



**EUROPEAN COMMISSION CONSULTATION "EVALUATION OF PROCEDURAL AND
JURISDICTIONAL ASPECTS OF EU MERGER CONTROL"**

HERBERT SMITH FREEHILLS LLP RESPONSE: ADDITIONAL INFORMATION¹

ANNEX 1 - JURISDICTIONAL THRESHOLDS (SECTION IV.2)

1. INTRODUCTION

- 1.1 As outlined in our response to Section IV.2 of the e-questionnaire, we do not consider that there is currently evidence that there are material shortcomings in the current turnover-based threshold system. We consider that this system - which is well-established and provides relative clarity for merging parties - together with EU Member State merger control regimes and the referral system - has operated effectively to ensure that the Commission and NCAs review relevant merger cases. As discussed further below, we do not consider that any changes in this respect are warranted.

2. IS THERE AN ENFORCEMENT 'GAP' REQUIRING CHANGE?

- 2.1 We recognise the Commission's concern that some transactions which have high acquisition values, but involve a target with limited turnover in the EEA as at the time of acquisition which nevertheless has competitive significance – for example due to its potential, fall outside the scope of the EUMR.
- 2.2 However, we do not consider there is any enforcement 'gap'. We are not aware of any empirical evidence that there is a material body of competitively significant transactions which are falling outside the scope of merger control review by the Commission or by one or more NCAs (which then may be subject to a referral to the Commission in applicable cases).² If and when the planned introduction of a deal-value threshold in Germany is implemented, then this would increase the prospect of NCA review for such transactions.
- 2.3 We note in this context that the *Facebook/WhatsApp* transaction referred to by the Commission is in fact an example of the system working well. The transaction fell within the jurisdictional scope of three Member State merger control regimes and was referred to the

¹ This additional information should be reviewed in conjunction with our responses to the e-questionnaire.

² We note that such transactions may of course also be notifiable in jurisdictions outside the EEA.



Commission under Article 4(5) EUMR. We understand the Commission has expressed a concern that such a referral would not now have occurred due to a change in one of the relevant Member State's jurisdictional thresholds. However, the transaction would have remained reviewable in two Member States, which would likely have applied a similar substantive assessment to that applied by the Commission (given the conclusion that most of the markets concerned were at least EEA wide in scope). We also note that the transaction received unconditional clearance in Phase I and so, even if the transaction had not been notifiable, would not constitute an example of a competitively problematic transaction escaping scrutiny due to the absence of a non-turnover based jurisdictional threshold.

- 2.4 Even if there were isolated examples of competitively significant transactions which have fallen outside Commission or NCA review, we do not believe that isolated examples can justify a wholesale change to the EUMR jurisdictional thresholds. Such a change would be disproportionate (catching many transactions without competitive significance) and give rise to significant legal uncertainty, in particular in light of the complexities in establishing suitable alternative thresholds (discussed below), in particular establishing an appropriate EU nexus, which would in our view outweigh any received benefits.
- 2.5 It would therefore unnecessarily increase burdens on business at a time when the Commission is seeking to streamline the EUMR to avoid unnecessary "red tape". It would also unduly divert Commission resources to transactions having no clear impact on competition in the EEA (in particular in light of likely precautionary notifications in the event of unclear or qualitative thresholds).
- 2.6 We also note that it is important for the Commission to bear in mind the important function the EU merger control regime has as a point of reference for other, newer, jurisdictions. If the EUMR is extended to capture transactions with no appreciable nexus to the EU, other jurisdictions may well be motivated to follow suit, thus triggering filings for foreign-to-foreign transactions which have no particular nexus with the jurisdiction in question, increasing further the administrative burdens involved in international M&A activity, which may as a result be negatively impacted.
- 2.7 The residual application of Articles 101-102 TFEU should also be borne in mind, should this ever become necessary in an exceptional case where a clear competition issue arose and a transaction was not notifiable at EU or NCA level.
- 2.8 We therefore consider that the Commission should not take any action at this stage, but the keep the issue under review, conducting further research as appropriate, and revisit should clear evidence of a material gap not sufficiently met by the above mechanisms arise



in future. This would also enable the Commission to take into account the experience in Germany under the planned new deal value threshold and assess both the extent of any enforcement gap and the application and appropriateness of such a threshold in practice.

- 2.9 If, despite the points noted above, the Commission remains concerned about the need for EU-level rather than NCA review of such transactions, then one option which could be considered is expanding the use of Article 22 EUMR to widen the scope for referrals in exceptional cases, rather than introducing alternative thresholds which would catch numerous transactions. In this regard:

2.9.1 Contrary to our preferred position outlined in Annex 2 below on case referrals in response to Question 24 of the e-questionnaire, the ability of Member States not having jurisdiction to make a referral under Article 22 could potentially be maintained and the Commission's jurisdiction could be expanded to EEA-wide jurisdiction.

2.9.2 The Commission could also make greater use of its power under Article 22(5) to invite an NCA or NCAs to make a referral request.

- 2.10 We would, however, stress the potential for uncertainty and delay arising from the application of Article 22. We therefore consider that clear guidelines would need to be issued as to when the Commission would invite a Member State to make a referral and when it would take jurisdiction (and ideally each NCA would issue guidance as to the circumstances in which it would consider requesting a referral), and stricter timelines would need to be introduced.

3. **DIFFICULTIES IN ESTABLISHING AND APPLYING EFFECTIVE AND PROPORTIONATE ALTERNATIVE THRESHOLDS**

- 3.1 Given the consequences which flow from a transaction falling within the jurisdictional scope of the EUMR and the penalties for non-compliance, it is crucial that the EUMR's jurisdictional rules are as clear and as straightforward to apply as possible, based on objective quantitative and readily accessible criteria. In this regard we refer to Point II of the ICN's *Recommended Practices for Merger Notification Procedures*. This is also important in the EU context to provide a proper delineation between Commission and NCA competence.

- 3.2 We believe there would be significant difficulties in designing and applying alternatives to the turnover-based thresholds, in particular in relation to establishing a clear local nexus of a transaction with the EEA. This is clearly needed to prevent the unwarranted extra-territorial application of the EUMR (as well as to delineate competence between the



Commission and NCAs). In this context we refer to Point I of the ICN's *Recommended Practices for Merger Notification Procedures*. We also refer to our discussion in relation to extra-EEA joint ventures in response to Section IV.1 of the e-questionnaire. The changes being considered clearly give rise to the risk of extra-EEA transactions with no or limited scope to impact competition in the EEA (for example a US private equity house (with EU interests) purchasing a high value target active only in Asia) being caught by the new thresholds, replicating the issues currently experienced in relation to extra-EEA joint ventures.

Local nexus

- 3.3 Establishing the nexus of the target with the EEA is indispensable. However, in the absence of a turnover-based threshold, it is difficult to formulate an appropriately quantifiable criterion. We do not consider the suggestions put forward to be appropriate. In particular:
- 3.3.1 A general provision that transactions which trigger on the basis of a deal size threshold are only notifiable if they are likely to produce "a measurable impact within the EEA" is insufficient. This is wholly unclear and uncertain, even if accompanied by guidance. Such a qualitative criterion would be very difficult for merging parties to assess in practice, and has the potential to be met by very little activity within the EEA (taking into account, for example, the expansive notion of the "effect on trade" concept under Articles 101-102 TFEU). The same is likely to apply to the, unarticulated, prospect of "industry specific criteria".
 - 3.3.2 The notion of a "maximum worldwide turnover" threshold as proxy for determining an EEA-nexus is an unsatisfactory approach. Although quantifiable, this does not represent an appropriate EEA-nexus – likely future impact in the EEA does not necessarily follow from a limited worldwide turnover.
 - 3.3.3 The proposed "value-to-turnover ratio" threshold may assist in identifying market potential, but this clearly does not necessarily signify potential in the EEA, and therefore does not assist with local nexus. Generally, we consider that adopting such a multiple would not be appropriate, as discussed below.
- 3.4 An alternative which could be considered, if the Commission is, despite the points outlined above, determined to proceed with the proposal for change, is a requirement for a specified asset value in the EEA (as under the US regime, whilst recognising that this is itself complex), specifying clearly what assets would be relevant and the basis of valuation (although we recognise there may be difficulties in settling on an appropriate level).



- 3.5 At the bare minimum, the target should be required to be engaged in economic activities in the EEA (and potentially also to have a physical presence in the EEA territory), but we do not believe that this is sufficient in itself.
- 3.6 In addition, we do not believe that any of the suggestions sufficiently deal with the fact that any such transaction may have a particular impact on one Member State rather than having EEA-wide impact (for example where existing EEA activities are concentrated in one Member State), and therefore be more appropriate for review at national level. The Commission's proposals therefore give rise to the potential for unwarranted extension of the Commission's jurisdiction at the expense of the Member States, under whose jurisdictional rules such transactions may otherwise be caught (given the generally lower turnover (or other) thresholds involved).

Deal size/value

- 3.7 A key issue is how to design a sufficiently objective threshold which would only catch the most relevant cases. We do not believe that it is possible to target only those cases where there is a real competitive concern. As noted above, many transactions have a high deal value without giving rise to competition concerns, including where the value is high when compared to turnover. The vast majority of transactions caught by any such threshold are likely to be of no concern, and therefore have disproportionate impact, on both merging parties' and Commission time and resources.
- 3.8 In relation to the suggestion of a multiple-based threshold, we note that this could potentially have a distorting effect on the parties' negotiations, with potential purchasers using the multiple as a de facto ceiling for the purchase price to avoid a filing requirement. Moreover, what level of ratio of turnover to value is "normal" and what potentially indicates competitively significant potential in the target will also vary significantly across industry sectors.
- 3.9 Even is "straightforward" deal value threshold is in fact complex. For example, how would structures such as earn-outs and deferred consideration be dealt with? At what point in time would deal value be assessed (given this may change quickly and materially over time, whether due to exchange fluctuations or changes in the value of shares where this forms part of the consideration³)? And how should such a level be set, given that relative values diverge significantly across industries and markets?

³ *Facebook/WhatsApp* is a useful example of such complexities: the deal value ultimately increased from US\$19 to 22 billion due to the rise in value of the Facebook shares which formed part of the consideration.



Minimum requirements for alternative thresholds

- 3.10 If, despite the issues outlined above, the Commission determines to proceed with the proposal for change, at a minimum:
- Any deal-value threshold should be set at a suitably high level.
 - The existing worldwide combined turnover threshold of €5 billion should be retained.
 - The existing turnover threshold of €250 million should continue to apply to at least one of the parties of the transaction.
 - A clear and practicable test for establishing local nexus must be adopted.
- 3.11 If the Commission does decide to proceed, we would encourage it to consult on detailed legislative proposals.



ANNEX 2 – REFERRALS (SECTION IV.3)

1. INTRODUCTION

1.1 We largely support the Commission's proposals in its 2014 White Paper aimed at improving the referral regime, although we do not agree with all proposed amendments and would in addition recommend a number of further changes in order to speed up the regime.

1.2 We set out our comments in respect of each of the relevant provisions below.

2. ARTICLE 4(5) EUMR

2.1 We fully support the proposed amendment to the Article 4(5) referral regime under which parties will be able to notify the Commission directly without the need for a preceding Form RS. This will simplify and speed up the referral process and allow the parties to start the Phase I timetable at an earlier stage. It will remove unnecessary duplication of work and result in cost savings for the notifying parties.

2.2 We are, on the whole, supportive of an early information exchange between the Commission and the Member States, provided that the extent of any pre-notification contact between the Commission and the Member States is first discussed between the case team and the notifying parties on a case by case basis, and that there should be no automatic presumption that information would be provided at this stage without the consent of the parties (which would be inappropriate in the case of highly confidential transactions for example).

2.3 In addition, we believe that the current 15 Working Days consultation period for the Member States can be reduced to 10 Working Days, which should be sufficient to allow the Member States to reach a view on whether or not they wish to retain jurisdiction over the notified transaction.

3. ARTICLE 22 EUMR

3.1 The current Article 22 EUMR process is complex and can result in substantial delays, legal uncertainty and increased costs for the parties involved. As raised in our Previous Response, it is also not clear whether there remains a material need for the Article 22 process, as its rationale of allowing Member States without a merger control regime to refer a case to the Commission has largely become irrelevant due to the prevalence of merger control regimes within the Member States.



3.2 If the Commission nevertheless decides it is necessary to retain the regime (including due to any concerns about its ability to review transactions with a high deal value but limited EEA-wide turnover (as discussed in Annex 1 on jurisdictional thresholds in response to Section IV.2 above), which may require consideration of whether the position advocated below requires any adjustment), any changes to the process should aim to address its shortcomings.

3.3 In this regard, in principle we:

3.3.1 Support the proposed amendment that only those Member States which are competent under their national law to review a merger should be able to request a referral or oppose a referral, as this is likely to increase legal certainty for the parties to the transaction.

3.3.2 Believe that Article 22 EUMR should mirror the requirements of Article 4(5) EUMR, and therefore the Commission should only be able to take jurisdiction in cases where the transaction is reviewable by three or more Member States.

This would more accurately reflect the Commission's proposed rationale for maintaining the Article 22 process, which is to ensure that the Commission is the best placed authority to consider a transaction.

3.3.3 Do not agree with the proposed amendment that, where a referral request is made and not opposed by a competent Member State, the Commission should have EEA-wide jurisdiction.

The Commission justifies this approach on the basis that it will eliminate the current patchwork of parallel transactions, but at the same time accepts that there are no means to ensure that a Member State has not already cleared a transaction before another Member State requests a referral. Such a change would impose additional burdens on the notifying parties in terms of information gathering for the Form CO. It also means that parties to a transaction involving more than one national filing and which has some cross-border effects will, as a matter of course, need to consider the feasibility of the transaction throughout the whole of the EEA, which will further increase costs and affect legal certainty for the parties. On that basis we believe that the Commission should only have jurisdiction for the territories of Member States which are competent to review the transaction and which had not yet cleared the transaction prior to the referral request.



- 3.4 We support the proposals for greater coordination between the different NCAs and the Commission, which includes replacement of the current ECA notice with a mandatory early information notice for multi-jurisdictional or cross border cases. Any suspension of the national deadlines under this process should be for as short a period as possible. We would therefore suggest shortening the 15 Working Day period during which Member States reach a decision on referral to a maximum of 10 Working Days.

4. **ARTICLE 4(4) EUMR**

- 4.1 We agree with the Commission's view that it is neither possible nor desirable to reform Article 4(4) EUMR referrals in the same way as the Article 4(5) EUMR referral regime and abolish the Form RS stage under this provision.
- 4.2 We support the Commission's proposal to amend the substantive test for transactions to qualify for a referral in order to remove the "self-incriminatory" aspect of the test. Under the current test the requesting parties are in essence required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market, which may have deterred some referral requests in appropriate cases. Amending the text so that parties only have to demonstrate that the transaction is likely to primarily impact a distinct market in the Member State in question should remove this potential deterrent.
- 4.3 In addition, we believe that it should be possible to reduce the time period for a response from the NCA from 15 Working Days to 10 Working Days, and from 25 Working Days to 15 Working Days for the Commission to reach a final decision on jurisdiction.

5. **ARTICLE 9 EUMR**

- 5.1 In respect of Article 9 EUMR referrals, we disagree with the Commission's proposals. We believe that the current 65 Working Days deadline from notification of the Form CO provides the Commission with ample time to decide whether or not to reject a referral request in the case of Phase II proceedings and that there is therefore no need to extend this deadline.
- 5.2 On the contrary, it should be possible to shorten this deadline. Referral of a case to a Member State post-notification is very burdensome for the parties, and shorter deadlines would provide the parties with certainty as to where their case will be reviewed at the earliest possible opportunity.



ANNEX 3 – TECHNICAL ASPECTS (SECTION IV.4)

1. INTRODUCTION

- 1.1 As outlined in our Previous Responses, we do believe that there is scope to improve the EU merger control system and welcome the Commission's initiative in considering such improvements. We set out our comments on the proposals within the 2014 Staff Working Document, and a number of additional suggestions, below.

2. PROPOSALS WITHIN 2014 STAFF WORKING DOCUMENT

Notification of share transactions outside the stock market (Article 4(1) EUMR)

- 2.1 We agree with the Commission's previously suggested amendment of Article 4(1) EUMR to allow notification of concentrations that are implemented via the acquisition of shares on a stock exchange without a public bid where there is a "good faith intention" prior to the acquisition of control.
- 2.2 More generally, in relation to all forms of transaction, it would be useful for further guidance on when a transaction can be notified prior to signing/announcement of a bid on the basis of a good faith intention to proceed.

Clarification of methodology for turnover calculation of joint ventures

- 2.3 We agree that it would be useful if Article 5(4) EUMR were amended to expressly refer to the rules currently in the Consolidated Jurisdictional Notice on the calculation and allocation of turnover for joint ventures between the undertakings concerned and third parties.

Time limits

- 2.4 Provided that the Commission does not intend to remove the requirement for agreement between the notifying parties and the Commission prior to any extension of time, we agree with the proposal to increase the maximum possible extension under Article 10(3) EUMR (for example by 10-15 Working Days).

Unwinding of concentrations with regard to partially implemented transactions by way of minority shareholdings (Article 8(4) EUMR)

- 2.5 Assuming that the EUMR is not amended to cover non-controlling minority shareholdings, we not believe that change is required to provide for a Commission power to require dissolution in these circumstances.
- 2.6 The intention of Article 8(4) EUMR is, in essence, to give the Commission the power to



unwind a concentration which has been implemented but has been prohibited as incompatible within the common market (or would have been so prohibited absent a condition which has been breached). The General Court has clarified that "implemented" in the context of Article 8(4) means a fully implemented concentration, i.e. a situation where the acquirer has acquired "control" over the target, and excludes partial implementation, such as in *Ryanair/Aer Lingus* where control was never acquired.⁴

- 2.7 We do not see any real need to change this position. These situations are rare and the present version of Article 8(4) EUMR is logical in allowing enforcement only in situations where a concentration has been implemented and prohibited. If the non-controlling minority stake would not fall within the scope of the EUMR taken alone, and therefore could have been acquired lawfully without EUMR scrutiny (or could subsequently be obtained with EUMR scrutiny), there is not in our view the need or justification for the Commission to be able to order its divestiture.

Staggered transactions under Article 5(2)(2) EUMR

- 2.8 We agree with the Commission's approach to ensuring that Article 5(2)(2) EUMR is tailored to ensure that it only captures cases of real circumvention. The application of Article 5(2)(2) would clearly not, by way of example, be appropriate in instances where a prior transaction had been notified to an NCA.
- 2.9 In the interests of legal certainty, clarification on this point and guidance on the circumstances in which the Commission would expect to rely on Article 5(2)(2) should be articulated within guidance (for example within section 1.5 of the Consolidated Jurisdictional Notice).

Qualification of "parking transactions"

- 2.10 We do not agree with the Commission's proposals in this regard.
- 2.11 "Parking transactions" should not in our view be considered as the first step of a single concentration leading to the ultimate buyer's control and should not therefore be assessed as part of the acquisition of control by the ultimate acquirer. "Parking" structures are merely temporary transactions which do not lead to a change of control on a lasting basis by either the interim buyer, or the ultimate buyer. On that basis, "parking transactions" cannot be considered to be concentrations and should therefore be able to be implemented without merger notification and clearance.

⁴ Case T-411/07 *Aer Lingus Group plc v Commission*.



- 2.12 However, we believe that for certainty purposes there is merit in the Commission articulating clearly its position in respect of various types of parking transactions/"warehousing" structures clearly within the Consolidated Jurisdictional Notice.

Effective sanctions against use of confidential information obtained during merger proceedings

- 2.13 We agree with the Commission's proposals in this regard.

Commission's power to revoke decisions in case of referral based on deceit or false information

- 2.14 We do not agree with the Commission's proposals in this regard.
- 2.15 We can identify practical difficulties in revoking Article 4(4) EUMR referral decisions, in particular where the Member State to which the case had been referred has already cleared the merger. The impact of the Article 4(4) revocation on the Member State's decision in this scenario is unclear. We consider fines to be the more appropriate sanction (as currently provided for in Article 14(1)(a) EUMR).

3. ADDITIONAL SUGGESTIONS FOR IMPROVEMENT

Non-full function joint ventures

- 3.1 As outlined in our Previous Responses, we consider that there is pressing need for the Commission to clarify the circumstances in which transactions involving the change of control over an existing joint venture or entity which does not perform on a lasting basis all the functions of an autonomous economic entity, i.e. which is not "full-function", fall within the scope of the EUMR, in particular the relationship between Article 3(1)(b) EUMR and Article 3(4) EUMR, and paragraph 91 of the Consolidated Jurisdictional Notice. On the basis of published decisions (which do not explicitly deal with this issue so far as we are aware), it appears that notifying parties and the Commission have not necessarily taken a consistent approach.
- 3.2 Whilst the Commission has been prepared to give informal guidance in specific cases, the publicly articulated position is unsatisfactorily unclear, raising significant issues for parties to transactions seeking to determine whether the EUMR applies to their transaction.
- 3.3 It is essential that the rules on what does and does not constitute a concentration within the meaning of the EUMR are clear. We urge the Commission to clarify within the EUMR and/or the Consolidated Jurisdictional Notice whether transactions resulting in a change of control over a non-full-function joint venture (or the acquisition of joint control over an existing solely-owned undertaking in circumstances where the resulting joint venture would



not be characterised as full-function) can constitute a concentration under the EUMR, and if so, in what precise circumstances.

Consolidated Jurisdictional Notice

- 3.4 In addition to the points mentioned above, we consider that the Commission should take the opportunity to review and revise the Consolidated Jurisdictional Notice generally to reflect its practice and case-law since the Notice's publication, and generally to improve clarity throughout.
- 3.5 By way of example, we highlight the following issues on which updated guidance and/or greater clarity would be particularly welcome:
- 3.5.1 The acquisition of control by investment funds/investment companies (paragraphs 14-15 of the Notice) and the allocation of turnover in these circumstances (paragraphs 189-191).
 - 3.5.2 The concept of an undertaking for merger control purposes and in particular when a market presence can be said to exist (paragraph 24).
 - 3.5.3 Successive transactions (paragraphs 29-35).
 - 3.5.4 Concentrations involving State-owned undertakings (paragraphs 52-53).
 - 3.5.5 Options (paragraph 60).
 - 3.5.6 Market-specific veto rights (paragraph 72).
 - 3.5.7 Full-functionality (paragraphs 94-102) (in particular in what circumstances real estate holding joint ventures will and will not be regarded as full-function (paragraph 96)).
 - 3.5.8 Acquisition of joint control and undertakings concerned (paragraphs 139-141).
 - 3.5.9 The meaning of "joint venture" for the purposes of paragraph 186-188 (for example whether such apportionment should occur where one parent owns more than half the capital or has the power to exercise more than half the voting rights (but another parent(s) has the right to manage as a result of veto rights), or only in the case of shareholdings of 50% or less where the parents have the right to manage).
 - 3.5.10 Geographic allocation of turnover (paragraphs 195-203).



Guidance

- 3.6 We also consider that it would be helpful for the Commission to update or issue guidance (as applicable) in relation to the following matters to reflect case-law and its practice.
- 3.6.1 Ancillary restraints (in particular in relation to joint ventures).
 - 3.6.2 The stand-still obligation and early implementation (including the application of Article 7(2) EUMR, and the Commission's approach to derogation requests under Article 7(3)).
 - 3.6.3 Parallel transactions.

Form CO

- 3.7 We believe that Section 6 of the Form CO should be amended to clarify that, for the purpose of identifying affected markets, in a joint control scenario relationships that exist only between the parents outside the field of activity of the joint venture are not considered horizontal or vertical relationships (as for the position in relation to reportable markets within the Short Form CO).

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