
**OBSERVATIONS ON THE COMMISSION'S
CONSULTATION PAPER**

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

January 31, 2017

CLEARY GOTTlieb STEEN & HAMILTON LLP

Observations On The European Commission's Consultation
"Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control"

We are pleased for the opportunity to respond to the Commission's Consultation concerning possible changes to the EU Merger Regulation ("EUMR"), "*Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control*."

I. JURISDICTIONAL THRESHOLDS

The "brightline" jurisdictional thresholds that have been in place since the EUMR entered into force in 1990 have worked well, clearly delineating the scope of application of EU and national merger control rules and providing legal certainty for merging companies and their legal counsel. These thresholds also capture a significant number of transactions (>300 annually in recent years), the overwhelming majority of which have been approved unconditionally (>90%). Transactions that do not meet the EUMR thresholds are subject to review by Member State agencies on the basis of national jurisdictional thresholds. Member State agencies collectively reviewed >3,000 transactions in 2016.

We believe the Commission bears the burden of demonstrating the existence of a significant enforcement gap before proposing any expansion of its jurisdiction, in particular given: the clarity and broad ambit of the EUMR's existing thresholds; the large number of transactions that are subject to review by national competition agencies; the uncertainty and increased regulatory burden that any change to the EUMR's thresholds would entail; and the possibility that other agencies around the world might follow the EU, thereby aggravating what is already an unwieldy and burdensome system of global merger enforcement.

Based on the information and arguments set out in the Consultation, we are not persuaded that the Commission has discharged this burden and identified a significant enforcement gap that merits adopting value-based thresholds or thresholds based on some other metric. We further believe that the modalities of the proposal canvassed in the Consultation would be difficult to apply and are likely to result in uncertainty and delay. In these circumstances, the Commission should not proceed with the envisaged proposal or should do so only on the basis of strong empirical support for expanding the EUMR's ambit and the development of clear, objective thresholds capable of quick and easy application.

1. The Consultation Does Not Evidence The Existence Of An Enforcement Gap

The Consultation's proposal is premised on the notion that certain high-value transactions may raise competition concerns even where the revenues of the undertakings concerned do not meet the EUMR's thresholds. Such transactions are typically ones in which a high value is placed on the acquired assets because of their scarcity or growth prospects. The Consultation does not, however, quantify the incidence of such transactions, produce empirical support for its conclusions, or explain why such transactions may be expected to raise competition concerns with sufficient frequency to merit subjecting a potentially large number of mergers to the delay, cost, and uncertainty associated with *ex-ante* mandatory review under the EUMR.

Evidentiary support for the Consultation’s proposal is limited to two transactions that are said to justify the adoption of new thresholds. On any basis, this represents thin support for change of the magnitude envisaged. Moreover, it is not apparent that either of the transactions cited in the Consultation evidences a material gap.

- **Facebook/WhatsApp** was reviewed by the Commission following a referral under Article 4(5) EUMR and was approved unconditionally in Phase I. As the Consultation notes, “*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.*” Given the existence of this referral system and the circumstance that the Commission reviewed and unconditionally approved the *Facebook/WhatsApp* transaction in phase I, it is not evident that it represents a gap in the existing framework of merger control in the EU that justifies expanding the Commission’s competence.
- **AbbVie/Pharmacyclics** was not reviewed by the Commission because the applicable thresholds were not met. It was, however, reportable and reviewed in the United States, where the U.S. Federal Trade Commission (“**FTC**”) approved the transaction unconditionally without a second request. In these circumstances, it is not evident that this was a “competitively significant” transaction that should have been reviewed by the Commission, still less that it justifies expanding the EUMR’s jurisdictional ambit.

If anything, these transactions illustrate the possibilities that currently exist for the Commission and national competition agencies to review transactions that do not meet the EUMR’s existing jurisdictional thresholds.¹ The *Facebook/WhatsApp* transaction was referred to the Commission pursuant to Article 4(5) EUMR, while the *AbbVie/Pharmacyclics* transaction could have been referred to the Commission pursuant to Article 22 EUMR had any Member State competition agency been concerned about its impact or had the Commission chosen to encourage such a referral. In our experience, most significant transactions that do not meet EUMR thresholds are reviewable by one or more Member State agencies, in particular in those jurisdictions whose merger control rules incorporate low revenue thresholds and/or market share thresholds.²

Accordingly, should the Commission continue to believe that there is merit in reforming the EUMR’s thresholds, it should conduct a comprehensive empirical assessment

¹ Notable digital economy sector cases referred to the Commission under Article 4(5) EUMR include *TomTom/Tele Atlas* (Case COMP/M.4854), *IBM/Telelogic* (Case COMP/M.4747), and *Google/DoubleClick* (Case COMP/M.4731), all of which were approved unconditionally. Notable pharmaceutical sector cases referred to the Commission under Article 4(5) EUMR include *Eli Lilly/Janssen Pharmaceutica* (Case COMP/M.6205), *Pfizer/Ferrosan* (Case No. COMP/M.6162), and *Galenica/Fresenius/Vifor Fresenius JV* (Case COMP/M.6091).

² By way of example, the merger control regimes in Austria, Cyprus, and Germany require filings for acquisitions of interests in companies that generate low revenues (German filings can be required for acquisitions of interests in companies with German revenues of €5 million; Austrian and Cypriot filings can be required for acquisitions of interests in companies with no revenues in those countries). The merger control regimes in Spain, Portugal, and the U.K. assess jurisdiction based on market share thresholds (amongst other criteria).

to determine the extent to which “competitively significant” transactions with a cross-border effect in the EEA have in fact escaped review by the Commission and Member State agencies.

2. A Transaction Value Threshold Would Raise Several Practical Issues

The EUMR’s existing thresholds are clear, objective, and, after 25 years of implementation, are reasonably straightforward to apply (at least relative to alternatives, such as market share or value of assets thresholds). The benefits to businesses are considerable: companies and their counsel can quickly determine whether they are subject to EU or national review. Further, experience around the world demonstrates that merger control rules that contain similar revenue-based thresholds are generally preferable to rules based on asset values and market shares. Value-based thresholds in particular raise a number of practical issues that can cause delay, create uncertainty and raise costs for merging parties and competition agencies. Two issues merit specific mention.

- **Transaction values are frequently difficult to assess.** Assessing deal value can be complex and uncertain, including because there are a number of possible methodologies for measuring value (*e.g.*, whether to use market values or book values). Also, transaction values may change, often quickly, in response to events that are unrelated to the underlying assets, still less the likely competitive effects of a given transaction (*e.g.*, market sentiment may change as sectors fall in and out of fashion and rival bidders may emerge for the same target company).³
- **Geographic allocation of transaction value is difficult.** The EUMR’s thresholds are based on the essential principle that one or both of the undertakings concerned should have a nexus with the EU. Allocating transaction value to a given jurisdiction is, however, difficult and often arbitrary, as experience in jurisdictions around the world that apply value-based thresholds has shown. The Consultation raises a number of questions that underline the difficulties associated with adopting value-based thresholds:
 - Defining a notification requirement by reference to transactions that are likely to produce a “measurable impact” within the EEA would be subjective and would create uncertainty for many cases.
 - Defining a notification requirement by reference to a worldwide turnover threshold, or only requiring one party to meet an EU turnover threshold, would result in the notification of any concentrations undertaken by corporations with significant

³ By way of example, transactions often combine a fixed amount of consideration that is paid at completion with some form of deferred consideration that is paid after completion and whose quantum is contingent on future events. Were the Commission competent to review concentrations with a transaction value of, say, €10 billion, questions would arise as to whether it had jurisdiction over a concentration that involved a completion payment of €9.5 billion, combined with an obligation on the acquirer to transfer a proportion of the target’s post-completion earnings for two years, if there was genuine uncertainty over whether the value of the earn-out mechanism would exceed €500 million.

worldwide and/or European revenues. Either approach would prejudice large corporations in competitive tenders, and would not necessarily ensure that the Commission would have jurisdiction over concentrations likely to affect the EEA.

- Defining a notification requirement by reference to a turnover/value ratio has no sound empirical justification, would establish jurisdiction over transactions that involve targets with lower revenues, and would produce different results for different industries.

Although it would presumably be possible to resolve some interpretive questions at the outset, it would take many years to develop clear and objective rules that addressed the litany of issues that could arise in practice. During this time, the jurisdictional ambit of the EUMR (and the division of powers between the Commission and Member State agencies) would be uncertain.

Alternatively, the Commission could from the beginning apply the guidance developed over many years by the U.S. agencies, where filings are required for transactions that meet a certain “transaction value.” There are, however, conceptual distinctions between the EUMR’s jurisdictional rules and the filing thresholds under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”),⁴ as well as aspects of the U.S. agencies’ guidance that may run counter to the objective criteria on which the EUMR has historically been based. By way of example:

- Under U.S. rules, when the transaction value is undetermined, the acquiring party is required to determine the “fair market value” of the equity or assets it is acquiring. The U.S. rules do not specify how such a determination is to be made, other than that it be made in “good faith” by the acquiring party. Inquiries from parties about possible approaches to fair market valuation, and potentially dubious valuations, are an on-going issue for the FTC.
- U.S. rules include exemptions designed to avoid the need for filings for transactions that lack sufficient nexus with the U.S. Accordingly, filings are only required where the target holds a certain amount of assets in the U.S. (or generates sales in or into the U.S. attributable to non-U.S. assets). Determining the location of assets for these purposes often creates uncertainties. For example, assessing the “U.S. value” of global intangible assets (such as brands), is rarely straightforward in practice.

⁴ The U.S. merger control regime differs from the EUMR jurisdictional framework in the critical aspect that the U.S. agencies have jurisdiction over all transactions, not just those that carry a filing requirement. The U.S. agencies can (and with some frequency do) investigate unreported transactions. Because U.S. substantive jurisdiction is not based on the filing thresholds, the need to have easily applied and highly objective filing criteria is significantly less than under the EUMR. (The Commission could in principle apply Articles 101 and 102 TFEU to concentrations falling outside the EUMR pursuant to Article 105 TFEU, although this possibility falls short of the current ability of U.S. agencies to investigate transactions that do not meet the HSR thresholds.)

In short, we are not persuaded that the Commission has identified a significant enforcement gap in the EUMR that merits adopting value-based thresholds. Experience in other jurisdictions further suggests that the modalities of the proposal canvassed in the Consultation would be difficult to apply and would result in uncertainty and delay. We therefore urge the Commission not to proceed with the envisaged proposal absent strong empirical support for expanding the EUMR's ambit and the development of clear, objective thresholds that could be applied quickly and easily.

II. SIMPLIFICATION

The Simplified Procedure has proven to be a valuable tool for reducing unnecessary regulatory burdens for merging parties, and easing the Commission's workload. As a general matter, we support its expansion to cover more concentrations and reduce the information that merging parties need submit. The 2013 Simplification Package was a helpful development and we welcome the Commission's continued efforts in this respect.

We believe the categories of cases that are currently eligible for the Simplified Procedure are broadly appropriate. In practice, however, the Commission's tendency to apply broadly the "plausible market" principle set out in points 5(c) and 6 of the Simplified Procedure Notice has significantly limited the benefits of that Procedure.⁵ In assessing whether a given concentration is eligible for notification under the Simplified Procedure Notice, we would therefore encourage the Commission to rely on past decisions and to apply the principles set out in the Market Definition Notice to the greatest extent possible.

The Consultation seeks views on three specific possible avenues for reform: (1) a targeted exemption regime, (2) lighter information requirements for certain categories of cases, and (3) a limited self-assessment system. Our views on each proposal and further observations on how the Simplified Procedure might be improved are set out below.

1. Targeted Exemption Scheme

We support the introduction of a targeted exemption regime for the categories suggested by the Commission.⁶ Of those categories, we would prioritise the withdrawal of notification requirements for joint ventures with no or negligible activities in the EEA.⁷

⁵ Point 5(c) to the Simplified Procedure Notice refers to cases where "*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%*" and cases where "*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 %.*" Point 6 of the Notice refers to cases where "*(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.*" Footnote 12 of the Notice states that "*The thresholds for horizontal and vertical relationships apply to any plausible alternative product and geographic market definition that may have to be considered in a given case.*"

⁶ These comprise: (1) mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA (point 5b of the Simplified Procedure Notice); (2) mergers involving only limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets in the EEA or relevant geographic markets that comprise the EEA (points 5c and 6 of the Simplified Procedure Notice); (3) joint ventures with no

A large number of concentrations notified under the EUMR involve two jointly controlling parents that meet the applicable thresholds but a target undertaking that has no or only *de minimis* activities in the EEA. Application of the EUMR to such concentrations serves no useful purpose. On the contrary, it results in delay and may prejudice investment funds that bid together to acquire non-EU based assets in competitive tenders.

Should the Commission determine that the exemption of such concentrations could be achieved only through a legislative amendment to the EUMR, and that such a change is not feasible, we would encourage the Commission to adopt a policy that achieves the same goal (*e.g.*, through public statement that the Commission will grant a derogation under Article 7(3) EUMR to any such transactions).

2. Lighter Information Requirements

We support the further reduction of the information that need be provided for non-problematic cases. The practical value of any such change would, however, rely in large part on the Commission's readiness to discipline itself to review the envisaged information notices within a short period of time (*e.g.*, one week) and to require the submission of a Short Form CO (or even Form CO) only exceptionally.

More generally, we encourage the Commission to further reduce the information requirements in Short Form CO. Specifically, the requirement introduced in the 2013 Simplification Package for notifying parties to provide data and information on all "plausible" market definitions, rather than on relevant antitrust markets, increased the burden on merging companies and reduced the benefits of the Simplified Procedure in many cases.

We encourage the Commission to consider withdrawing this criterion for Simplified Procedure cases, or at least make clear that the obligation to propose "plausible" alternative market definitions is limited to those that are grounded in legal precedent and/or the principles set out in the Commission's Market Definition Notice.

3. Self-Assessment Regime

We do not believe a self-assessment regime is desirable at this time. Although such a regime could potentially reduce the burden on notifying parties, it would require robust legal and administrative mechanisms to remove the uncertainty about *ex-post* intervention by the Commission. Any such system would also require the Commission to devote resource to monitoring, collecting, and analysing information on market developments to ensure that potentially problematic mergers were identified.

or negligible activities (actual or foreseen) in the EEA (point 5a of the Simplified Procedure Notice); and (4) transactions where a company acquires sole control of a joint venture over which it already has joint control (point 5d of the Simplified Procedure Notice).

⁷ We nevertheless encourage the Commission to preserve the benefits of the one-stop-shop system to those transactions. Therefore, we advocate that these transactions are exempted from the requirement to seek Commission approval, but are not excluded from the scope of the EUMR.

4. Other Observations

In addition to the changes proposed by the Consultation, we would encourage the Commission to maximize the potential of the Simplified Procedure. The most significant time and cost savings could be achieved by continued efforts from the Commission Services to keep pre-notification questions in Simplified Procedure cases to an absolute minimum.

In our experience, although the duration of pre-notification discussions in Simplified Procedure cases is often shorter than it is for other cases, they can nevertheless take a substantial amount of time and involve the provision of a significant amount of information that is burdensome to gather. Even today, the notification of a significant proportion of transactions that manifestly involve no material horizontal or vertical relationships are delayed pending submission of responses to numerous detailed questions.

We would also invite the Commission to encourage merging parties to an even greater extent than currently exists to submit Short Form CO notifications without pre-notification in appropriate cases. We believe this possibility remains under-used, even in cases that involve no reportable markets and joint ventures with no/negligible EEA activities.

III. REFERRALS

Overall, we think that the referral system set out in the EUMR works well. However, we consider that certain reforms, including some of the Commission's proposed modifications, could improve its effectiveness.

1. Article 4(4): Pre-Notification Referrals From The Commission To A Member State

We support the proposal to abolish the requirement in Article 4(4) to demonstrate that a proposed concentration "*may significantly affect competition in a market within a Member State*" and to replace it with a requirement that a proposed concentration be likely primarily to impact a market in the particular Member State(s) to which the request is directed.

2. Article 4(5): Pre-Notification Referral From The Member States To The Commission

We believe the current process for pre-notification referrals from Member States to the Commission is cumbersome and time-consuming. We therefore support the Commission's proposal to abolish Form RS for such applications.

3. Article 22: Post-Notification Referrals From Member States To The Commission

We do not agree that the Commission should be competent to review referred transactions on an EEA-wide basis when this would expand the Commission's jurisdiction to assess the effect of concentrations in Member States that would otherwise not be competent to review a transaction.

IV. TECHNICAL ASPECTS

We support several of the Commission's technical proposals:

- The amendment of Article 4(1) to provide more flexibility for notifying mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- The amendment of Article 5(4) to clarify the methodology for turnover calculation of joint ventures.
- The amendment of Article 5(2), which treats transactions occurring between the same undertakings and within a two-year period as a single concentration, so that only cases of real circumvention, where parties have deliberately sought to stagger transactions, are captured.
- Allowing appropriate sanctions against undertakings that receive access to non-public commercial information for the exclusive purpose of a merger proceeding, but disclose or use such information for other purposes.
- Clarifying (as appropriate) that referral decisions based on deceit or false information for which one of the parties is responsible may be revoked.

We disagree, however, with the following proposals:

- As to any proposal to extend Phase II deadlines, including the maximum number of working days by which the Phase II deadline may be extended under Article 10(3) EUMR, or the possibility of an automatic extension following the submission of a remedies proposal before day 55, we believe the current Phase II review period is sufficiently long, especially given the Commission's habitual use of extended pre-notification periods and increasingly common use of Article 11(3) decisions.
- The proposal to modify Article 8(4) to align the scope of the Commission's power to require dissolution of partially implemented transactions with the scope of the suspension obligation was justified in the 2014 Staff Working Document as being intended to "*align with the proposed reform extending merger control to certain acquisitions of non-controlling minority shareholdings.*" Because this legislative reform was not taken forward, amendment of Article 8(4) is not justified.
- The proposal to clarify in the EUMR that "parking transactions" should be assessed as part of the acquisition of control by an ultimate acquirer. The situations in which so-called "warehousing arrangements" are used in practice vary significantly in each case. In certain cases (*e.g.*, where there is no certainty about who the ultimate purchaser of a business will be at the time at which the parking transaction is entered into), it might be inappropriate to review the parking transaction and the ultimate acquisition of control over the target business together. We therefore consider that Paragraph 35 of the Jurisdictional Notice requires further clarification since, as drafted, it may characterize as "parking transactions" concentrations that should not be characterized as such.

CLEARY, GOTTlieb, STEEN & HAMILTON LLP