

EVALUATION ROADMAP			
TITLE OF THE EVALUATION	Evaluation of procedural and jurisdictional aspects of EU merger control		
LEAD DG RESPONSIBLE UNIT	DG COMP – A2	DATE OF THIS ROADMAP	3 rd August 2016
TYPE OF EVALUATION	Evaluation, Internal	PLANNED START DATE	Q2 / 2016
		PLANNED COMPLETION DATE	Q3 / 2017
		PLANNING CALENDAR	http://ec.europa.eu/smart-regulation/evaluation/index_en.htm
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A. Purpose
(A.1) Purpose
<p>Context</p> <p>Merger control constitutes one of the instruments of EU competition law. It aims at ensuring that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations. It is based on Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EU Merger Regulation”), its Implementing Regulation and related Notices and Guidelines.</p> <p>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.</p> <p>In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU merger control (the "White Paper"). 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.</p> <p>The key proposals of the White Paper were the following:</p> <ol style="list-style-type: none"> 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: 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 the internal market; 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; 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. <p>Based on the White Paper, the Commission carried out a public consultation (http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html). Respondents mostly agreed that the EU merger control system works well overall. They welcomed the White Paper’s proposals in relation to the streamlining of the case referral system and simplification. Stakeholders were however more critical as regards the necessity and proportionality of the proposed system for the introduction of a review of minority shareholdings.</p>

<p>Purpose of the evaluation</p> <p>Simplification and functioning of the case referral system In light of the positive feedback on the White Paper's proposals on simplification and the European Commission's general objective to cut red-tape where possible, it appears appropriate to explore whether there is scope for further simplification of EU merger control. Moreover, the evaluation will seek to confirm the findings of the consultation on the White Paper in relation to the functioning of the case referral system.</p> <p>Emerging issues – effectiveness of the purely turnover-based jurisdictional thresholds of the EU Merger Regulation The EU Merger Regulation only applies to concentrations of a Union dimension, which are those where the undertakings concerned meet the different relevant turnover thresholds. In the aftermath of the public consultation on the White Paper, a debate has emerged on the effectiveness of these purely turnover-based jurisdictional thresholds, specifically on whether they allow to capture all transactions which can potentially have an impact in 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. Moreover, relevant business models may involve the formation of commercially valuable data inventories without generating corresponding turnover (at least in an initial period). Therefore, players in the digital economy may have considerable market potential, but generate only little turnover at the moment when jurisdiction needs to be established for EU merger control purposes. The acquisition of such companies with low turnover is likely not to be captured under the current notification requirements of 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. Therefore, 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. This perceived legal gap may not only concern the digital industry, but also other industry sectors, such as pharmaceuticals.</p> <p>Other technical aspects Recent experience in enforcing the EU Merger Regulation has shown the opportunity to evaluate certain technical aspects of the procedural and investigative framework for the assessment of mergers. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.</p>

(A.2) Justification
<p>Given the positive stakeholder feedback received on the proposals of the White Paper that aim at streamlining procedures and reducing administrative burden, it appears opportune to further assess related aspects of EU merger control with a view to identifying difficulties with a view of future regulatory simplification. Moreover, in light of the emerging discussion on the effectiveness of the turnover-based jurisdictional thresholds of the EU Merger Regulation, it appears opportune to assess this issue with a view notably to determine whether any policy response may be warranted. Finally, it is appropriate to evaluate a number of technical aspects of the procedural and investigative framework for the assessment of mergers, in order notably to explore the possibility to increase the efficiency of EU merger review and simplify procedural requirements.</p>

B. Content and subject of the evaluation
(B.1) Subject area
<p>Procedural and jurisdictional aspects of EU merger control, as set up in the EU Merger Regulation and its Implementing Regulation, as well as related Notices and Guidelines.</p>
(B.2) Original objectives of the intervention
<p>In accordance with the principle of an open market economy with free competition, the objective of EU merger control is to ensure that corporate reorganisations in the form of concentrations do not distort competition in the internal market.</p> <p>In light of this general objective, the jurisdictional turnover-based thresholds of EU merger control limit the scope of application of the Merger Regulation to concentrations with a Union dimension, as those are considered as bringing significant structural changes, the impact of which on the market typically goes beyond the national borders of any one EU Member State.</p>

In light of the principle of subsidiarity, the EU Merger Regulation's rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission operate as a corrective mechanism to the initial attribution of jurisdiction pursuant to the turnover-based thresholds.

The procedures foreseen by the EU Merger Regulation are designed in a way to achieve administrative efficiency.

(B.3) How the objectives were to be achieved

In order to achieve the general objective of EU merger control, namely to prevent a distortion of competition in the internal market, concentrations with a Union dimension are subjected to an exclusive ex-ante review and approval by the European Commission.

In order to achieve the objective that the EU Merger Regulation applies to concentrations having an impact on the internal market going beyond the borders of any one EU Member State, the EU Merger Regulation contains jurisdictional thresholds. These jurisdictional thresholds are based on the individual and aggregate turnover of the merging parties. Concentrations that meet these jurisdictional thresholds are subject to a review at EU level. Concentrations that do not fall within the scope of application of the Merger Regulation may come within the jurisdiction of the Member States, in accordance with their respective national legislations. In order to achieve this objective, thresholds need to be set at the appropriate level. The evaluation will look into this.

In order to achieve the objective of a more flexible attribution of competences between the Commission and National Competition Authorities of the EU Member States ("NCAs") in particular cases, the EU Merger Regulation provides for a referral system. This system allows for a reallocation of cases in light of the principle of subsidiarity and of the principle that the best-placed authority should carry out the investigation, while maintaining the benefits inherent in a 'one-stop-shop' system and ensuring legal certainty with regard to jurisdiction. It is based on pre-notification referrals at the request of the notifying parties and post-notification referrals at the request of NCAs. The correct allocation of cases reduces administrative burden and increases legal certainty. In order to achieve this objective, all procedures on attribution of competences need to be evaluated to see if there is scope for simplification.

In order to achieve the objective of administrative efficiency of EU merger control procedures, the EU Merger Regulation sets out strict, legally binding deadlines for the adoption of decisions and limits the opening of in-depth (phase II) investigations to concentrations that raise serious doubts as to their compatibility with the internal market after a preliminary (phase 1) investigation. Furthermore, a simplified notification and review procedure has been established for certain categories of cases that typically do not raise competition concerns. In order to achieve the most efficient functioning of the merger control procedures, they will be assessed to verify if there is room for further simplification.

C. Scope of the evaluation

(C.1) Topics covered

The two public consultations on the EU Merger Regulation in 2009 and 2013, as well as the 2014 public consultation on the White Paper confirmed that EU merger control works well overall and that no fundamental overhaul is needed. However, these public consultations showed that there may be room for improvements in certain areas. While the 2014 consultation cast doubts about the proportionality of the proposed system for the expansion of the scope of the EU Merger Regulation to the acquisition of non-controlling minority shareholdings, stakeholders welcomed the White Paper's proposals to streamline the case referral system and further simplify the way mergers not giving rise to competition concerns are dealt with. Also, more recently, a debate on the effectiveness of the turnover-based jurisdictional thresholds of the Merger Regulation has emerged. This latter issue has not been addressed by the White Paper or discussed in detail in the previous public consultations.

Against this background, the following procedural and jurisdictional aspects of EU merger control shall be evaluated in order to complement the work already undertaken in the context of the White Paper and prior consultations:

1. Treatment of certain categories of cases which generally do not raise competition concerns, as set out in the EU Merger Regulation, the Implementing Regulation, and the Commission Notice on simplified procedure;¹
2. Application of the turnover-based jurisdictional thresholds set out in the EU Merger Regulation, in particular with regard to certain categories of transactions involving companies which do not (yet) generate significant turnover but may however play a significant role in the market or develop into playing such a role;
3. Functioning of the case referral mechanisms set out in the EU 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.

(C.2) Issues to be examined

The main issues that the evaluation will address will relate to aspects of the turnover-based jurisdictional thresholds of the EU Merger Regulation, the simplified treatment of certain categories of cases and the case referral system, as well as other technical aspects of the procedural and investigative framework, (the latter are notably outlined in the Commission Staff Working Document accompanying the White Paper "Towards more effective EU merger control" (Part 5.2 Other issues, pages 47 to 51). In particular the following issues will be examined:

Relevance

The evaluation will assess to what extent the procedural and jurisdictional aspects of EU merger control under scrutiny are nowadays relevant in order to achieve the overall objective of EU merger control, namely ensuring that corporate reorganisations in the form of concentrations do not distort competition in the internal market.

- As regards simplification, the evaluation will assess to what extent the need to ensure the protection of competition and consumers allows for a simplified treatment of certain categories of typically unproblematic cases currently subject to EU merger control.
- As regards the jurisdictional thresholds, the evaluation will assess to what extent purely turnover-based thresholds are intrinsically susceptible to capture all concentrations which may have an impact on competition in the internal market.
- As regards the referral mechanism, the evaluation will assess to what extent this corrective mechanism ensures in a business-friendly manner a reallocation of jurisdiction over certain concentrations between the European Commission and NCAs.

Effectiveness

The evaluation will assess to what extent the procedural and jurisdictional aspects of EU merger control under scrutiny are nowadays effective in contributing to reach the overall aim of EU merger control.

- As regards simplification, the evaluation will assess to what extent the Simplification Package (2013) has contributed to the reduction of the burden (in terms of workload and resources spent) incurred by the Commission and businesses for having certain categories of typically unproblematic cases subject to EU merger control and whether there is scope for a further reduction of such a burden without affecting the effectiveness of EU merger control.
- As regards the jurisdictional thresholds, the evaluation will also seek to assess to what extent the Merger Regulation's approach to establish the Union dimension of a concentration – which is exclusively based on the aggregate turnover of the undertakings concerned – is effective in ensuring that the EU Merger Regulation applies to all competitively significant transactions in the EU internal market with a cross-border dimension.
- As regards the referral mechanism, the evaluation aims at validating the findings of the White Paper and the respective public consultation as to the effectiveness of the case referral system provided for by the EU Merger Regulation.
- Finally, the evaluation will assess the effective functioning of certain technical aspects of the current procedural and investigative framework for the assessment of mergers.

¹ 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").

Efficiency

The evaluation will assess to what extent the procedural and jurisdictional aspects of EU merger control under scrutiny contribute nowadays to efficiently reaching the overall aim of EU merger control.

- As regards simplification, the evaluation will assess to what extent the burden (in terms of workload and resources spent) incurred by the Commission and businesses for having certain categories of typically unproblematic cases subject to EU merger control is proportionate to the objectives of the Merger Regulation and whether there is any room for further reduction of this burden and for efficiency gains both for the Commission and companies.
- As regards, the jurisdictional thresholds, it will be evaluated to what extent the existing purely turnover-based thresholds allow to efficiently identify all competitively significant transactions in the internal market with a cross-border dimension.
- Moreover, the evaluation aims at validating the findings of the White Paper and respective public consultation as to the administrative burdens associated with the current functioning of the case referral system.
- Finally, the evaluation seeks to assess the efficiency of certain technical aspects of the current procedural and investigative framework for the review of mergers and the scope for possible improvements.

Coherence

The evaluation will assess to what extent the current procedural and jurisdictional aspects of EU merger control under scrutiny contribute to the overall objective of the EU Merger Regulation and are aligned with other EU policy interventions.

- As regards simplification, the evaluation will assess to what extent the current procedure and scope for the simplified treatment of certain categories of generally non-problematic cases fully aligns with the objectives of other EU policy interventions (e.g. the Action Plan on Building a Capital Markets Union) and more generally with the overall commitment of the Commission to cut red tape and burdens on investment.
- As regards jurisdictional thresholds, the evaluation will also explore how well the current purely turnover-based jurisdictional system aligns with the objectives of the Commission's Digital Single Market strategy. Account will also be taken of certain envisaged initiatives to introduce additional jurisdictional thresholds by EU Member States.
- Finally, the evaluation seeks to review the internal coherence of the current investigative framework.

EU added value

The evaluation will assess to what extent the current procedural and jurisdictional aspects of EU merger control under scrutiny contribute to ensure that EU added value results from EU merger control.

- As regards simplification, the evaluation will assess to what extent the simplified treatment of certain categories of generally unproblematic cases ensures that merging parties enjoy the advantages of the one-stop-shop system provided by EU merger control while being subject to lesser costs and without any negative consequences for the protection of competition and consumers in the relevant markets.
- As regards jurisdictional thresholds and the referral mechanism, the evaluation aims at assessing to what extent these instruments contribute to ensure that the EU Merger Regulation is applied to those cases which may have an impact on competition in the EU internal market, ensuring that companies and consumers fully benefit from the system of EU merger control.

(C.3) Other tasks

In addition to evaluating the current functioning of procedural and jurisdictional aspects of EU merger control, the evaluation will seek to obtain first indications of possible ways to address any weaknesses and problems identified.

D. Evidence base

(D.1) Evidence from monitoring

Detailed information on all merger cases and statistics are available on DG COMP website:

<http://ec.europa.eu/competition/mergers/cases/>

<http://ec.europa.eu/competition/mergers/statistics.pdf>

(D.2) Previous evaluations and other reports

The evaluation will notably incorporate the evidence base of:

Reports and Papers by the European Commission

- the 2014 "White Paper Towards more effective EU merger control", available at:
<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1406814408042&uri=CELEX:52014DC0449;>
- the Commission Staff Working Document accompanying the White Paper "Towards more effective EU merger control", available at:
[http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf;](http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf)
- the Impact assessment accompanying the White Paper towards more Effective EU merger control, available at:
[http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf;](http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf)
- the 2013 Commission Staff Working Document – "Towards improving EU merger control", available at:
[http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf;](http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf)
- the 2009 Report on the functioning of Regulation No 139/2004, available at:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0281:EN:NOT;>
- the 2009 Commission Staff working paper accompanying the Communication from the Commission to the Council Report on the functioning of Regulation No 139/2004, available at:
[http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009SC0808R\(01\);](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009SC0808R(01);)
- [A review of merger decisions in the EU: What can we learn from ex-post evaluations? \(October 2015\)](#)

Feedback received in response to previous public consultations concerning EU merger control:

- Replies to the 2014 public consultation on the "White Paper Towards more effective EU merger control" of 2014, http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html
- Replies to the 2013 public consultation "Towards more effective EU merger control", available at http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html

Reports and Papers by other entities/ authors

- "Challenges for Competition Policy in a Digitalised Economy", Study prepared for the European Parliament's ECON Committee, IP/A/ECON/2014-12, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU\(2015\)542235_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU(2015)542235_EN.pdf).
- "Competition policy: The challenge of digital markets", Special Report No 68 by the German Monopolies Commission, published in 2015, available at [http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf;](http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf)
- "Online Platforms and the Digital Single Market", The United Kingdom's House of Lords, Select Committee on European Union 10th Report of Session 2015–16, HL Paper 129, available at [http://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/129/129.pdf;](http://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/129/129.pdf)
- "Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (9. GWB-ÄndG)", by the German Federal Ministry for the Economy and Energy, available at <https://www.bmwi.de/BMWi/Redaktion/PDF/G/neunte-gwb-novelle,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

(D.3) Evidence from assessing the implementation and application of legislation (complaints, infringement procedures)

The evaluation will also include anonymised/aggregated evidence from DG COMP's merger case data.

(D.4) Consultation

The 12 week public consultation shall collect views and opinions on the above-mentioned procedural and jurisdictional aspects of EU merger control and gather related factual information, data and knowledge.

As part of its consultation strategy, DG COMP will carry out a public consultation in the second half of 2016 allowing interested stakeholders at large to provide their views on the issues at stake. The most obvious group of stakeholders includes undertakings that have to comply with the provisions of EU merger control law, EU citizens and undertakings that benefit from effective EU merger control. Other important stakeholders are industry and business organisations, consumer associations, formal and informal associations of professionals in EU competition law and policy, as well as national competition authorities, national ministries and other government bodies in charge of competition law and policy, and academia.

Moreover, in parallel to the public consultation, DG COMP will carry out interviews and discussions with selected stakeholder groups, namely industry and business organisations, consumer associations, formal and informal associations of professionals in EU competition law and policy, as well as national competition authorities, national ministries and other government bodies in charge of competition law and policy, and academia. Via announcements on the Your Voice in Europe website and the DG COMP website, stakeholder groups will be asked to signal their interest to participate in such interviews and discussions. Moreover, DG COMP will pro-actively approach the above-mentioned stakeholder groups.

It is anticipated to publish the responses to the public consultation in the first quarter of 2017. A summary of these responses will also be made available. The evaluation Staff Working Document will be published in the second half of 2017.

(D.5) Further evidence to be gathered

For the evaluation of the jurisdictional thresholds, the evaluation will also use evidence from external data bases, such as Bloomberg, as well as case statistics of national competition authorities within the EU. In this context, publicly available information will be used as well.