

**RESPONSE TO THE EUROPEAN COMMISSION’S PUBLIC CONSULTATION OF 7  
OCTOBER 2016**

**EVALUATION OF PROCEDURAL AND JURISDICTIONAL ASPECTS OF EU  
MERGER CONTROL**

**13 JANUARY 2017**

**1. Introduction and executive summary**

- 1.1 Reference is made to the European Commission’s (*the Commission*) public consultation of 7 October 2016, on the evaluation of procedural and jurisdictional aspects of EU merger control. This is a joint response by Canada Pension Plan Investment Board (*CPPIB*), Alberta Investment Management Corporation (*AIMCo*), OMERS Administration Corporation (*OMERS*), Public Sector Pension Investment Board (*PSPIB*), British Columbia Investment Management Corporation (*bcIMC*), Ontario Teachers’ Pension Plan (*OTPP*) and Caisse de dépôt et placement du Québec (*CPDQ*). The Parties have total assets under management of more than EUR 815 billion, of which approximately EUR 139 billion is held in the EU.

*Background to the parties*

- 1.2 CPPIB is a professional investment management organization that invests the funds not needed by the Canada Pension Plan (*CPP*) to pay current benefits on behalf of 19 million contributors and beneficiaries. CPPIB has approximately EUR 214.8 billion assets under management as of 30 September 2016, of which approximately EUR 41.5 billion is held in the EU. In order to build a diversified portfolio of CPP assets, CPPIB invests in public equities, private equities, real estate, infrastructure and fixed income instruments. Headquartered in Toronto, with offices in London, Hong Kong, Mumbai, Luxembourg, New York and São Paulo, CPPIB is governed and managed independently of the CPP and at arm’s length from government.<sup>1</sup>
- 1.3 AIMCo is one of Canada’s largest and most diversified institutional investment managers with approximately EUR 64.3 billion of assets under management, of which approximately EUR 6.1 billion is held in the EU. AIMCo was established on 1 January 2008 with a mandate to provide superior long-term investment results for its clients. AIMCo operates at arms-length from the Government of Alberta and invests globally on behalf of 31 pension, endowment and government funds in the Province of Alberta. AIMCo is headquartered in Edmonton, and has offices in Toronto and London.<sup>2</sup>
- 1.4 Founded in 1962, OMERS administers one of Canada's largest defined benefit pension plans, with more than EUR 55 billion in net assets as at 31 December 2015, at which time, the fund’s gross exposure to Europe was approximately EUR 19.4 billion. It invests and administers pensions for 461,000 members from municipalities, school boards, emergency services and local agencies

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<sup>1</sup> More information about CPPIB can be found at [www.cppib.com](http://www.cppib.com).

<sup>2</sup> More information about AIMCo can be found at [www.aimco.alberta.ca](http://www.aimco.alberta.ca).

across the Province of Ontario. OMERS has employees in Toronto and other major cities across North America, the United Kingdom, Europe and Australia, originating and managing a diversified portfolio of investments in public markets, private equity, infrastructure and real estate.<sup>3</sup>

- 1.5 PSPIB is a large Canadian pension investment manager, with approximately EUR 89.9 billion of assets under management as of 30 September 2016, of which approximately EUR 19.2 billion is held in the EU. PSPIB invests funds for the pension plans of the Public Service, the Canadian Armed Forces, the Royal Canadian Mounted Police and the Reserve Force. PSPIB invests through a global portfolio in stocks, bonds and other fixed-income securities, and investments in private equity, real estate, infrastructure, natural resources and private debt. PSPIB is headquartered in Ottawa and has offices in Montreal, New York and London.<sup>4</sup>
- 1.6 bcIMC is a large Canadian institutional investor, with approximately EUR 87.1 billion assets under management as of 31 March 2016, of which approximately EUR 9.7 billion is held in the EU. bcIMC invests on behalf of public sector clients in British Columbia and helps finance the retirement benefits of more than 538,000 plan members, as well as insurance and benefit funds that cover over 2.3 million workers. bcIMC invests in fixed income, mortgages, public and private equity, real estate, infrastructure and renewable resources. bcIMC is headquartered in Victoria.<sup>5</sup>
- 1.7 OTPP is a corporation without share capital incorporated under the Teachers' Pension Act (Ontario), having its principal office and business address in Toronto, Ontario, Canada and offices in London, Hong Kong and New York. OTPP is concerned with the administration of pension benefits and the investment of pension plan assets on behalf of active and retired teachers in the Canadian province of Ontario. It is the largest single-profession pension plan in Canada, with approximately EUR 122.5 billion in net assets at 31 December 2015, of which approximately EUR 7.9 billion is currently held in the EU. OTPP is jointly sponsored by the Government of Ontario and the Ontario Teachers' Federation, a professional organization established by the Government of Ontario and of which all teachers in publicly funded schools in the Province of Ontario are members.<sup>6</sup>
- 1.8 CDPQ is a long-term institutional investor that manages funds primarily for public and parapublic pension and insurance plans, with approximately EUR 182.2 billion in net assets under management as at 30 June 2016, of which approximately EUR 35.2 billion is held in the EU. As one of Canada's leading institutional fund managers, CDPQ invests in major financial markets, private equity, infrastructure and real estate, globally. CDPQ is headquartered in

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<sup>3</sup> More information about OMERS can be found at [www.omers.com](http://www.omers.com).

<sup>4</sup> More information about PSPIB can be found at [www.investpsp.com](http://www.investpsp.com).

<sup>5</sup> More information about bcIMC can be found at [www.bcimc.com](http://www.bcimc.com).

<sup>6</sup> More information about OTPP can be found at [www.otpp.com](http://www.otpp.com).

Montreal, with subsidiaries in London, New York, Paris, Mexico City, Delhi, Singapore and Sydney.<sup>7</sup>

*Commission's policy objectives*

- 1.9 We greatly appreciate the opportunity to respond to the Commission's consultation and provide feedback for optimization of the merger control framework. We especially welcome the Commission's consideration of ways to improve the assessment of cases that observe the requirements for simplified treatment<sup>8</sup> (also referred to as simple cases in this response) and to reduce the burden for companies, while preserving the objectives of the Merger Regulation.
- 1.10 One of the Commission's key priorities is to deliver new jobs, growth and investment. Accordingly, the First Vice President of the Commission was entrusted with the responsibility for better regulation and given the mandate to identify "red tape", which includes reducing unnecessary regulatory burdens. In the Commission Work Programme 2015, the Commission announced that rules will be overhauled to make sure they contribute to the jobs and growth agenda – "*where there is unnecessary red tape, we will cut it*".<sup>9</sup> In addition, Commissioner for Competition Vestager indicated in her State of the Union speech on 15 June 2015 that "*competition policy is a key factor in creating a climate that fosters investment and innovation*".<sup>10</sup>
- 1.11 In the Commission Communication on Long-Term Financing of the European Economy, the Commission indicates that non-bank sources of financing, including pension funds, play a significant role in the diversification of funding. As the Commission confirms, this is "*important in the short run to improve the availability of financing, as well as in the long run, to help the European economy sustain future crises better*".<sup>11</sup> Moreover, the Commission identifies pension funds as institutional investors with long-term liabilities, so they have the capacity to be "*patient*" investors.<sup>12</sup> The fact that pension funds are increasingly turning to alternative investments, such as infrastructure, in

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<sup>7</sup> More information about CDPQ can be found at [www.cdpq.com](http://www.cdpq.com).

<sup>8</sup> The categories of cases that are mentioned in point 5 and 6 of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (*the Notice*).

<sup>9</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015, A New Start, p. 3.

<sup>10</sup> Speech Margrethe Vestager, 'The State of the Union: Antitrust in the EU in 2015-2016', 15 June 2015.

<sup>11</sup> Communication from the Commission to the European Parliament and the Council on Long-Term Financing of the European Economy, 27 March 2014, p. 4.

<sup>12</sup> Communication from the Commission to the European Parliament and the Council on Long-Term Financing of the European Economy, 27 March 2014, p. 6.

order to diversify portfolios and provide higher returns, is also welcomed by the Commission.

*Merger control regime is burdensome and needs to be improved*

- 1.12 Whilst we fully appreciate and understand the need for an effective merger control regime, we believe that in relation to the treatment of cases that observe the requirements for simplified treatment, the merger control system needs to be significantly improved.
- 1.13 As our common investment structure involves investing alongside other operating and financial investors, filing obligations to the Commission are often triggered regardless of the turnover, size and activities of the target in which we invest. Due to the nature of our investments, usually in fragmented markets such as real estate, or infrastructure, the vast majority of cases involve investments that are not capable of adversely affecting competition. Yet, due to the structure of our investments (joint ventures/consortia), we need to obtain EU merger control clearance for most investments we make, even if it relates to an individual real estate building or toll road and even if these isolated assets are located outside of the EU. For example, cases M.6213, M.7124, M.7689, M.7775, M.7776, M.7809, M.8052, M.8122, M.8171, M.8194 and M.8205 each concerned an individual building/warehouse, the acquisition of which did not result in any meaningful overlap. Cases M.6604 and M.8173 concerned a toll road in Chile and Mexico respectively, and case M.7260 concerned a natural gas pipeline in Peru. Case M.7629 concerned a solar thermal generation plant active exclusively in the United States.
- 1.14 The resources required to assess filings requirements with often complex investment structures and to obtain EU merger control clearance and the associated costs and administrative burden are very significant and in our view clearly disproportionate when considering that the objective of merger control is to prevent transactions involving an adverse impact on competition.
- 1.15 To illustrate, as a result of the way that the notifications thresholds contained in the Merger Regulation apply, we notified more than 40 cases to the Commission over the period 2010-2016. This includes more than 25 cases during 2015-2016. Some of us individually need to notify on average five cases annually.
- 1.16 Over the period 2010 to 2016, more than 95% of the investments notified by us were cleared under the simplified procedure in Phase 1. Not a single case raised substantive competition concerns.<sup>13</sup>
- 1.17 As will be described further in this response, the administrative burden associated with first identifying filing requirements and then preparing each notification is substantial. This includes the preparation and submission of a detailed notification form, a pre-notification phase lasting several weeks with multiple rounds of questions in the form of Requests for Information (*RFI*) and subsequently a 20 to 25 working day formal review period.

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<sup>13</sup> Requiring remedies and/or a Phase 2 procedure.

- 1.18 The aforementioned review period can, and does, have a material impact on our ability to participate in auctions where an ability to close in a timely manner often has a meaningful impact on our chance of success.
- 1.19 Use of the Short Form CO does not materially reduce the administrative burden, compared to use of the Form CO in a situation where there are no affected markets. In addition, regularly, the questions raised by the case teams do not appear proportionate or necessary and are often of a formalistic nature whereby the relevance of the information to assessing (the lack of) competition concerns is not always apparent. Questions are moreover typically only raised during the pre-notification phase, while no questions are asked during the formal review period. This unnecessarily and significantly prolongs the overall period needed for obtaining clearance in circumstances where competitive auction processes are frequently involved.
- 1.20 Apart from the administrative burden associated with the notification procedure, the current merger regime results in additional costs and risks when making investments. Clearance from the Commission is often the last condition precedent that needs to be satisfied before closing of a transaction can take place. Depending on the transaction, this may mean that financing needs to be kept in place for a longer period, increasing costs. In addition, in some cases investors need to compensate sellers for the period between signing and closing, so that the longer it takes to close the transaction, the greater the costs incurred by the buyers.
- 1.21 Worse, having to obtain merger control clearance can in practice result in losing out on an investment opportunity, because very frequently, sales processes are run as competitive auctions, given global demand for real estate, infrastructure and other assets, and regularly sellers do not want to sell to investors that need to obtain merger control approval. This is unrelated to competition concerns (which in many cases are absent) but simply driven by the preference to sell to another investor that could immediately sign and close the transaction (for example, because a competing investor acquires sole control as result of which the notification thresholds contained in the Merger Regulation are not exceeded). The need to obtain merger control approval for transactions that can obviously not raise any competition concerns can in practice negatively affect the opportunities for us to partner with other investors. The way the current EU merger control rules apply to our investments is often difficult for us to explain to potential transaction parties and seems difficult to explain in view of the Commission's policy objectives. As the number of investments by us in the EU increases, the scale and significance of the problem will become more substantial.
- 1.22 In this regard, we note (and support) the observation of Mr. Mosso, Acting Deputy Director General for mergers at DG COMP, that: *"The key challenge of merger control in the EU is to ensure that the positive impact of M&A activity in terms of restructuring and investment is preserved to the greatest extent possible without negatively affecting the competitive structure of the markets concerned."*<sup>14</sup> We agree that the Commission should strive to meet

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<sup>14</sup> Speech Carles Esteva Mosso, 'EU Merger Control: The Big Picture', 12 November 2014.

this challenge by re-considering whether merger control rules are fit for this purpose and achieve this balance and consider that the application of the current EU merger control regime to simple cases produces unintentional consequences by functioning as a disproportionate and unnecessary administrative burden and potential obstacle for making investments in Europe.

*Suggestions for improvement*

1.23 In this response, we make a number of suggestions to improve the framework as it applies to simple cases. These suggestions include:

- (a) Removing the standstill obligation for all cases that observe the requirements for simplified treatment, allowing for simultaneous signing and closing of transactions;
- (b) Removing a notification obligation in relation to particular types of transactions that do not involve horizontal or vertical overlap, that involve joint ventures with no (or very little) nexus to the EEA or that involve a change from joint to sole control. Alternatively, reducing the information that needs to be provided for these types of transactions by replacing the need to submit a Short Form CO with an information notice. Under all circumstances, also in case no notification obligation applies, the one stop shop principle should continue to apply for these types of transactions;
- (c) More critically assessing whether requests for additional information are proportionate and necessary to determine that a particular transaction does not result in a significant impediment to effective competition;
- (d) Providing more clarity regarding how full-functionality is assessed and when the criterion is applied;
- (e) Promoting consistency with respect to the composition of case teams that deal with subsequent notifications made by the same company. The review of our investments can be made more efficient and effective if one or more case team members are involved that are familiar with both our portfolio from previous cases and of common structures employed in a funds and/or real estate/infrastructure platform context.

1.24 We are among the largest institutional investors active in Europe and remain fully committed to making future investments in the region. We consider that the changes that are proposed in this response fully safeguard the objectives of an effective merger control regime and that these proposed changes align with the Commission's broader policy objectives as described above. At the same time, it provides investors with more flexibility and a reduction of the administrative burden. Overall it makes for a more dynamic and competitive market while still giving the Commission the controls it justifiably requires. We strongly advocate amending the merger control regime as per the suggestions in this response, to facilitate even greater investment in the EU.

- 1.25 Below we address the topics and questions raised by the Commission in its consultation, focussing on the treatment of simple cases.

**2. One-stop-shop principle should be maintained<sup>15</sup>**

- 2.1 The one stop shop review at the EU level creates significant added value, as it can increase efficiency by not having to submit notifications in multiple EEA Member States. We therefore consider it important that the one stop shop review and jurisdiction of the Commission is maintained in relation to the categories of cases that are mentioned in point 5 and 6 of the Notice. In this response, we suggest ways to improve efficiency in the merger control review process of these categories of cases and amendments to limit the administrative burden for companies in relation to cases that do not result in competition concerns. However, we do not advocate that the scope of the one stop shop review is limited.

**3. The simplified procedure has not materially reduced the burden placed on notifying parties<sup>16</sup>**

- 3.1 In practice, the simplified procedure does not substantially reduce the burden on companies. The amount of information that needs to be provided in a Short Form CO is not materially reduced when compared with a Form CO without affected markets. An exception is the number and scope of internal documents that are requested in Section 5.4 of the Form CO, compared to a Short Form CO where no reportable markets arise, although if there are no affected markets a (partial) waiver in relation to this request can be discussed and agreed with the case team.
- 3.2 The 2013 Simplification Package introduced a useful change that in relation to joint ventures, overlap in activities between parent companies is not viewed as a relevant vertical or horizontal relationship.
- 3.3 In addition, the 2013 Simplification Package usefully increased the market share threshold to 20% for markets where there is horizontal overlap and to 30% for markets where there is vertical overlap.
- 3.4 However, in practice this increase has not resulted in a substantial reduction of the burden on the notifying party, as the 2013 Simplification Package requires the inclusion of all “plausible alternative markets”.
- 3.5 In our experience, the information burden is significantly increased, as the Commission often requires market data and descriptions in relation to multiple narrow alternative and hypothetical market definitions, even in situations in which it is clear that no competition concerns can arise. These alternative and hypothetical market definitions in relation to which information needs to be provided are sometimes not based on Commission precedents and have in some cases even been rejected in previous decisions adopted by the Commission. We suggest that the Commission can more critically assess

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<sup>15</sup> Question 1 and 10 of the Commission’s consultation.

<sup>16</sup> Question 2, 7 and 12 of the Commission’s consultation.

whether an alternative and hypothetical market really concerns a plausible alternative market, before additional information is requested from the notifying party, particularly in cases where no competition concerns can arise on any possible basis.

- 3.6 Moreover, it seems that in practice case teams are very focussed on whether the (market share) thresholds for use of the Short Form CO are observed, which seems to add to case teams' approach of requesting market data for multiple alternative and hypothetical market definitions, which sometimes appear unduly narrow and unlikely to be plausible.
- 3.7 Also in view of the risk of the Commission requiring the notifying party to switch to the use of the Form CO during the process, it is not always apparent that the Short Form CO provides tangible efficiency gains. Immediate use of the Form CO, in cases where there are no affected markets, does not result in a substantial increase in the amount of information that needs to be provided (as mentioned above) and it removes the risk of having to provide substantial additional information to demonstrate that the thresholds for use of the Short Form CO are observed under all hypothetical scenarios.

#### **4. Costs incurred by businesses when notifying simple cases are disproportionate<sup>17</sup>**

- 4.1 The following applies with respect to each of the categories of cases that are mentioned in point 5 and 6 of the Notice. The associated resources and workload required, as well as the fact that the parties need to wait with implementing the concentration until clearance has been obtained, appear disproportionate in the view of the objective of the Merger Regulation.

##### *Extensive RFIs during pre-notification*

- 4.2 In practice, the number and scope of RFIs issued by the Commission during the pre-notification phase can be in some cases extensive. This results in pre-notification phases which regularly last several weeks and causes delays to commencement of the formal review period. This does not appear useful in relation to cases that obviously do not result in any competition concerns. Examples are cases M.7689, M.7775 and M.7776, which resulted in less than 2% market share on the narrowest (hypothetical) market. Depending on the transaction, the delay as a result of a lengthy pre-notification phase can result in an unnecessary increase in transaction costs, for example due to the need to keep financing available for a longer period. It seems that in many cases the length of the pre-notification phase can be reduced by raising fewer questions. Moreover, the Commission has the ability to raise questions during the formal review period, which may also allow for a shorter overall review period.

##### *Full-functionality: lack of legal certainty*

- 4.3 Moreover, the Commission's guidance and practice regarding certain jurisdictional issues is to some extent uncertain. For example, it is not clear how the "full-functionality" criterion is applied and under what circumstances.

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<sup>17</sup> Question 6, 9, 11 and 13 of the Commission's consultation.

It appears that this has been applied differently across different cases and by different case teams. This topic can be very important when determining whether the Commission has jurisdiction, and thus whether a deal requires merger clearance. This is for example especially relevant in the real estate and infrastructure sectors. Some of us have experienced multiple rounds of questions from the Commission in relation to this topic during the pre-notification phase, resulting in material delays. These questions could not have been anticipated, in view of the apparent inconsistent application of the full-functionality criterion across cases. Examples of inconsistencies include whether the criterion needs to be applied where joint control is acquired over an asset which prior to the proposed concentration was solely controlled by one of the notifying parties and whether real estate platforms are full-function if the management and investment resources are provided contractually by one of the parent companies and the joint venture has limited own staff. Moreover, it is unclear if the full-functionality test needs to be applied in case a jointly controlling shareholder is replaced or added to an existing joint venture. We would welcome more guidance on this from the Commission.<sup>18</sup>

*Transactions falling under point 5a of the Notice*<sup>19</sup>

- 4.4 In general, joint ventures with no or negligible activities in the EEA can rarely result in any potential competition concerns in the EEA, especially if the relevant market upon which the joint venture is active does not encompass the EEA.
- 4.5 To illustrate, some of us have in the past invested alongside other investors in infrastructure assets outside of the EEA, which clearly could not have any effect on any market in the EEA, but still required merger control clearance from the Commission. For example, reference is made to case M.6604 and M.8173, which concerned a toll road in Chile and Mexico respectively, and case M.7260, which concerned a natural gas pipeline in Peru. Case M.7629 concerned a solar thermal generation plant active exclusively in the United States.
- 4.6 The current simplified procedure still results in having to provide significant information in the notification form, including in relation to activities that can rarely have an effect in the EEA.
- 4.7 In this response, we propose that these types of transactions are excluded from a notification obligation and are deemed cleared, for example through a block exemption similar to the State Aid General Block Exemption Regulation. Alternatively, the submission of a summary information notice is proposed in

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<sup>18</sup> It can moreover be considered if guidance can be provided that would potentially exclude certain individual (real estate or infrastructure) assets from the scope of “undertaking”, for example because the asset is considered to provide insufficient access to a market. It would be very helpful if for example an individual warehouse or office building no longer falls within the scope of the Merger Regulation.

<sup>19</sup> This also addresses question 9 of the Commission’s consultation.

combination with an exemption from the standstill obligation. In both instances, the one stop shop principle should apply.

*Transactions falling under point 5b of the Notice*

- 4.8 In general, a concentration involving parties which do not have activities which horizontally or vertically overlap does not raise any potential competition concerns.
- 4.9 In this response, we also propose that these types of transactions are excluded from a notification obligation and are deemed cleared. Alternatively, the submission of a summary information notice is proposed in combination with an exemption from the standstill obligation. In both instances, the one stop shop principle should apply.

*Transactions falling under point 5c or point 6 of the Notice*

- 4.10 We appreciate that in relation to these types of transactions the Commission may require the type of information as set out in the Short Form CO, to confirm that they do not result in a significant impediment to effective competition.
- 4.11 However, as set out above, we consider that the process can be made more efficient and the scope of the additional information typically sought by the Commission can be reduced.
- 4.12 In this response, in addition to the changes suggested above, we propose that these types of cases are exempted from the standstill obligation.

*Transactions falling under point 5d of the Notice*

- 4.13 Although we often invest alongside other investors and thereby acquire joint control, we consider that the acquisition of sole control of an undertaking over which joint control is already held, whereby the criteria for simplified treatment are observed, typically does not raise any competition concerns. This is further illustrated by the consideration that the original concentration whereby joint control was obtained will often already have been assessed in the context of a merger control procedure, also considering that the acquisition of joint control will more readily exceed the notification thresholds contained in the Merger Regulation as it involves more undertakings concerned. It seems that the potentially changed incentives of the remaining solely controlling shareholder can only result in competition concerns in exceptional circumstances.
- 4.14 In this response, we propose that these types of transactions are excluded from a notification obligation and are deemed cleared. Alternatively, the submission of a summary information notice is proposed in combination with an exemption from the standstill obligation. In both instances, the one stop shop principle should apply.

## 5. Scope for further simplification<sup>20</sup>

### *Exemption from the standstill obligation*

- 5.1 We propose that all types of cases for which the simplified procedure is available no standstill obligation applies. In case no notification obligation applies – as proposed below for certain types of transactions – it is obvious that there is also no standstill obligation. If our alternative proposal were to be implemented whereby for these types of transactions an information notice needs to be submitted, an exemption from the standstill obligation should apply. This should also be the case for the other types of transactions that would still require the submission of a Short Form CO, as detailed below.
- 5.2 In our experience, transactions that observe the criteria for simplified treatment do not raise competition concerns. It therefore seems that the rationale for applying a standstill obligation – i.e. in order to prevent implementation of concentrations prior to finalization of the merger control review process in view of the risk of a significant impediment to effective competition – does not apply.
- 5.3 In case no standstill obligation applies, companies will implement concentrations at their own risk. Should competition concerns be identified during a review by the Commission which cannot be remedied, the parties may need to unwind the transaction. We are often so convinced that our investments (in for example fragmented real estate or infrastructure markets) do not raise any competition concerns that we will be willing to take the risk that a transaction may need to be unwound after having implemented it prior to clearance; we strongly believe that other investors will be able to assess and take that risk as well.
- 5.4 In case there is any doubt as to whether the Commission will agree that a proposed concentration does not result in a significant impediment to effective competition, companies can always wait with implementation of the concentration and/or file a standard Form CO rather than a Short Form CO.
- 5.5 Experience suggests that investors are well placed to determine that particular simple cases cannot result in any competition concerns. An exemption from the standstill obligation in such a case provides significant benefits, as it allows the parties to implement a particular concentration much sooner. This can *inter alia* limit the costs of financing arrangements that often need to be in place between signing and closing. It also allows acquirers to quickly exercise control over the target, stimulating competition. Overall it makes for a more dynamic and competitive market while still giving the Commission the jurisdiction and control it justifiably requires.
- 5.6 Investors that typically acquire joint control by investing in consortia are at a disadvantage compared to other investors that acquire sole control, because the notification thresholds contained in the Merger Regulation can be met by the turnover of the investors alone, regardless of the size and turnover of the

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<sup>20</sup> Question 8 of the Commission's consultation.

target. Accordingly, investors that are part of consortia regularly need to obtain EU merger control clearance, even in relation to the acquisition of very small assets. The fact that currently such concentrations cannot be quickly closed as a result of the application of the standstill obligation puts such investors at a competitive disadvantage. Exempting cases that observe the criteria of the simplified procedure, will partly remove that disadvantage.

- 5.7 Other merger control regimes in which no standstill obligation automatically applies, such as the United Kingdom, Australia, New Zealand and Singapore, demonstrate that this works well in practice. Compared to these jurisdictions, in our proposal potential risks from a merger control policy perspective are reduced further, as a standstill obligation does not apply only in relation to cases that observe the criteria for simplified treatment.

*Remove the notification obligation for particular categories of cases, or alternatively, limiting information requirements*

- 5.8 With respect to (i) mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA (point 5b of the Notice); (ii) joint ventures that have no or limited activities in the EEA (point 5a of the Notice); and (iii) transactions where a company acquires sole control of a joint venture over which it already has joint control (point 5d of the Notice), we propose to remove the notification obligation, in view of the significant unlikelihood of competition concerns. It is crucial that the one stop shop principle continues to apply in relation to these types of transactions, to prevent the need to make filings in national EEA Member States. To that end, the concentrations should be deemed cleared.
- 5.9 Alternatively, if the Commission considers that it needs to be informed about these types of transactions<sup>21</sup>, it is proposed to replace the requirement to submit a Short Form CO with a requirement to submit a brief information notice.
- 5.10 The information notice could include summary information in relation to the parties, the transaction, turnover and the products and services involved. It is important that the information notice meaningfully reduces the burden compared to a Short Form CO. It is therefore submitted that the information notice should not require the parties to define relevant markets, provide market shares and/or submit details on competitors and customers. Moreover, it should not require the submission of internal documents. The nature of the transactions to which the requirement of submission of an information notice in our alternative proposal would apply as such provides significant comfort that no competition concerns will arise.
- 5.11 Should the Commission nevertheless require more information, it could decide within a short, fixed period (e.g. within 10 working days), to require the submission of a Form CO. In order not to undermine the efficiency gain that can be achieved by using an information notice, the Commission should require the submission of a Form CO only in exceptional circumstances. If the

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<sup>21</sup> Or, for example, for the referral system in EU merger control to be able to function.

Commission has not requested the submission of a Form CO, the concentration can be quickly cleared (and deemed automatically cleared within a short period of time of e.g. 15 working days after submission of the information notice).

- 5.12 Following receipt of the information notice, the Commission can inform national competition authorities (NCAs) and publish a notice in the Official Journal as soon as possible.

*Consistency in relation to the composition of the case team*

- 5.13 In addition to the responses provided above, it would be helpful if there is consistency with respect to the composition of case teams that deal with subsequent notifications made by the same company. To illustrate, we notify transactions to the Commission multiple times annually. The review of transactions involving the same investor can be made more efficient and effective if one or more case team members are involved that are familiar with the investor's portfolio from previous cases.

**6. No additional notification thresholds should be introduced<sup>22</sup>**

- 6.1 We do not believe that the introduction of additional jurisdictional thresholds is warranted. We are not aware of transactions that did not meet the notification threshold contained in the Merger Regulation or the notification thresholds at national level and had a material impact on the internal market, but were not reviewable by at least one Member State. Furthermore, we consider that a deal value threshold would introduce legal and practical issues in implementation, placing an additional burden on investors.
- 6.2 We expect complexities to arise in relation to the assessment of whether a transaction has a local nexus with the EU and a transaction's deal value.
- 6.3 In its consultation, the Commission has suggested that the requirement for a local nexus might be captured by 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 EU. This would be accompanied by explanatory guidance. In our view, even with guidance, there is a real risk that such a clause would be insufficiently clear and that it could catch many more transactions than those that do in fact have a potential impact on the internal market.
- 6.4 Even if a deal value threshold sets out objectively quantifiable criteria, it would introduce uncertainty as companies grapple with difficulties applying the relevant criteria to transactions that are unlikely to have a clearly identifiable deal value. The transaction value threshold under the US Hart-Scott Rodino Act is an example of this. It is complicated to apply and frequently requires the purchaser's board of directors to determine the "fair market value" of the target assets; a test that is far removed from the objective simplicity of the Merger Regulation's turnover thresholds.

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<sup>22</sup> Questions 14-19 of the Commission's consultation.

- 6.5 A deal's value is often calculated by reference to parameters that are variable, such as the level of a company's debt, earn-out and other performance-based measures, or fluctuating share prices. The value of a deal may also vary significantly depending on when the deal is calculated, for instance from the date of notification to the date of closing. In instances where a deal's value is only calculated at closing or is based on future performance, significant difficulties may arise for businesses in determining whether a transaction meets the deal value threshold for notification.
- 6.6 In addition and unlike the US position, the Merger Regulation thresholds must serve not only as a basis for determining notifiability but also for allocating competence to review as between the EU and member states. A high deal value does not necessarily mean that a transaction will have cross border (or indeed any) effects in the EEA. Instead, it should be for the referral system to allocate cases as is currently the case, between the EU and member states as appropriate and depending on the circumstances.
- 6.7 To conclude, we do not believe that there is sufficient evidence to warrant the addition of complementary jurisdictional criteria, and which justifies and outweighs the complexities that such changes would entail.
- 6.8 Should the Commission nevertheless decide to propose additional deal value based thresholds, it is crucial that the threshold is sufficiently high. It would be highly unfortunate if amendments to the Merger Regulation resulted in *more* rather than *less* burden for investors. In particular, the threshold should be sufficiently high to prevent the capture of typical acquisitions of real estate or infrastructure assets. We therefore consider that a potential deal value based threshold should be above at least EUR 2 billion and if possible higher. It seems that, should the Commission identify a need to be able to review additional transactions which are not caught by the existing notification thresholds, these could only merit attention in case of very high purchase prices, as more customary purchase prices would not reflect a significant competitive importance of a target.

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