

Response by Linklaters LLP to the European Commission's Evaluation of procedural and jurisdictional aspects of EU Merger Control

We welcome the European Commission's ("**Commission**") consultation¹ on the evaluation of procedural and jurisdictional aspects of the European Merger Regulation² ("**EUMR**"). Our comments focus primarily on the possible expansion of the jurisdictional thresholds to cover transactions that currently fall below the EUMR turnover thresholds, but could still have a significant impact in the EU.

We also address the other three areas that had already been identified in the 2014 White Paper, namely, (i) simplification of the case referral system; (ii) further streamlining of the simplification package; and (iii) settling the ambiguities on certain technical/procedural questions under the EUMR and the Consolidated Jurisdictional Notice ("**CJN**").³

A. Jurisdictional thresholds (questions 14-22)

1 No need for an additional threshold based on transaction value (questions 14-19)

In our experience there have not been a material number of competitively significant transactions in the digital economy, pharmaceuticals or other sectors that were anti-competitive and not captured by the EUMR or equivalent national laws in the Member States.⁴ We encourage the Commission to carry out a comprehensive quantitative and qualitative study in order to determine whether the posited "enforcement gap" in fact exists. Only if that were true, would there be a case for reform.

We submit that the introduction of additional thresholds based on deal value would raise significant procedural, practical and substantive challenges for both the Commission and the business community. Such a path should, therefore, be avoided:

- Transaction value is not a good reference point for a transaction that may give rise to competitive concerns. The price of an undertaking is often influenced and also ultimately determined by a host of factors that are completely unrelated to competitive dynamics in the product or service markets concerned. These factors include, especially, fluctuations in share price driven by capital markets developments, price developments driven by rival bidding for the target undertaking, or the structuring of a transaction or the purchase price (e.g., all cash, cash and stock or all stock). Even where the substantial price is driven by strategic reasons, the ultimate price is influenced by the level of risk that the purchaser is willing to assume in securing an asset, and there are numerous examples of M&A transactions where purchasers overpaid.⁵

¹ Available [here](#).

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal L 24, 29.01.2004, p. 1-22.

³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

⁴ The Commission refers to *Facebook/WhatsApp*, but we note that this case was cleared unconditionally in Phase I and was not deemed to give rise to a significant impediment of effective competition.

⁵ One highly publicised example is Hewlett-Packard's acquisition, in 2011, of the British software group Autonomy for around US\$ 11 billion, which represented a 79% premium to the stock price. Within one year, the transaction value was written down by US\$ 8.8 billion. See [HP Enterprise seeks to end Autonomy saga with software sale](#), Financial Times, 2 September 2016.

- As a result, the determination of jurisdiction on the basis of transaction value carries an inherent risk that DG COMP's resources would be further constrained by the review of a significant number of notified transactions that do not raise substantive competition concerns. This would reduce the Commission's ability to adequately review, in a timely fashion, those transactions that do give rise to substantive competition concerns.
- Transaction value does not establish a sufficient territorial nexus to the common market or the necessary cross-border effects. The EUMR's "one-stop-shop" system is justified by, and must comply with, the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty. The EUMR should apply to significant structural changes with impact beyond the national borders of any one Member State.⁶ An unqualified transaction value threshold would likely capture many purely national transactions without effects in the EU or without the requisite cross-border effects within the EU. As a result, any transaction value threshold would necessarily need to be combined with additional EU-specific thresholds, which would add additional layers of complexity (see Section 2 below).
- The concept of transaction value is more elusive than it may appear to be. The ultimate transaction value may depend on adjustments or determinations that can only be made after an agreement has been reached. This means that the definitive transaction value may not be known at the time a notification should be contemplated.⁷ The U.S., which has adopted a size of transaction test, has had to implement complex rules regarding the valuation of transactions for purposes of determining whether the size of transaction test is met.⁸ For example, depending on the transaction structure and whether the target is publicly traded or not, the size of the transaction is determined by reference to the market price of the target's shares (in the context of an acquisition of shares of a publicly-traded company), the negotiated price for the target shares or assets, or the fair market value of the target shares or assets. In addition, under some circumstances, the amount of debt of the target that is being paid off in connection with the transaction may be deducted from the value of the transaction, and the value of shares or assets of the target previously acquired by the acquirer may need to be aggregated with the shares or assets being acquired in the transaction at hand. Introducing a similar test in the EU would add an additional – and unnecessary – layer of complexity.
- In addition, even for the few transactions that could potentially be problematic, the substantive assessment would essentially involve analyses of how the transactions affect potential competition. These assessments, in particular, require a forward-looking analysis where "the chain of cause and effect are dimly discernible" at best.⁹ This is particularly the case in highly innovative sectors, such as the digital economy, where the competitive landscape may vary or even completely shift within very short periods of time, and where, for example, the success of products which are not yet developed or marketed is uncertain and various

⁶ See EUMR, Preamble, paragraphs 6 and 8.

⁷ E.g., contingency payments, which are common in for instance the pharmaceutical sector.

⁸ See <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/valuation-transactions-reportable-under>

⁹ See, by analogy, Judgment of the European Court of Justice in Case C-12/03 P, *Commission v Tetra Laval*, recitals 37 to 51 (upholding the [General Court]'s Judgment in Case T-5/02, *Tetra Laval v Commission*, which overturned the Commission's decision in Case COMP/M.2416, *Tetra Laval/Sidel* of 13 January 2003).

stakeholders may have different views. This type of analysis is inevitably more speculative than evaluating an actual horizontal overlap or vertical foreclosure concerns.

- The current referral system, even with the modifications that we propose in Part B below, would further reduce any such perceived gap. *Facebook/WhatsApp* is an example of a case that did not trigger the EUMR thresholds but which was eventually referred to and cleared unconditionally by the Commission. We are confident that parties will generally seek to have a case reviewed by the best-placed authority, as the current referral system seeks to achieve or at least make possible.

We therefore consider that any amendments to the current thresholds need to be carefully considered in order to avoid imposing unjustified burdens on the business community and the Commission.

2 Key considerations for a value-based threshold (Questions 20-22)

If the Commission decides to introduce a value-based threshold, we recommend that the Commission take into account the following key considerations in setting such a threshold:

- The transaction value threshold should be higher than current transaction value thresholds set by national competition authorities of the Member States. Given that Germany is already considering a transaction value threshold of EUR 350 million, any corresponding threshold at the EU level should be considerably higher.
- The transaction value threshold should be combined with a threshold which establishes a (i) sufficient territorial nexus in the EU, as required by the EU Courts,¹⁰ and (ii) sufficient cross-border effects, as required by the principle of subsidiarity. We propose the following approach: (i) at least one of the parties should have an EU-wide turnover of at least EUR 250 million; and (ii) the other party (typically, the target) must have a minimum amount of sales or assets in at least three Member States. This would ensure that a target has an established link with the EU and has cross-border activities in the EU (i.e. assets or sales in at least three Member States).
- A value/turnover ratio would not be appropriate. Value/turnover ratios are, in our experience, not used in the valuation of transactions. They would also present practical challenges given that, as mentioned above, the concept of a “transaction value” is not clearly identifiable. As recommended by the International Competition Network (“**ICN**”), notification thresholds should be based exclusively on objectively quantifiable criteria (e.g., assets and turnover). The ICN has also stated that subjective and fact-intensive criteria (e.g., market shares) are not appropriate for use in making the initial determination as to whether a transaction is notifiable.¹¹
- It would also not be appropriate to have different transaction value thresholds for different industry sectors. Setting different thresholds by industry sector would be a complex (and potentially arbitrary) exercise. Even though valuations may vary

¹⁰ See Judgment of the Court of First Instance of 25 March 1999 in Case T-102/96, *Gencor Ltd v European Commission*, para. 50.

¹¹ See ICN's Recommended Practices for Merger Notification Procedures, available [here](#).

depending on the sector, it would be speculative at best to set different transaction value thresholds.

- The introduction of a deal value threshold would have to be consistent with the concept of “concentration” defined in the CJN, and in particular the concept of an undertaking. The CJN states in paragraph 24 that the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or part of an undertaking, i.e., a business with “a market presence, to which a market turnover can be clearly attributed”. Linklaters was involved in Case COMP/M.7872, Novartis/GSK¹², where the Commission took the position that it is sufficient that the business in question is “capable of producing a market turnover in the foreseeable future”. However, in practice such an assessment is highly subjective, as it requires an analysis of the likely success of the asset in question and the sufficiency of the package of assets involved in the transaction, which would considerably complicate the EUMR jurisdictional assessment and indeed raise issues of legal certainty.

Should the Commission decide to adopt a transaction value threshold, it would be essential to provide detailed guidance in order to avoid as much uncertainty as possible with the application of the new threshold. Even though guidance has often been issued after a period of experience, given the significant issues which may be caused by the application of a value threshold, the Commission should consider upfront guidance.

In addition, the Commission should consider simplifying further the Form CO disclosure requirements for this type of transaction, given that by definition the target may have minimal sales or no sales at all in this context. For these cases, the Commission should consider a simpler filing, closer to the HSR filing in the U.S., and less focused on horizontal overlaps as is the case with the current Form CO.

B. Case referral system (questions 23-25)

We believe that Articles 4(4) and 4(5) have generally worked well to ensure that the best-placed authority has reviewed the case and have offered notifying parties the benefit of a one-stop-shop review.

In contrast, Article 22 has in some instances led to adverse outcomes in terms of merger review, with the most notable example being the *Sara Lee/SC Johnson* case, where the transaction was delayed by more than one year and was eventually abandoned.¹³

1 Article 4(4) EUMR: Pre-notification referral to Member States

We welcome the Commission’s proposed amendment to remove the requirement that a concentration “may significantly affect competition in a market within a Member State” and replace it with a requirement that the transaction is “likely to have its main impact in a distinct market in the Member State(s)”.

This would enable parties to transactions to request more easily referrals at the national level, without having to consider a “self-incrimination” risk by admitting that the transaction will affect competition in the Member State in question.

¹² *Novartis/GSK* (Ofatumumab Autoimmune Indications), paragraph 11 and footnote 10.

¹³ Withdrawal of notification of a concentration in Case COMP/M.5969 — *SCJ/Sara Lee insecticides’ business*, OJ 2011/C 168/09.

2 Article 4(5) EUMR: Pre-notification referral to the Commission

We welcome the Commission's proposal to remove the Form RS requirement and allow the submission of a Form CO. Removing the Form RS requirement and replacing it with a Form CO would avoid duplication and improve efficiency.

We also suggest that the Commission consider shortening the period during which Member States can object to the referral from 15 working days to 10 working days. Such reform would render this procedure more efficient and more attractive for parties and would be appropriate, given the increased level of cooperation within the ECN.

3 Article 22 EUMR: Post-notification referral

Article 22 was designed to address a problem that no longer exists, namely, that a Member State might not have a merger control regime. Article 22 has become obsolete, given that all Member States (except Luxembourg) now have merger control regimes in place.

The Article 22 mechanism can lead to undesired outcomes such as parallel reviews of the same transaction by both the Commission and one or more national authorities that decided not to join the Article 22 request.

However, despite its shortcomings, a modified Article 22 would be a more effective alternative to a new transaction value threshold, provided that Article 22 is modified so that only the Member States which have jurisdiction on their own rules are in a position to request, join or block an Article 22 referral. This would resolve the existing ambiguity with regard to Member States which do not have jurisdiction to review a case but which are currently capable of requesting and/or joining an Article 22 referral.

On the other hand, we disagree with the proposal to modify the time limits envisaged in the White Paper as this would potentially lead to further delays. We recommend that the current deadlines under the existing Article 22 mechanism be maintained.

C. Further simplification (questions 1-13)

We welcome the simplification proposals and the opportunity to work further with the Commission to develop these proposals. We encourage continued efforts to streamline the notification process and reduce the effective review period.

The Commission seeks feedback on the potential options to further simplify the current procedures by:

- Exempting certain categories of simplified cases from notification,
- Introducing a light information system,
- Introducing a self-assessment system with the possibility of a voluntary notification; and/or
- Excluding extra EEA joint ventures from the scope of application of the Merger Regulation.

For the purposes of this response, we comment here on two proposed amendments: (i) treatment of joint ventures taking place outside the EEA; and (ii) possible exemption of non-problematic transactions from the full notification requirement.

Treatment of Joint Ventures outside the EEA and exemption of non-problematic transactions

We support the Commission's proposal to block-exempt from the notification requirement joint ventures which operate entirely outside the EEA and which can have no appreciable impact on the EEA.

We suggest that such an exemption should cover both existing joint ventures and the creation of new joint ventures. As set out in our Consultation Responses, this may be achieved by requiring that the joint venture itself must be one of the "undertakings concerned" that meets the EUMR thresholds. As for greenfield joint ventures, the Commission could introduce a provision whereby if the joint venture's projected turnover falls below the relevant turnover threshold three years after closing, the concentration would be exempted from filing.

We also welcome the proposal that the Commission exclude transactions that do not raise competition concerns. This would be the case for transactions that do not include any "reportable markets" under the Short Form CO. We consider that this would create significant efficiency benefits for both the parties and the Commission.

However, if the Commission were minded to reduce rather than remove the notification burden, we would propose the following:

- The submission of an information notice (instead of a Form CO) along the lines proposed in relation to structural links, without any suspensory obligations.¹⁴ We see such a procedure as being comparable to the Bundeskartellamt's practice, which we generally consider works well.
- If nonetheless the Commission maintains the requirement for a Form CO, we would suggest that the Commission show a greater degree of flexibility on the amount of information required on "reportable markets". There are many cases in which DG COMP case teams require large amounts of information in order to establish that there are no affected markets, even in cases where the proposed concentration does not give rise to any material overlaps.

D. Technical aspects (questions 26-29)

We welcome the Commission's proposals in the SWD in relation to technical aspects of the EUMR which are aimed at reducing the administrative burden on enterprises and ensure that costs are minimised.

In particular we submit the following observations with regard to the following amendments of EUMR articles as proposed by the Commission in its SWD:

- **Article 4(1) EUMR**

We agree with the proposal to amend Article 4(1). Such a proposal should provide flexibility regarding share acquisitions (that do not constitute public takeover bids), by allowing the parties to notify before a shareholding level enabling the exercise of *de facto* control is attained.

- **Article 5(4) EUMR**

We note that the proposal to amend Article 5(4) to provide clarity on the turnover calculation principles for joint ventures essentially implies transposing the contents of the CJN to the EUMR.

¹⁴ Except for a set time limit within which the Commission may request further information and/or request the notifying parties to submit a Form CO.

Further guidance on the notion of “right to manage” would also be welcome. More specifically:

- There is a degree of uncertainty as to the precise circumstances in which third-party managers appointed by investment funds are included for the purpose of turnover calculation, particularly in cases where the manager has no equity interest in the fund or ownership rights over the properties held or participated in by the fund.
- We would welcome confirmation of the informal understanding that the Commission’s view that contractual veto rights over strategic commercial decisions that constitute control for Article 3(2) purposes (e.g., veto over the budget, business plan, appointment/removal of senior management) constitute a contractual right to manage and therefore that any form of joint control (other than *de facto* joint control) implies that the “right to manage” test under Article 5(4) EUMR is met.

- **Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases**

The concern with extending the time limits under Article 10(3) from 20 to 30 working days is that such extensions may become routine and add further delays to an already lengthy review process. The maximum period for a Phase 2 review, if one also factors in the pre-notification, should generally be sufficient for a thorough review. It would be more appropriate to introduce the possibility of a “timing agreement” with the Commission whereby the parties and the Commission would agree to stop the clock to address one or more specific issues that come up during the review and which cannot be properly addressed under the Phase II timeframe.

Article 8(4) EUMR

We welcome this proposal, as it would avoid a repetition of the *Ryanair/Air Lingus* case, where the Commission could not order the complete divestment of Ryanair’s significant minority stake in Air Lingus, despite the fact that the transaction was prohibited. The Commission lacked the tools to order a complete divestment under the EUMR – despite the fact that the transaction was prohibited – because the Ryanair transaction was not completed and Article 8(4) applied only to completed transactions. By extending Article 8(4) to cover partially implemented transactions, the Commission could order the complete divestiture of any significant (non-controlling) minority stake in the event that the concentration is prohibited and thereby fill a significant procedural gap in the Commission’s power in relation to anti-competitive minority shareholdings. This would also reduce the need for further reform in relation to minority shareholdings.

- **Article 5(2)(2) EUMR**

We agree with the Commission’s proposal to amend Article 5(2)(2). However, we would welcome further clarification on how the Commission intends to define the scope of Article 5(2), and particularly the ability to capture only cases of “real” circumvention (as in many cases the first transaction was already notified and cleared by an NCA).

- **Article 3(1) EUMR**

Parking arrangements have the added value of allowing for more liquidity in the marketplace by (i) enabling sellers of strategic businesses to maximise the sales price and

(ii) placing strategic purchasers on an equal footing with financial investors. In addition, the *Odile Jacob* case law shows that parking arrangements, if properly structured, will not lead to the acquisition of control for the purposes of Article 3(2).¹⁵ The proposed amendment would essentially be a complete ban on such parking arrangements, so we would urge the Commission to reconsider its position on such arrangements, which if structured properly to ensure no control over the target business during an interim period, could improve liquidity.

- **Article 17(1) EUMR**

We understand the Commission's concern that when the merging parties or third parties obtain commercially sensitive information in the context of merger proceedings, the Commission lacks an effective mechanism to enforce the obligation in Article 17(1) EUMR. We agree in principle with the Commission's proposal to amend Article 17(1) EUMR in order to protect the disclosing parties against the improper use or disclosure of confidential information. However, more details on the scope of application and limits of such sanctioning power would be necessary in order for us to fully endorse any legislative change.

- **Articles 6(3)(a) and 8(6)(a) EUMR**

We agree with the Commission's proposal to extend the scope of Articles 6(3)(a) and 8(6)(a) EUMR to confer analogous revocation power to the Commission for falsely obtained information for which one of the parties is responsible, in the context of Article 4(4) referrals.

E. Conclusion

We generally endorse the Commission's proposals towards a more effective merger control regime. We would look forward to further guidance from and dialogue with the Commission on the circumstances and conditions where the EUMR and/or accompanying instruments would be amended.

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¹⁵ See in particular Judgment of the Court of First Instance of 13 September 2010 in Case T-270/04, *Editions Odile Jacob SAS v European Commission*, at paras. 116-163, where the CFI conducted a thorough assessment of the provisions of the parking arrangement and concluded that it did enable Lagardère to acquire control of VUP. The Court of Justice did not take a position on whether the parking arrangement in that case amounted to an acquisition of control, but did not invalidate the General Court's findings either.