

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.

Article 4(5) referrals

In the experience of the Task Force members, the cumbersome nature of the Form RS process deters many companies from taking advantage of the Article 4(5) referral possibility. Therefore, we warmly welcome the Commission's proposal made in the 2014 White Paper to abolish the requirement for a reasoned submission and to replace this procedure with a system under which the parties seeking a referral would only have to provide a Form CO notification to the Commission. This new procedure would effectively cut down the notification process by 15 working days, provide for a more expedient process and help reduce unnecessary duplication of work as most of the information contained in Form RS generally repeats that which is required by Form CO. However, to achieve such efficiencies, it is indispensable that the elimination of the Form RS procedure does not result in a lengthier and/or more cumbersome pre-notification phase, the duration of which is always unpredictable and a source of uncertainty for the notifying parties.

Mergers are often time-sensitive and the parties may be reluctant to engage in a time-consuming referral process. Therefore we support the Commission's proposal to reduce the consultation period to 10 working days. Additionally, we suggest that, where a NCA decides to veto an Article 4(5) referral, the NCA should accept the Form CO as it has been drafted by the parties for the purpose of the original notification. This would avoid the unnecessary administrative and financial burden of redrafting the notification form and the attendant delay to completing the transaction.

However, the Task Force notes that the 2014 White Paper fails to address another principal reason that dissuades notifying parties from using the Article 4(5) referral process. Namely, the fact that the Commission will review the transaction in all EEA Member States, while each NCA's investigation is limited to the economies of the relevant Member State. Therefore, using the Article 4(5) referral process may in fact result in a more burdensome process. Therefore, the Task Force advocates the introduction of a rule limiting the geographic scope of the Commission's review in the event of an Article 4(5) referral to the territory of the otherwise competent Member States.

Finally, the Task Force considers that the referral mechanism is hindered by the fact that the proposed transaction would need to be notifiable in at least three Member States. There appears to be no objective reason for setting the threshold at three, rather than two, Member States for cross-border transactions. The Task Force recommends lowering the threshold for triggering an upward referral to the Commission from three NCAs to two.

Article 4(4) referrals

In the experience of Task Force members, notifying parties will generally only consider filing a pre-notification Article 4(4) request if they are certain that some Member States will make a referral request post-notification to the Commission, therefore adding more costs and delaying the transaction. As, when making an Article 4(4) request, the parties are required to admit that the proposed concentration will pose local competition concerns, this Article is rarely used. No business would want to start the notification process with a "self incrimination" claim. We therefore strongly agree with the Commission's proposal to remove this requirement. Such reform

is likely to encourage greater use of the Article 4(4) procedure, particularly where the affected markets are national in scope.

Article 22 referrals

We consider that the current Article 22 referral process has substantial disadvantages. In particular, such referrals are a source of unnecessary complexity, create legal uncertainty, substantial delays and costs for the parties.

Pursuant to the 2014 White Paper, the Article 22 procedure would be amended to provide that only the competent Member State(s) have the right to request a referral to the Commission. If the Commission accepts the request, it would have jurisdiction over the whole of the EEA. If any of the Member States with jurisdiction over the transaction opposes the referral, all competent Member States would retain their jurisdiction and the transaction would continue to be subject to national regimes.

We support the proposal that only Member States with jurisdiction over the notified transaction should be able to make an Article 22 referral request. This is necessary to ensure that the notifying parties have a greater degree of legal certainty as regards the expected timeframe and to allow them to anticipate what substantive issues might arise in relation to the transaction.

However, the Task Force strongly disagrees with the proposed broadening of the geographic scope of the Commission's jurisdiction after referral. Under the proposals, notifying parties would be obliged to assess the transaction's substantive impact in each EEA country for every deal that triggers merger control thresholds in two or more jurisdictions. Further, additional information concerning territories of non-competent Member States would need to be produced. Given the difficulty of predicting when an Article 22 referral request might be made, such a change would place undue burdens on businesses.

In the experience of the Task Force members, the principal issue with the current Article 22 referral process is parallel review of the same transaction by the Commission and by Member States, sometimes leading to inconsistent decisions. This issue has not been adequately addressed by the 2014 White Paper proposals. Contrary to the one-stop-shop principle, notifying parties may, for instance, face the unsatisfactory situation whereby a transaction receives clearance in certain Member States before the referral occurs.

Additionally, businesses will continue to face the burden of preparing and filing multiple notification forms, complying with different language and timing requirements, and responding to numerous information requests. This imposes unnecessary financial and administrative burdens on businesses, particularly for non-problematic transactions (which are by far the majority)

Our primary recommendation is therefore that Article 22 referrals should be abolished. However, should the Commission decide to retain Article 22, we suggest the following amendments:

The Commission may accept a referral of a case where at least one competent Member State requests the referral pursuant to Article 22 and no Member State competent to review the merger under national law opposes the referral.

The Commission's invitation to a Member State to make a request commences the period during which other competent Member States are free either to join or to object to the referral.

The Commission maintains its discretion whether or not to accept a referral. However, a referral could only be accepted if the transaction is reviewable in three or more EEA Member States (to align Article 22 with Article 4(5)).

The Commission's decision to accept a referral gives it jurisdiction for all the territories of the competent Member States, unless one or more of those Member States has already cleared the transaction (in which case they are excluded from the jurisdictional scope of the Commission's review).

The periods between each stage of the current referral process should be reduced as follows:

- the period of 15 working days in which a referral may be made following notification of an NCA should be shortened to 10 working days;
- to minimise the risk of a prior decision of a NCA, the Commission should be required to

transmit the request to the other competent Member States on the same day as it receives the request;

- the period within which other competent Member States may join a referral request should be reduced from 15 working days to 10 working days; and
- there should be no change to the period in which the Commission may conduct its review.

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?

- ☐ YES
☐ NO
☒ OTHER

We agree that there is scope to amend the EU Merger Regulation. Please see our comments in relation to each of the SWD proposals below.

- **Article 4(1):** We welcome this reform. We suggest that it could be achieved by adding to the list of circumstances set out in Article 4(1), second paragraph: "a good faith intention to make a public bid" or "a good faith intention to acquire decisive influence".
- **Article 5(4):** We strongly welcome formal guidance in relation to the method for calculating a joint venture's turnover. In the interests of consistency, the Commission should address the discrepancy between on the one hand, allocating a portion of turnover to the undertaking concerned on a per capita basis if it exercises decisive influence in an undertaking jointly with third parties and, on the other hand, allocating zero turnover to the undertaking concerned if it exercises negative sole control over an undertaking (where no third parties have a decisive influence).
- **Article 8(4):** We do not agree with this proposal. To ensure internal consistency, we would advocate that the Commission should seek to "restore effective competition" rather than require the transaction to be fully unwound. This would allow an acquirer to retain a minority interest providing that it poses no harm to competition and to prevent the imposition of disproportionate costs on businesses (which cannot be justified by reference to any competitive harm).
- **Article 5(2)(2):** We agree that transactions which have already received clearance from the Commission should not be subject to a reappraisal in the event of a further transaction between the same parties that breaches EU Merger Control rules.
- **"Parking transactions":** We recognise that this would codify long-standing practice of the Commission. However, in our view the Commission should take this opportunity to reconsider its approach to parking transactions. Parking structures are valuable transactional tools: they facilitate the efficient allocation of risk between seller and purchaser, and so allow transactions to take place that would not otherwise be possible. While the Commission might understandably have reservations that giving carte blanche to the use of warehousing might prejudice the integrity of its review process, those concerns could be allayed or mitigated by measures falling short of an outright ban. In particular, it ought to be possible to address specific concerns through the Commission's jurisdictional guidance. For example, if a warehousing structure might, in theory, be used to ensure the elimination of a rival (albeit at considerable cost) by acquiring assets that do not themselves amount to a viable, standalone business and would therefore inevitably degrade in the hands of the warehouser if the ultimate acquisition is blocked, that concern could be addressed by the Commission taking the position that parking transactions are only possible if the criteria set out in Article 3(5)(a) EUMR are met, and that those criteria

imply that the target assets are capable of disposal, and therefore must amount to a viable, standalone business. In addition, the experience of jurisdictions in which no standstill obligation applies suggests that allowing certain forms of warehousing would not have significant adverse effects. In the UK, for example, completion of an acquisition by a rival affects the authorities' ability to remedy a transaction's anticompetitive effects only in rare and exceptional circumstances. So a structure that leaves the target in the hands of a non-competitor bank in the event of insurmountable competition concerns is even less likely to cause problems in this respect. We note that there is nothing in the judgment of the General Court and the subsequent opinion of Advocate General Mazak in Cases T-279/04 and C-551/10 Editions Odile Jacob (the ECJ having refrained from ruling on the point in its final judgment) that would preclude such an approach.

- **Use/ disclosure of non-public commercial information:** We agree that this would be sensible. However, we would advise against sanctioning parties that receive such confidential information as part of a market testing process.
- Finally, and more strategically, as ICC has already advocated in its response to the white paper, the Task Force considers that a real European one stop shop should exist for notifying companies that find it appropriate, allowing them to file a request for clearance to only one competition authority when the EU thresholds are not met. The ECN should then take care of involving the interested national authorities or the European Commission, in such a way that the burden of multi-notification should be avoided within the EEA.