified procedure and therefore, has reduced the administrative burden for our clients.

However, the new Short Form CO also increased the administrative burden. In case of reportable markets, the parties have been submitted to additional information requirements by the introduction of a new Section 5.3. (internal documents). In addition, for transactions falling under point 6 of the notice additional information requirements have been included in Section 7. In case of non-reportable markets, the administrative burden has increased with the introduction of Section 8 of the Short Form CO.

Given the limited impact of these transactions on competition in the EEA, we consider the extent of the current Short Form CO disproportionate. In our view, the burden for simplified procedures can definitively be further reduced.

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.

Given the fact that most of the simplified cases have no or only a limited impact on competition in the EEA, we consider that they should be exempted from the obligation of prior notification to the Commission.

In our view, this would in particular be appropriate for extra-EEA joint ventures (point 5(a) of the notice), changes from joint to sole control in relation to a party which already has joint control (point 5(d) of the notice) and concentrations without any horizontal or vertical overlaps in the EEA (point 5(b) of the notice).

In any event, if the Commission opts for exempting certain types of transaction from the notification obligation, they should keep their EU dimension. Hence, the exemption from the notification obligation should not give the Member States the competence to review these cases. The one-stop-shop principle should continue to apply to these transactions.

In addition, the exemption should only apply for clear categories of transactions defined on the basis of objective criteria which do not leave room for discussion. Parties must have legal certainty regarding the eligibility of their transaction for exemption on the basis of a straightforward test.

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.

For those simplified cases which could not benefit from exemption from the notification obligation, the proposal of replacing the Short Form CO with a short information notice calls for support.

We consider legal certainty of the utmost importance in merger control cases. However, in our view, this does not require an explicit approval decision from the Commission. Legal certainty can also be provided be a mere lapse of time, as provided for under the current EUMR.

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 case of merger control we consider legal certainty of the utmost importance. If the Commission were to have the power to review acquisitions post-closing and impose remedies, then this would introduce an element of uncertainty. In such case, buyers and sellers may be reluctant to proceed without a notification and the Commission's approval decision.

Therefore, in our view, a self-assessment system is not appropriate in relation to merger control.

8.4 Other

- ◉ YES
- ○ NO

Please explain.

We believe that in addition to lighter information requirements the Commission should consider curtailing the review period for cases under the simplified procedure. The 25 working day review period is disproportionate for some types of transactions. As these transactions have no or only limited effects on competition in the EEA, we believe that the review period for such cases could be curtailed to for example 10-15 working days.

In addition, such cases should all be exempted from pre-notification, unless the parties would consider it appropriate to engage in pre-notification with the Commission to discuss certain issues.

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.

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Not applicable.
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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

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In case of extra-EEA joint ventures, the impact of the concentration occurs
completely outside the EEA. The concentration only has to be notified to the
Commission because of the turnover of the parents. As they do not have any
effect on competition on markets in the EEA, they cannot have any adverse
effects for competition and consumers in Europe. The notification to the
Commission is purely red tape.
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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

The one-stop-shop review prevents that extra-EEA joint-ventures are subject to review by the national competition authorities in different Member States. Therefore, the one-stop-shop is to the benefit of the parties and reduces the burden for companies. However, the one-stop-shop principle is unrelated to simplification.

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 these transactions have no impact on competition in the EEA, the notification to the Commission is purely red tape and disproportionate. Therefore, we consider that the current simplified procedure is too burdensome and costly for these types of transactions. In addition, it has an impact on the timing of the transaction.

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

These transactions already benefitted from the simplified procedure before the 2013 Simplification Package. Hence, the 2013 Simplification Package did little to reduce the administrative burden for these types of transactions. To the contrary, the administrative burden has increased with the introduction of Section 8 of the Short Form CO.

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.

We are against excluding extra-EEA joint ventures from the scope of the EU Merger Regulation. This would have as a consequence that these concentrations would lose the benefit of the one-stop-shop. Hence, the national competition authorities would be competent to review these extra-EEA joint ventures.

Excluding extra-EEA joint ventures from the scope of the EUMR could increase the administrative burden for companies as they risk having to notify the concentration in several EU Member States because of the turnover of the parents. Given the lack of impact on competition in the EEA, such burden would be disproportionate.

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

- (●) YES
- ( ) NO

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

In case of extra-EEA joint ventures, the transactions take place completely outside the EEA and only have to be notified to the Commission because of the turnover of the parents. As they do not have any effect on competition on markets in the EEA, they do not have any adverse effects for competition and consumers in Europe. The notification to the Commission is purely red tape.

Therefore, any form of notification system is, in our view, disproportionate in view of the total lack of impact of these transactions on competition in the EEA. Even in case of a light information system parties would still have to invest time and costs.

Hence, we would recommend to exempt extra-EEA joint ventures from notification.

In any event, if the Commission opts for exempting certain types of transaction from the notification obligation, the exemption should only apply for clear categories of transactions defined on the basis of objective criteria which do not leave room for discussion. Parties must have legal certainty regarding the eligibility of their transaction for exemption on the basis of a straightforward test.

(iii) Other.

Please explain.

```
Not applicable.
```

IV.2. Jurisdictional thresholds

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

Article 1 of the Merger Regulation

Scope

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

2. A concentration has a Union dimension where:

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

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

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

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

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

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

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

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

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

4. […]

5. […]

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

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

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

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

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

- YES
- NO
- OTHER

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

```
Not applicable
```

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

```
Not applicable
```

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

```
Not applicable
```

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

```
Not applicable
```

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

```
We have not encountered competitively significant transactions in the digital economy 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 EUMR.
```

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.

```
Not applicable
```

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

```
Not applicable
```

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

```
Not applicable
```

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

```
Not applicable
```

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

```
We have not 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 EUMR.
```

16. In your experience, have you encountered competitively significant transactions **in other industries than the digital and pharmaceutical sectors in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?
    - ○ YES
    - ◉ NO
    - ○ OTHER

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

```
Not applicable
```

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

```
Not applicable
```

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

```
Not applicable
```

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

```
Not applicable
```

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

```
We have not encountered competitively significant transactions in any other
industries 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
EUMR.
```

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.

As shown by the Facebook/WhatsApp case which was reviewed by the Commission subsequent to a pre-notification referral under Article 4(5) EUMR, the current referral mechanisms allow the Commission to review mergers which are not captured by the EU merger control thresholds but have an impact in several EU Member States.

The advantages of the one-stop-shop principle in terms of timing, costs and information gathering may be considerable for parties. This makes it interesting for them to submit a referral request to the Commission. The number of referral requests under Article 4(5) EUMR in the past years also proves this.

However, as set out below in response to questions 23 and 24, the current referral mechanisms place an unnecessary burden on businesses. In our view, the reforms proposed in the 2014 White Paper would make referrals to the Commission more effective and therefore, also more likely.

In conclusion, we consider that the referral mechanisms offer sufficient guarantees that the Commission will review transactions with cross-border effects. However, the proposed reforms would greatly contribute to the effectiveness of the referral mechanisms and consequently, direct more transactions with cross-border effects towards the Commission and contribute to closing any perceived enforcement gap.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- ○ YES
- ◉ NO
- ○ OTHER

- **If yes**, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

Not applicable.

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

In our view, the double turnover threshold ensures that transactions with a significant impact on cross-border competition in the EEA are reviewed by the European Commission. In addition, the turnover thresholds are complemented by the referral mechanisms, thereby limiting the chance that cross-borders transactions with a significant impact on competition in the EEA would escape the Commission's scrutiny. This was clearly illustrated by the Facebook /WhatsApp case.

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 current turnover thresholds complemented by the referral mechanisms work well and allow the Commission to capture competitively significant transactions with cross-border effects in the EEA.

The big advantage of the turnover thresholds is legal certainty. The current thresholds provide a bright-line test allowing the parties to define with certainty whether their transaction comes within the jurisdiction of the Commission or not. A threshold based on the value of the transaction would seriously jeopardize legal certainty. Contrary to turnover figures, the value of the transaction can be defined in many different ways. Furthermore, values can change significantly over short periods of time and are subject to market volatility. The exact deal value may also be the result of a post-transaction pricing mechanism and therefore, not be immediately apparent.

The current German legislative proposal already shows the difficulties in defining and calculating the value of the transaction.

In addition, the concerns regarding the perceived enforcement gap are very different for each sector. The concerns in the digital sector clearly need to be distinguished from those in the pharmaceutical sector. Although in both sectors a high transaction value might be involved, this is not always representative of the impact the transaction may have on competition.

In case of the digital sector, the limited turnover of the target can be due to a particular business model. Nevertheless, due to the number of users they might be an important player on the market. In such case, the target is already present on the market offering its services to a large customer base. Hence, with regard to the digital sector the perceived enforcement gap relates to companies who will typically already be active on the market and offering their services.

With regard to the pharmaceutical sector, the concerns are different and we understand that the Commission is more concerned about protecting innovation. The perceived enforcement gap relates to pipeline products, i.e. products who are still at the R&D stage or going through clinical trials. Contrary to the digital sector, the products are not yet on the market and it is not even certain that they will ever be marketed. A pharmaceutical company might have in its portfolio very promising pipeline products, which could be the subject of a transaction with a substantial consideration but this is not a guarantee that these pipeline products will in the end generate revenue. This will depend on the outcome of the clinical trials. Hence, even if a pipeline product is highly valued, this does not necessarily imply that eventually it will have an impact on the market and competition.

In our view, relative values also differ across industries. Therefore, the introduction of a “deal size” threshold might subject certain sectors to an additional burden, while allowing other sectors to escape the intended scrutiny.

Furthermore, there are a lot of practical issues in relation to a “deal size” threshold. The Commission should reconsider the division of competence with the Member States for cases caught by the “deal size” threshold (for example, how will the 2/3 rule be applied to such cases?).

Finally, in our view, the introduction of a “deal size” threshold would go against the Commission’s intent to reduce red tape for companies. It would bring legal uncertainty and risks imposing a disproportionate burden on companies to catch only a very limited number of potentially problematic cases.

Should the Commission opt for a “deal size” threshold, the level of the transaction value threshold must be considered carefully. In our view, the threshold should be set sufficiently high. If set too low, the Commission risks being flooded by a large number of non-problematic cases, which have no or only a very limited effect on competition in the EEA. This would mean a significant increase of red tape notifications, resulting in a disproportionate burden for companies.

If a value-based threshold is to be imposed, additional criteria will be required to limit the application of the new threshold and to ensure an appropriate nexus with the EEA. However, the application of such local nexus test should be straightforward and not allow room for discussion or litigation. Therefore, we believe industry specific criteria and vague tests (such as tests on the basis of the impact of the transaction within the EEA

or tests based on market share thresholds) should be avoided.

In order to make sure that the introduction of a transaction value threshold only captures transactions that are likely to have a significant impact on competition in the EEA, we submit that such a value-based threshold should be combined with minimum combined worldwide and EU-wide turnover thresholds (for instance a combined worldwide turnover of minimum € 5 billion and a combined EU-wide turnover of minimum € 250 million).

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.

Not applicable.

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.

Not applicable.

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

- ( ) YES
- ( ) NO
- ( ) OTHER

Please explain your answer.

Not applicable.

IV.3. Referrals

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

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

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

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

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

Those proposals essentially consist of:

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

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

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

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

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

- YES
- NO
- OTHER

Please explain.

The current referral mechanisms contribute to allocating merger cases to the more appropriate competition authority. However, the current procedures are burdensome and time-consuming. In particular, the procedures under Articles 4 (5) and 22 EUMR place an unnecessary burden on businesses.

The current two-phase procedure under Article 4(5) EUMR doubles the work for parties and delays the transaction significantly. Given the low level of oppositions from Member States against the referral requests under Article 4 (5) EUMR, the separate Form RS and the 15 working day period for the Member States to oppose can be considered unnecessary.

The lack of jurisdiction of the Commission for the entire EEA in case of a referral under Article 22 EUMR implies a serious burden for companies. The parallel procedures at the Commission and the national competition authorities cause a serious delay and imply double work for the parties. Therefore, if the Article 22 EUMR procedure applies, the national competition authorities competent to review the transaction should lose jurisdiction.

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 the proposals made by the White Paper would contribute a great deal to a better and more efficient allocation of merger cases between the European Commission and the national competition authorities of the Member States. They would reduce the overall administrative burden.

The abolishment of the Form RS in case of a referral under Article 4(5) EUMR would reduce the burden on companies in terms of costs and time. It would make the current referral mechanism more attractive for companies and direct more cases to the Commission. As a result hereof, this proposal could also contribute to closing the perceived enforcement gap.

The proposed amendments of Article 22 EUMR extend the benefits of the one-stop-shop to concentrations for which the Commission accepts jurisdiction.

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.

The proposals made in the 2014 White Paper address the main shortcomings of the current referral mechanisms.

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?

In our view, the proposals of the 2014 Commission Staff Working Document would contribute to the effectiveness of the EU merger control regime. In particular, the proposed clarifications with regard to Articles 5(2) and 5(4) EUMR and the “parking” of transactions would contribute to legal certainty. Further, the proposal to modify Article 4(1) EUMR in order to provide more flexibility with regard to the notification of share acquisitions on the stock exchange without a public takeover bid will allow the Commission to take into account economic reality.

However, the proposal to modify Article 8(4) EUMR does not call for support. The Commission only has the power to review acquisitions of minority shareholdings which confer control. It does not have the power to assess and prohibit acquisitions of non-controlling minority shareholdings. Hence, when finding that a concentration, which is incompatible with the internal market, has been implemented, the Commission should only be allowed to require the disposal of the shares resulting in the acquisition of control. The fate of non-controlling minority shareholdings which were acquired prior to the prohibited concentration should not come within its powers.

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?

We consider that the current merger control regime overall works well.

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.

We acknowledge that in cases involving complex economic data analysis the time limits to which the Commission is subject in Phase II might be challenging. However, we consider that the possibility of a deadline extension under Article 10(3) of the EU Merger Regulation provides an answer to these time constraints. An increase of the maximum number of working days from 20 to 30 by which the Phase II deadline may be extended under Article 10 (3), would offer the parties and the Commission more flexibility. Nevertheless, as is currently the case, such an extension should be left exclusively to the initiative of the parties.

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.

We do not support the proposal of an automatic 15 working day deadline extension for Phase II deadlines under Article 10(3)(1) EUMR in all cases where commitments are offered. However, in view of greater flexibility we believe that at any time in the procedure (also when offering commitments before 55 working days) the parties should be free to indicate to the Commission that they believe that extra time is needed and therefore, be able to request a 15 working day deadline extension.

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