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Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

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

Latham & Watkins LLP

*Your full name

Chloé Cluzel, Marc Williamson, Luca Crocco, Alessio Aresu

*Email address

chloe.cluzel@lw.com, marc.williamson@lw.com, luca.crocco@lw.com, alessio.aresu@lw.com

* Organisation represented

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

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

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

- ◉ YES
- ○ NO

*1.1.2 How many employees does your company have?

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

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

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*1.3 Where are you based?

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

*Please specify.

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Boulevard du Régent, 43-44
B-1000 Brussels
Belgium
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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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817067819413-17
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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 overall assessment of the 2013 Simplification Package is positive. In particular, the extension of the scope of application of the simplified procedure has enhanced legal certainty and, by reducing the workload required and the resources and time spent, lowered costs for businesses.

Still, the procedural burden remains disproportionate for certain categories of transactions that do not raise any competition issues, as shown by the fact that historically the European Commission has never objected to them. There is still room for a further simplification of the EU merger control regime, which would benefit businesses and ultimately consumers without compromising in any respect the effectiveness of competition rules.

Set out below are our main suggestions:

While keeping them within the scope of application of the EU Merger Regulation, the Commission should consider entirely exempting from reporting obligations (i) transactions establishing joint ventures which achieved no revenues in the EEA in the last financial year and have no firm and approved plans to operate in the internal market (point 5 (a) of the Notice) and (ii) acquisitions of real estate which only entail a transfer of ownership of real property without the transfer of other assets, e.g.: significant goodwill or contracts. These transactions have never raised competition issues under the original and the recast merger regulation. There is overwhelming evidence that they do not raise competition concerns and therefore little justification for continuing requiring a full notification.

The Commission should consider formally granting, within the framework of the

Notice, a specific treatment to (i) transactions in which there are no horizontal overlaps or vertical relationships between the merging parties (point 5 (b) of the Notice), and (iii) transactions in which the control situation changes from joint to sole control (point 5 (d) of the Notice).

The parties should be allowed to report the basic elements of these transactions to the Commission by a simple “notice”. The Commission would have the ability to request, within a limited period (e.g. 10 business days from filing of the notice), the submission of a full notification under the simplified or normal procedure.

The Commission could consider adopting this procedure also for two categories of transactions discussed in the previous point (joint ventures with no activities in the EEA and acquisitions of real estate), should it wish keeping a reporting obligation for them.

For transactions falling under point 5 (c) or point 6 of the Notice, the Commission should consider revising the current requirement to verify that the market share thresholds are not exceeded under every “plausible alternative … market definition”. The obligation should be limited to market definitions accepted in previous decisions of the European Commission or national competition authorities, third party market surveys or ordinary course of business analysis.

The Commission should revise the procedure under Article 4(5) of the Merger Regulation and in particular eliminate the duplicative submission of the Form RS and of the Form CO. Instead, the parties should be required to submit directly the draft Form CO which would then be notified to National Competition Authorities in parallel, giving them a period to raise objections to the Commission taking jurisdiction over the matter.

In our view, transactions of the type mentioned above do not create any meaningful risk of harm to competition. However, subjecting them to review under the EUMR creates substantial regulatory burdens. The added value to consumers of such review is nil. The Commission has the procedural tools to correct this imbalance and focus its resources on ensuring that cases that raise or could raise competition issues, are dealt with effectively and swiftly.

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

This category of cases has benefited from the simplified treatment since 1994. The 2013 revised Notice acknowledged that pre-notification contacts are less useful for this type of transactions (point 23), and that parties may prefer to notify immediately.

However, the way the procedure is actually managed has neutralised many of the procedural and cost efficiencies that the 2013 revised Notice was expected to generate.

In practice, the requirement to confirm that there are no reportable market “under any plausible market definitions” leads the Commission case teams to informally require the parties to submit a draft of the notification in all cases. At that point, while the case teams endeavour to provide feedback promptly, often in less than the five working days foreseen by the Commission’s best practice, it is not uncommon that the parties are requested to supplement the notification with information on the structure of the transaction or other administrative details. Thus, the cases where parties actually proceed to notifying directly the Form CO are an exception.

It is submitted that, in the spirit of the Notice, the parties should be encouraged to file the notification without pre-notification discussions under the assurance that absent exceptional reasons, any question that has no bearing on the competitive assessment of the transaction during the 25 working days period should be asked while the review period is running. It is further submitted that even if queries arose on the absence of an overlap, these could be dealt with during the 25 working days period. In case of substantial disagreements, the Commission retains the ability to declare the notification incomplete.

(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 application of the simplified procedure to transactions falling under point 5 (c) and 6 of the Notice has contributed to reducing the burden on companies, but more could and should be achieved given that these transactions are unsuitable to raise any competition problem.

The simplified procedure still requires companies to define every “plausible alternative relevant product and geographic markets” in a “precise” way (see footnote 12) and to provide shares for each “plausible” market definition (see Section 6.2, 7.1 and 5.3 of the Short Form CO).

Each of these requirements can be potentially very cumbersome particularly for multiproduct businesses and/or companies that control businesses operating in multiple segments (e.g. financial investors like private equity funds or sovereign wealth funds). The scope of each of these requirements could be made more reasonable without affecting the Commission’s ability to verify that the transaction is actually eligible for simplified procedure.

A. The Commission should consider revising the requirement to identify “all reportable markets” including “plausible alternative relevant product and geographic markets” in Section 6.2 of the Form CO as well as footnote 12 of the Notice, which requires a “precise enough” definition of such “plausible alternative product and geographic markets”. The “plausibility” threshold is too vague and creates legal uncertainty. It should be replaced with a narrower requirement to provide a market definition based on (a) existing precedents of the Commission and National Authorities as well as - to the extent they are different - (b) alternative definitions based on ordinary course of business analysis or (c) third party reports. While footnote 73 of the Form CO does identify (a), (b) and (c) as possible sources of alternative market definitions, the Commission should clarify that the parties have no obligation to consider other conceivable definitions if not reflected in any of these sources.

B. The requirement to “identify all reportable markets” can be particularly cumbersome in relation to potential vertical relationships, which are also caught as “reportable markets” under Section 6.2(b) of the Short Form CO (“regardless of whether there is or not any existing supplier/customer relationship between the parties”). The reality (acknowledged by the European Commission policy on non-horizontal mergers) is that vertical relationships

cause competition concerns only rarely – and even less frequently when there is no actual vertical relationship between the parties but only a potential one. Footnote 10 of the Notice helpfully clarifies that “A vertical relationship normally presupposes that the product or service of the undertaking active in the upstream market in question constitutes an important input to the product or service of the undertaking active in the downstream market”. This language should be given more prominence in the Notice as well as in Section VI of the Form CO, by unequivocally stating that potential vertical relationships only qualify as “reportable markets” if the upstream input is an “important input” by virtue of its impact on the final cost of the downstream product, if it represents a significant source of product differentiation for the downstream product or where the cost of switching to alternative inputs is relatively high.

Potential vertical relationships not involving “important inputs” should be outside the scope of the Form CO.

The requirement to provide market shares and other information under point 7.1 of the Form CO should be unequivocally limited to the product and geographic markets identified as relevant by the notifying party(-ies), and not to all the “plausible alternative product and geographic markets”. To the extent necessary, the Commission should retain the ability to request further information on such alternative markets of which it will have a list under Section 6.2 of the Form CO.

(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

Joint ventures with no revenue in the EEA cannot pose any threat to competition in the internal market. There have never been phase II investigations involving similar transactions, which have benefited of the simplified treatment since before the adoption of the 2004 Merger Regulation.

The Commission is well aware that the obligation to notify these transactions is an unintended by product of the thresholds in the EUMR, to the point that it introduced a special, semi-official procedure, the so-called "super-simplified procedure", to deal with them more expeditiously (see press release issued by the European Commission on 5 December 2013, available at http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm).

The current practice is however still unsatisfactory for businesses, because (i) it still requires the preparation of (at least) a Short Form CO and (ii) it still requires the parties to factor in a statutory waiting period of up to 25 working days to close a transaction that has no nexus with Europe.

Another unintended consequence is that due to the Commission's standing and prestige as regulator in antitrust matters, several regimes in other countries (China, Serbia, Turkey and – until a few years ago – Brazil) have replicated the same approach and also require the notification of joint ventures with no sales in their territory. A move towards simplification by the Commission could promote a more pragmatic approach also in other jurisdictions.

It would be desirable to amend the EUMR to exclude altogether transactions of this type from the scope of the regulation. This could be achieved by modifying the thresholds or adopting a requirement of domestic effect, as under the German ARC. It is significant in this respect that the recent Bundeskartellamt's "Guidance on domestic effects in merger control", expressly identifies joint ventures not active or foreseen to be active in Germany as transactions without "domestic effect" that escape altogether merger control rules.

Even if an amendment of the EUMR is regarded as too complex to achieve, significant time and cost economies could be reached under the current rules, by amending the EUMR implementing regulation and the Notice.

In practical terms, it is submitted that the Commission should explicitly exempt these transactions from notification through a Form CO. The parties should only be required to fill-in a short notice with a brief explanation of the JV's activities. The Commission should also make clear that these cases do not require a case allocation request or pre-notification. Finally, the Commission should commit to clear these transactions on the first working day following the expiry of the 15 working day period during which Member States may request referral of the concentration pursuant to Article 9 of the Merger Regulation.

(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

These transactions have been eligible for “simplified procedure” since 1994 and the 2013 Notice did not introduce any change in this respect.

It is submitted that in most cases these transactions result in a de-concentration of the market and therefore the procedural burden on the notifying party(-ies) should be reduced to the minimum necessary.

The Commission has taken the view since the original EUMR that “Decisive influence exercised singly is substantially different to the decisive influence exercised jointly, since the latter has to take into account the potentially different interests of the other party or parties” (Case M.23, ICI /Tioxide). This view is now reflected in the Consolidated Jurisdictional Notice (see point 89). The Notice (point 16) further states that the change from joint to sole control may raise competition concerns when, due to the removal of the diverging incentives of exiting shareholder, and to the integration of the joint venture into the remaining single controlling shareholder, its strategic market position could be strengthened. This may happen, for instance, when, before the transaction, the joint venture was a direct competitor of the remaining shareholder.

Although these scenarios are not wholly implausible, they are in practice very unlikely to materialise as demonstrated by the fact that, to the best of our knowledge, the Commission has never blocked a transaction of this type, despite having analysed over 6,000 concentrations in more than 25 years of merger control.

The procedural apparatus should therefore be lightened further, at least as regards transactions where the party acquiring sole control does not have activities upstream/downstream of, or horizontally related to, those of the JV, and hence strategic behaviour is not just very unlikely, but altogether impossible.

In these cases, the information to be provided should go no further than that required under the “Super Simplified Procedure” currently applied to joint ventures with no revenues in the EEA, i.e. a brief description of the activities of the JV as well as a declaration that the party acquiring sole control has no upstream/downstream or horizontally related activities. Finally, no case allocation request or pre-notification contacts should be required.

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

Real estate transactions (i.e. the acquisition of control of a property without additional goodwill or contracts, with a view to exploit it commercially by way of renting and/or selling space) often trigger a filing requirement under the EUMR, despite clearly not raising any competition concern. There is therefore a strong case for materially lightening the information burden for transactions in this industry.

To the best of our knowledge and based on the analysis of concentrations in the Commission's database through their NACE codes, real estate transactions have never resulted in an in-depth investigation let alone a prohibition or a conditional clearance in over 25 years of EU merger control. Real estate ownership is extremely fragmented and barriers to entry are non-existing – this explains the extremely competitive nature of industry.

At the same time, it is common for investors such as private equity houses or sovereign wealth funds to jointly acquire property for investment purposes. An EU filing is often triggered as a result, simply because the joint investors have more than EUR 250 million in sales in the EU – even when the property development itself will never generate significant revenues. We have counted no fewer than 20 filings a year of this type.

In short, the situation of real estate transactions is very similar to that of the joint ventures with no present or foreseen activities in the EU: they are all transactions for which businesses are often required to file a notification to the Commission (and wait for the approval) due to a technicality in the EUMR thresholds, and despite strong evidence that no competition issues will ever arise.

Real estate transactions benefit almost invariably of the "simplified procedure". However, given that there is no evidence so far that competition concerns could arise, the Commission should consider ways to altogether exempt at least some of them from the notification obligation – we refer in particular to real estate transactions that only involve the acquisition of immovable property without any additional assets, contracts or goodwill and real estate transactions where the parties acquiring control are financial investors (e.g. Private Equity funds, sovereign wealth funds, pension funds, hedge funds). These non-strategic investors can be easily identified on the basis of objective criteria such as the lack of integration of the target in the investors' structure, the lack of a common management, etc.

One way to achieve this goal would be by clarifying the conditions under which a real estate transaction can meet the basic requirement for a "concentration". In particular, the Commission should provide additional guidance on points 24 and 96 of the Consolidated Jurisdictional Notice, respectively as regards when a property development is "the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed" and when a joint investment in a property development is a "full function undertaking".

Alternatively, the Commission should pursue the more limited goal of reducing the information burden, for instance by requesting that parties to reportable real estate transactions only provide a short notice with basic information on the transaction. The Commission should also commit to granting the approval on the first working day following the expiry of the 15 working day period during which Member States may request referral of the concentration pursuant to Article 9 of the Merger Regulation.

A move towards an exemption of real estate transaction or a significant lightening of the notification burden would be consistent with the position of other competition authorities. For instance, the US Federal Trade Commission has granted to transactions involving the acquisition of real estate assets exemptions from notification based on Section 7A(d)(2)(B) of the Hart Scott Rodino Act, which gives the FTC the power to exempt transactions that are unlikely to violate antitrust rules. In particular, the FTC determined that real estate assets “are abundant and are used in markets that are generally unconcentrated” - two factors which make it unlikely that a transaction could have anticompetitive effects. For this reason, the FTC concluded that it was not necessary to examine each individual transaction to determine if it will violate antitrust rules. The exemption covers both direct acquisitions of real estate assets and acquisitions of shares of companies that own real estate assets. It also covers “acquisitions of investment rental property assets” i.e. real estate that will be held solely for rental to third parties or investment purposes. An exemption drafted along similar lines would simplify business in the EU without compromising merger control enforcement.

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.

It is hardly conceivable that joint ventures with no revenue or present or foreseen activities in the EEA would have harmful effects on competition in the EEA. To the best of our knowledge, the Commission has never opened an in-depth investigation on transactions of this type, let alone adopted a prohibition decision – in fact, they are invariably approved unconditionally under the simplified procedure.

The current requirement to submit a short form notification generates significant legal, administrative and financing costs, and cause delays in the closing of the transaction. Businesses find it difficult to understand and justify these costs and the very fact that the European Commission has jurisdiction on these transactions due to a technicality in the EUMR.

- Transactions falling under point 5b of the Notice:

- ○ YES
- ◉ NO

Please explain.

Parties to transactions falling under point 5 (b) of the Notice, that is, transactions where there is no horizontal overlaps or vertical relationships between the parties (no “reportable” markets) are still required to submit a notification and provide a considerable amount of information and documents. This generates significant costs (both in terms of workload, resources spent, and other costs such as legal fees or financing costs) on business, while such transactions are very unlikely to have any harmful effects on competition in the EEA.

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

- ○ YES
- ◉ NO

Please explain.

The requirements of providing market data for “plausible alternative … market” can be very burdensome and not proportionate given that these transactions are unlikely to have any impact on competition in the EEA. It creates uncertainty, increases legal costs and cause delays which are hard to justify in light of the goals of the EUMR. As discussed under 2(ii) above, it would be advisable for the Commission to revise the current language to narrow the scope of the reportable markets and the information to provide.

- Transactions falling under point 5d of the Notice:

- ○ YES
- ◉ NO

Please explain.

As stated, transactions bringing about a change from joint to sole control transactions lead, in most cases, to a de-concentration of the market and should therefore not be a concern for the Commission. Costs and delays incurred for the preparation of a notification – even if simplified – do not contribute to achieving the objective of the Merger Regulation.

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

Only to a very limited extent, as explained above. As long as an obligation remains to complete a Short Form CO and wait several weeks for the notification to be accepted and the transaction to be approved, these costs continue to seem unjustified given how unlikely it is that any of these transactions raise a competition problem. It is submitted that there is still significant space for further simplification, without sacrificing in any way the effectiveness of EU merger control.

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.

As mentioned, it is very unlikely that transactions involving a joint venture with no revenue in the EEA (point 5 (a)) or real estate investments could have harmful effects on competition in the EEA. The Commission should consider ways of exempting such transactions from notification requirements. However, this should be achieved without sacrificing the “one stop principle” of the EUMR.

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.

This could be an acceptable alternative to exempting joint ventures with no activities in the EEA and real estate transactions from the EUMR regime. The same requirement could be extended for the same reasons to mergers without any horizontal or vertical overlaps within the EEA or relevant geographic markets that comprise the EEA (point 5 (b) of the Notice) and transactions where a company had joint control and acquires sole control (point 5 (d) of the Notice).

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.

A self-assessment system would not provide the companies with sufficient legal certainty.

8.4 Other

- (●) YES
- ( ) NO

Please explain.

In addition to the simplification proposed above, for cases that are unlikely to raise any competition concerns (i.e. the categories discussed above), the Commission should consider encouraging the parties to file the notification without pre-notification discussions, encouraging the parties not to notify (see above) or at least providing precise time limits for the case team to allow parties to notify officially. Absent exceptional reasons, any questions that has no bearing on the competitive assessment of the transaction during the 25 working days period will be asked while the review period is running. It is further submitted that even if queries arose on the absence of an overlap, these could be dealt with during the 25 working days period. In case of substantial disagreements, the Commission retains the ability to declare the notification incomplete.

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.

The risk of “false negatives” and “false positives” is inherent in any legal standard.

In this context, “false negatives” like the ones mentioned in the question should be balanced against “false positives”, i.e. all the transactions for which the parties must incur legal, administrative and time costs to receive an approval, when in practice it is prima facie obvious that no competition issues would arise.

A further reduction of the notification burden for transactions that do not involve any horizontal or vertical overlap would generate significant savings for businesses, while the practice of the Commission shows that the risk of “false negatives” is theoretical at best. To the best of our knowledge, there are no examples of cases that were initially notified under the simplified procedure but then required a closer examination due to conglomerate effects. In fact, regardless of the simplified procedure, there have been historically only a handful of cases that raised exclusively conglomerate concerns absent any vertical or horizontal overlap between the parties.

As regards the ways to further reduce the notification burden, it is submitted that a notice system seems more adequate to address the concern around “false negatives”.

To be effective, the notice system should focus on verifying the eligibility of a transaction to be treated under the notice procedure. For instance, the notice should ask the parties to confirm that there are no horizontal or vertical overlaps under any market definition arising from EU, NCA or ECJ precedents, third party surveys or used in the ordinary course of business, or that any vertical relationship does not concern an “important input” as defined in the Commission’s policy documents and practice, and require a brief explanation in support. This would allow the Commission case team to quickly react where appropriate, asking follow up questions and – in most cases – get comfortable with the absence of any competition concern.

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

The risk that a joint venture with no current or foreseeable activities in the EEA can harm competition and consumers in the EEA seems entirely theoretical. There is no evidence that this could happen. See above for a discussion of the - in our view almost entirely theoretical - risk of “false negatives” should the Commission decide to reduce the information burden for this type of transactions.

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 mechanism has often avoided the parties the obligation to submit multiple filings at the EU Member State level for transaction that cannot have any effect on competition thus reducing costs for businesses.

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

The costs currently incurred are still disproportionate to the need of ensuring the preservation of effective competition in the EEA. Although there is overwhelming evidence that this type of transaction does not raise any competition issues, and the risk of “false negatives” is essentially theoretical, companies are still requested to fill-in a Short Form CO and wait for the clearance decision. The information burden is reduced compared with standard notifications and other types of transactions benefiting of the “simplified procedure”, but remains material.

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

The “Super Simplified Procedure” introduced in semi-official form by the European Commission in 2013 has reduced the information burden vis-à-vis the previous system. However, as explained before, the need to fill in the Short Form CO and undergo an administrative proceeding still poses a material burden on businesses, with little justification given the overwhelming evidence that these transactions cannot threaten competition in the EEA.

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.

As explained, the objective of any simplification should be decreasing the administrative burden on businesses, while ensuring that transactions that may have a harmful effect on competition and have an EU dimension are reviewed by the Commission.

Excluding altogether extra-EEA joint ventures from the scope of the Merger Regulation would not fulfil this objective, as such transactions may then become notifiable in one or more Member States. This would cancel out the benefits provided by further simplification at the EU level.

It is submitted that the creation of extra-EEA joint ventures having “Community dimension” should benefit from an explicit exemption from the notification requirements or a radical simplification of the information burden and the procedural framework, while still benefitting of the “one stop shop” principle.

(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.

```
As explained above, it is extremely unlikely that extra-EEA joint ventures
have any harmful effect on competition in the EEA. It is submitted that they
should benefit from an exemption from notification or alternatively a
significant lightening of the information burden and a quicker review period.
```

(iii) Other.

Please explain.

```
No answer.
```

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.

```
No answer.
```

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.

```
No answer.
```

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.

```
No answer.
```

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.

```
The current thresholds ensure legal predictability, transparency, legal
certainty.

The referral system works well in transferring jurisdiction in relevant cases
and enables the Commission to review cases that would not normally be
reviewed under the EU Merger Regulation.

In our experience, the cases that the Commission would want to review but
would be unable to do so because of the jurisdictional thresholds as
currently set in the EU Merger Regulation, are very few if any at all and
they would be likely caught by merger control rules at Member State level.
The very fact that the acquisition in 2014 of WhatsApp by Facebook was
eventually referred to the European Commission shows that the current
referral system is able to deal with the alleged “gap” and there is no need
for a change that would have potentially damaging unintended effects.
```

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.

```
No answer.
```

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.

A complementary jurisdictional threshold based on the value of the transaction would add more uncertainty to the current regime of EU merger control, without any additional benefit to the effective enforcement of merger control rules.

The value of the transaction is often still not defined when the parties assess merger filing requirements. It may be subject to post-closing adjustments or changes, exchange rate fluctuations, etc. Moreover, the value of the transaction is not directly indicative of any form of competitive significance of the deal. Ultimately, the value of the transaction depends on the parties, who could decide to alter it to avoid merger control scrutiny.

Before deciding to intervene in this area, the Commission should carry out a detailed assessment to understand how many cases that could have potentially raised competitive issues were not notified to the Commission nor to national authorities but would have been caught by a threshold based on the value of the transaction (and at which level that threshold should have been set).

It is submitted that the Facebook/WhatsApp case, ultimately decided by the Commission, demonstrates the effective functioning of the referral system rather than any alleged gap in the EUMR thresholds. Before proposing further reforms, the Commission should act upon a sufficient amount of solid evidence pointing to a need for reform.

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 overall assessment of the current case referral mechanism is positive.
However, the Commission could improve this process further, in particular, by
reducing the length of the Article 4(5) procedure which currently has limited
appeal on businesses.
```

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.

The proposal to reduce the two steps procedure of Article 4(5) is positive. Companies should be able to trigger the Article 4(5) procedure and the pre-notification contacts of the Form CO through a single submission, a draft Form CO including a section for referral requests. Upon submission of the draft Form CO, the Commission would start the pre-notification review while in parallel the concerned Member States would be granted a period to put forward objections to the upward referral.

Ideally, the Commission should reduce to ten working days the period granted to the Member States to accept/refuse the referral. This modification would allow the two procedures to run in parallel so that companies would not be discouraged from seeking a referral of a transaction that requires multiple filings.

It is submitted that the risk of wasted efforts on the Commission's side (due to Member States opposing the request for referral) would be limited. First of all, the refusal would come at an early stage of the pre-notification review. Second, the likelihood that a Member State opposes a request under Article 4(5) is very low: since the adoption of the EC Regulation 139/2004, there have been 324 requests under Article 4(5) – of these, only 7 (i.e. about 2% of the total) were rejected.

We support the proposal to replace the sentence "may significantly affect competition in a market" with a more neutral and less self-incriminatory language.

In addition, the Commission should promote the repeal of Article 22, which is now obsolete given that all but one Member States have a system of merger control. The case M.6569 Sara Lee/SC Johnson shows the uncertainties that Article 22 can create for businesses and how it can undermine the "one stop shop principle".
Should an amendment of Article 22 prove too difficult to achieve, we take a favourable view of the proposal that upon the opposition of one Member State to the referral, the Commission should renounce jurisdiction in full.

On the other hand, it is submitted that when the Commission accepts an Article 22 referral from a Member State, the scope of its review should be strictly limited to the assessment of the impact of the transaction in that /those Member State(s) where a filing was triggered or which joined the request for referral. The Commission should not have jurisdiction to review the impact of the transaction in other Member States (unless market are defined as having a regional rather than national scope) as proposed in the White Paper.

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.

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No answer.
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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?

There is scope for further simplification of EU merger control. The majority of the proposals contained in the 2014 SWD would contribute to achieving this purpose.

It is however submitted that the proposal to modify Article 8(4) of the Merger Regulation should not be implemented as it would surreptitiously introduce a form of review of non-controlling minority shareholdings, currently outside of the scope of the EUMR. The EUMR is based on the notion of control. The unity and coherence of the EUMR around this principle should not be upset to deal with a largely theoretical risk. Competition rules (Articles 101 and 102 TFEU) provide the tools for dealing with any competition issue arising from non-controlling minority shareholdings.

All the other suggestions below are positive and the Commission should adopt them.

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?

No answer.

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.

The overall duration of the proceedings and of each intermediate step, particularly of Phase II, is sufficient to ensure that the Commission carries out a thorough investigation and parties can exercise their rights of the defence.

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.

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No answer.
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V. Submission of additional information

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

Contact

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