Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control

Introduction

Within the framework of the Evaluation of procedural and jurisdictional aspects of EU merger control ("the Evaluation"), a public consultation was launched in October 2016 and closed in February 2017 ("the Consultation"). The Evaluation builds upon work carried out in previous 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. This exercise led to the adoption in 2014 of the White Paper "Towards More Effective EU merger control" (the "White Paper") that contained a number of proposals[1] as regards a possible revision of the EU Merger Regulation.[2] In parallel, in December 2013, the Commission adopted a package of measures aimed at simplifying procedures without amending the EU Merger Regulation itself (the "2013 Simplification Package").[3]

The Commission has received submissions from a large number of stakeholders in response to the Consultation. Overall, more than 90 public and private stakeholders submitted their views (15 national competition authorities ("NCAs"), 7 other public bodies, 31 associations, including industry and consumer associations, 21 companies, 19 law firms, 4 research institutes and 1 from private individuals).

The following provides an executive summary of those submissions. It is structured pursuant to the four topics subject to the Evaluation, namely (1) simplification of EU merger control, (2) the functioning of the jurisdictional thresholds, (3) the functioning of the referral system, and (4) specific technical aspects. The executive summary groups submissions according to stakeholder groups or according to the views expressed on specific issues, as appropriate.

Executive summary of the contributions per topic

1. Simplification

The Consultation asked for feedback, first, about the benefits of the simplified procedure at EU level and the impact of the 2013 Simplification Package and, secondly, on the possible scope for further simplification of EU merger control, notably on (i) whether there are categories of cases, in addition

[1] The proposals of the White Paper in particular included: (i) introducing a light and tailor-made review of those acquisitions of non-controlling minority shareholdings which could harm competition; (ii) making case referrals between Member States and the Commission more business-friendly and effective: (iii) making procedures simpler; and (iv) fostering convergence between Member States notably in parallel merger reviews conducted by the competition authorities of several Member States.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, p. 1-22.

[3] This Simplification Package notably expanded the categories of cases that could be assessed under the simplified procedure, substantially re-drafted and streamlined the forms required for notifying mergers or making pre-notification referral requests and reduced the information requirements for both simplified and non-simplified cases wherever possible.

to those that currently fall under the Notice on simplified procedure[4] that typically do not raise competition concerns and could therefore be treated under the simplified procedure and on (ii) potential legislative options for further, wider-ranging simplification of the treatment of certain categories of non-problematic cases.

The Consultation identified four possible broad options to achieve further simplification, namely (1) exempting certain categories of cases from the notification and standstill obligations; (2) introducing a light information system for selected categories of cases; (3) setting-up a self-assessment system with the possibility of a voluntary notification for selected categories of cases; and (4) excluding extra EEA joint ventures from the scope of application of the EU Merger Regulation (a proposal contained in the 2014 White Paper). For all options, the Consultation inquired about possible benefits (particularly reduction of burden for companies) but also associated risks (notably that potentially anticompetitive transactions may not be reviewed).

NCAs & other public bodies

Overall, 15 NCAs and 5 other public bodies comment on the Simplification section of the Consultation, notably on the different options for a possible design for a new system:

- Around half of the NCAs that replied would be in favour of amending the current legislative framework to further simplify the way that certain categories of simplified cases are being treated.
- The other half of the NCAs do not support any modification of the current legislative framework, although a few of them propose instead to further streamline the current notification system (e.g. as regards the use of waivers, requests for information, etc.).

Among those NCAs that express a favourable opinion towards a possible reform of the EU Merger Regulation, the preferred option to further simplify and streamline procedures would be the replacement of the current notification requirement under the simplified procedure (based on the Short Form CO) by a lighter information system for certain categories of simplified cases, in particular extra-EEA joint ventures (which fall under paragraph 5a of the Notice on a simplified procedure) and operations bringing a change from joint to sole control (which fall under paragraph 5d of the Notice on a simplified procedure). A few NCAs also mention this possibility for mergers which do not give rise to horizontal overlaps or vertical relations ("non-overlap" mergers, falling under paragraph 5b of the Notice on a simplified procedure). However, for transactions with limited overlaps (falling under paragraphs 5c or 6 of the Notice on a simplified procedure), NCAs overall call for caution and express a preference for keeping the current notification system.

Conversely, the possibility of introducing an exemption system for certain categories of cases or excluding them completely from the scope of the EU Merger Regulation receives very limited support from NCAs. Only a small minority of NCAs would be in favour of excluding certain transactions (notably extra-EEA joint ventures) from the scope of the EU Merger Regulation altogether or would consider an exemption system, with high caution. Finally, the introduction of a self-assessment

[4] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, (OJ C366, 14.12.2013, p.4).

system seems to be the least desirable option for NCAs, as only one NCA expresses some support, while at the same time highlighting the risk that some cases might escape scrutiny.

Private stakeholders

A large majority of private respondents 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. A large majority also considers that the simplified procedure has generally reduced the burden on companies (notably the merging parties) compared to the treatment under the normal procedure.

In this regard, private stakeholders overall welcome the simplification efforts undertaken at the time of the adoption of the Simplification Package and consider that it has led to a general reduction of burden when it comes to most categories of cases currently falling under the simplified procedure. Notwithstanding this, the proposals for further simplification of the treatment of certain categories of non-problematic cases have attracted interest among private stakeholders, in line with the positive feedback already received during the public consultation to the 2014 White Paper. A majority of private stakeholders are indeed in favour of further simplifying procedures either through a reform of the EU Merger Regulation or a through less ambitious non-legislative streamlining of the functioning of the current simplified procedure.

Scope for further simplification within the current system

A significant number of private stakeholders voice concerns about the burdens that, in their view, still persist for companies when notifying transactions under the simplified procedure. Overall, most respondents welcome the adoption of the 2013 Simplification Package as a step in the right direction. Some respondents indicate however that the efforts undertaken to further simplify have not fully been felt in practice, in particular when it comes to cases with a limited combined market share. In their view, certain information requirements in these cases – notably requirements to provide market information for all "plausible" market definitions and to provide internal documents under Section 5(3) of the Short Form CO in certain cases – are burdensome to comply with and may generate delays in the pre-notification stage. Private stakeholders therefore call for a general reduction of requests for information, a more extensive and streamlined use of waivers and shorter pre-notification periods.

Calls for further simplification of certain categories of simplified cases

Private stakeholders overall support the idea of amending the EU Merger Regulation to simplify the procedure applicable to most cases currently falling under the simplified procedure, in particular extra-EEA joint ventures, mergers which do not give rise to horizontal overlaps or vertical relations within the EEA and transactions involving a change from joint to sole control. Most stakeholders consider that the burden of the obligation to notify these cases (both in terms of costs and time) is not justified given that these cases are very unlikely to raise competition concerns in the EEA.

As regards the means to achieve such further simplification for these cases, a majority of private stakeholders express a preference for an exemption system whereby these transactions would not need to be notified to the Commission.[5] A large number of private stakeholders also support an

[5] A few respondents suggest the introduction of a "pure" exemption system, that is, one where there would be no obligation to notify, no standstill obligation and no need for the Commission to adopt a decision but an automatic

option of replacing the current notification obligations by a lighter information system (whereby the merging parties would provide only some basic information on the transaction to the Commission), either as their preferred option or as an alternative to an exemption system. On the other hand, private stakeholders generally oppose the possibility of excluding cases from the scope of the EU Merger Regulation altogether, as this would mean losing the benefit of the one-stop-shop mechanism. A self-assessment system for certain categories of cases is not supported either, as such system would jeopardize legal certainty for businesses and would increase the burden both for the notifying parties and for the Commission.

Conversely, private stakeholders do not generally call for a radical reform of the current notification system for cases which give rise to a limited combined market share. However, the majority of responding private stakeholders questions the appropriateness of the information requirements imposed in the current Short Form CO given that these transactions have a limited impact on competition in the EEA. As a result, private stakeholders would favour the introduction of a lighter information system in particular for this category of cases, instead of a radical reform of the current system.

Finally, a few respondents also call for an expansion of the categories of cases falling under the current simplified procedure, for instance, by increasing the combined market share thresholds for horizontal cases and/or for vertical cases, or by applying the simplified procedure to all cases with a very small increment.

2. The functioning of the EUMR's jurisdictional thresholds

The Consultation inquired about (i) the possible existence of a enforcement gap concerning acquisitions of highly-valued targets with no or limited turnover, (ii) what type of transactions and industry sectors would be concerned by any such potential enforcement gap, and (iii) whether the current referral system combined with merger control at the level of Member States would be sufficient to deal with transactions without Union-dimension. Secondly, the Commission solicited stakeholders' views on ideas for potential complementary jurisdictional thresholds, including a jurisdictional threshold based on the value of a transaction.

A **minority of respondents** – including several NCAs and other public bodies, a few companies and associations – perceive the existence of such an enforcement gap and are in favour of introducing complementary jurisdictional thresholds.

Indeed, a minority of responding NCAs consider that the EUMR suffers from an enforcement gap. Several responding public bodies other than NCAs also identify an enforcement gap. The digital sector is cited most frequently as an area where the EUMR may fail to catch all competitively significant cross-border transactions**.** Some NCAs also point to the pharmaceutical and biotechnology

compatibility of transactions falling under the exemption. However, many other respondents appear to prefer a mixture of features of an exemption system with those of self-assessment or light-information systems. As a result, they appear to favour an exemption from notification whereby a short information notice would need to be submitted by the parties, with a short time period for the Commission to decide whether to request full notification or not. Some stakeholders acknowledge however the risk of missing potentially problematic cases and also explore possible ways to mitigate such risks, for example, by including additional criteria for a case to fall under the exemption system, such as the absence of potential competition issues and of activities in neighbouring markets or the possibility for the Commission to call in cases within a defined time-limit.

sectors as well as patent portfolio acquisitions. NCAs and other public bodies refer to a number of cases as evidence for an enforcement gap. A minority of responding NCAs and several responding public bodies see the need for the introduction of a complementary jurisdictional threshold based on the value of the transaction. They point out that the level of a transaction value threshold that could be introduced into the EUMR should be set at a sufficiently high level.

Also, a small minority of responding associations perceive an enforcement gap in EU merger control due to the functioning of its jurisdictional thresholds. A small minority of companies express the same view. In addition to the case Facebook/WhatsApp, the respondents mainly refer to more recent acquisitions by a number of large Internet companies of smaller companies that mostly escaped merger control scrutiny in Europe. Most associations and companies that perceive an enforcement gap propose to introduce a complementary jurisdictional threshold based on the value of a transaction. One association proposes, as an alternative criterion, to expand the EUMR's jurisdiction by adding a notification requirement based on the number of consumers which are directly impacted by the merger.

Finally, some of the responding research institutes perceive an enforcement gap in EU merger control due to the functioning of the jurisdictional thresholds. However, they do not propose to introduce a complementary jurisdictional threshold.

Conversely, the **majority of public and private stakeholders responding to the questionnaire** do not perceive any (significant) enforcement gap as regards highly valued acquisitions of target companies that do not generate sufficient turnover to meet the jurisdictional thresholds of Article 1 of the EU Merger Regulation, which would require legislative action. In addition, they consider that the referral mechanism pursuant to Articles 4(5) and 22 of the EU Merger Regulation combined with national merger review systems in the Member States are sufficient to ensure that cases without Union dimension are reviewed either at national or European level. Some respondents note, however, that the extent to which high value/ low turnover transactions could be caught through the referral system depends on the existence of non-turnover-based notification thresholds in at least some Member States.

Accordingly, the majority of respondents do not see any need for introducing complementary jurisdictional thresholds.

The main arguments respondents raise against complementary thresholds can be summarised as follows:

- There is no or insufficient empirical evidence for an enforcement gap.
- At the outset, the jurisdictional thresholds of EU merger control are not meant to capture all transactions with a cross-border dimension. The referral system is specifically designed to facilitate allocation of a case to the appropriate governance level.
- The few cases of highly valued acquisitions of low turnover targets that do not meet the EU thresholds are typically subject to merger review at the national level and could therefore be referred according to Articles 4(5) and 22 of the EU Merger Regulation, if appropriate. In this context, some respondents point out that the referral system could be made even more efficient.

- A number of stakeholders urge the Commission to await and analyse the implementation of new laws introducing value-based jurisdictional thresholds into some national merger control regimes, to draw lessons both on the existence of a jurisdictional gap and how best to address it. In this context, some respondents note that national laws usually can be adapted more swiftly to deal with unintended consequences of legislative changes than European laws.

- In the absence of cogent evidence for an enforcement gap, the introduction of additional thresholds would be disproportionate and create unnecessary administrative burden. As a consequence, an expansion of EU merger control would have a chilling effect on innovation and investments in Europe.

- There is a risk of catching large amounts of false positive cases and/or spending time on consultations to clarify jurisdictional questions. This would negatively impact the Commission's resources, potentially taking away manpower from competitively significant cases.

- Moreover, many respondents believe that the EU Merger Regulation is a role model for many third country merger control regimes and fear that other jurisdictions could follow the EU in modifying their merger regimes in ways that may not comply, in their view, with Recommended Practices of the International Competition Network.

As regards, more specifically, the potential introduction of a complementary threshold based on the value of the transaction, the main criticisms of respondents are the following:

- The purchase price is subjective and does not give any indication of the possible competitive significance of a transaction.

- The value of a transaction is difficult to determine in many constellations. Respondents point for instance to contractual earn-out provisions or conditional milestone payments, fluctuation of share prices between e.g. the announcement of a transaction and its closing and exchange rate fluctuations that can all significantly modify the value of the transaction.

- A jurisdictional test based on the value of a transaction does not ensure sufficient local nexus.

As regards the latter issue, namely how to ensure local nexus in the event a complementary jurisdictional threshold based on the transaction value were to be introduced into the EU Merger Regulation, most respondents consider that:

- A general clause (possibly supplemented by guidance that could be sector-specific) requiring activity or measurable competitive impact within the EEA would be too vague and would lead to legal uncertainty, possibly leading to the notification of many transactions without a clear nexus to the EEA.

- Moreover, especially for digital transactions, it would be difficult to geographically allocate the transaction value (if such allocation were required as part of a deal-size test).

- A (local) market or supply share threshold to ensure local nexus would be challenging to apply in the digital sector (due to emerging product markets) and would not work for pharmaceutical pipeline products.

- Local turnover or assets may be suitable criteria to establish the necessary nexus between a transaction and the EEA. In this context, reference is made to the notification thresholds of the US merger control regime. However, several respondents also take the view that the US system's local nexus provisions for foreign transactions (local turnover or assets) are characterised by complexities and should not necessarily serve as a blueprint.

Many respondents consider, moreover, that additional filters or a combination thereof would be needed in order to limit the number of potentially notifiable concentrations, if a complementary jurisdictional threshold were to be introduced.

3. The functioning of the case referral system

In view of the consultations on the functioning of the case referral system in previous years, the Evaluation aimed mostly at verifying whether the views expressed by stakeholders on the proposals made in the White Paper have evolved in light of the more recent experience with case referrals. Those proposals included notably to: (1) rephrase the test of Article 4(4) of the EU Merger Regulation in order to avoid the perceived "self-incrimination" test upon parties requesting a referral; (2) abolish the two-step procedure pursuant to Article 4(5) of the EU Merger Regulation, consisting of the submission of a Form RS in a first step and then the submission of the formal notification in the second step; and (3) assign jurisdiction for the entire EEA to the Commission if it accepts a referral pursuant to Article 22 of the EU Merger Regulation; in turn, if one (or more) competent Member State(s) oppose the referral under Article 22 EU of the Merger Regulation, the Commission would renounce jurisdiction for the entire EEA.

NCAs and other public bodies

The views of NCAs and other public bodies on the referral related proposals made in the 2014 White Paper have generally not changed. Many of the NCAs and other public bodies refer to their submissions on the White Paper. The large majority supports the proposed reform of pre-notification referrals under Article 4(4) and (5) EUMR. As regards post-notification referrals to the Commission under Article 22 of the EU Merger Regulation, they overall express support for the substantive proposals, although in some cases subject to a number of comments or suggestions on some procedural aspects. Moreover, several NCAs and other public bodies reiterate their suggestions for a reform of post-notification referrals to Member States under Article 9 of the EU Merger Regulation. Some NCAs and other public bodies also reiterate their proposal to abolish the two-step procedure in Article 4(4) pre-notification referrals, so that the notifying parties would only have to file the respective notification at national level.

Private stakeholders

Private stakeholders (associations, companies, law firms, education and research institutes) are generally in favour of amending Article 4(4) and Article 4(5) as proposed in the 2014 White Paper, while advocating a further reduction of the applicable deadlines. Several respondents make a new proposal relating to pre-notification referrals under Article 4(5) of the EU Merger Regulation and suggest that, when accepting such referral, the Commission's jurisdiction should be limited to carrying out its assessment on worldwide or EEA-wide markets and, if the notified transaction

concerns markets that are national or even smaller, to the territories of those Member States that would have jurisdiction over the transaction pursuant to their national merger control laws. Also, some stakeholders request to reduce the required number of Member States competent to review a transaction for it to be referred under Article 4(5) EU Merger Regulation, from currently three to two or even to just one Member State. In relation to post-notification referrals pursuant to Article 22 of the EU Merger Regulation, many private stakeholders reiterate their request to repeal this mechanism as no longer necessary. If not repealed, at least the Commission's jurisdiction under Article 22 should be clearly limited to those Member States that are initially competent to review the case, if national or smaller markets are concerned. As regards referrals pursuant to Article 9 of the EU Merger Regulation, private stakeholders do not request removing or limiting the Commission's discretion under this provision.

4. Technical aspects

The Staff Working Document accompanying the White Paper identified certain technical aspects of EU merger control that could be improved, ranging from clarifying the methodology for turnover calculation of joint ventures, amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can be revoked, to modifying Article 8(4) of the EU Merger Regulation to broaden its scope to include the power for the Commission to require dissolution of a partially implemented transaction. The Consultation sought to identify any evolution of stakeholders' views on those proposals and specifically solicited feedback on whether stakeholders experienced significant time constraints in merger investigations, notably in Phase II. Overall, however, these technical improvements have not been at the core of the Consultation.

NCAs and other public bodies

NCAs and other public bodies do not generally comment on the various proposals, except on the suggestions relating to (i) the revocation of a referral decision based on deceit or false information, which is opposed by several NCAs; and (ii) any possibility to provide the Commission with more time flexibility in Phase II investigations, which raises concerns as regards the time allocated to the Member States to review the final decision in the Advisory Committee.

Private stakeholders

Private stakeholders generally agree with the large majority of the technical proposals, to the notable exception of (i) the modification of Article 8(4) of the EU Merger Regulation, that a large majority clearly opposes, as this proposal would in their view usher in jurisdiction over minority shareholdings "by the back door"; and (ii) any ideas to give more time flexibility to the Commission, notably in Phase II. A large number of private stakeholders are against the latter proposal, but some associations, companies and law firms could envisage giving some time flexibility to the Commission if this is done in agreement with the merging parties.

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