

## **CMA's response to consultation: 'Evaluation of procedural and jurisdictional aspects of EU merger control'**

1. The Competition and Markets Authority welcomes the opportunity to comment on the European Commission ("**Commission**") questionnaire relating to the "*Evaluation of procedural and jurisdictional aspects of EU merger control*" (the "**Evaluation Questionnaire**").<sup>1</sup>
2. The CMA refers to its previous replies to the Commission's Evaluation of procedural and jurisdictional aspects of EU merger control Roadmap, the Commission's consultation on its White Paper "*Towards more effective EU merger control*,"<sup>2</sup> and the response of the UK former competition authorities to the Commission's consultation on the Reform of the EU Merger Regulation ("**EUMR**").<sup>3</sup> The views expressed in this reply should be read in conjunction with those submitted in previous replies.
3. This reply focuses primarily on the specific issues that are raised in the Evaluation Questionnaire, and therefore sets out our comments in relation to the following issues:
  - a. The potential for further simplification in EU merger control:
  - b. The effectiveness of complementary jurisdictional thresholds (in particular based on the value of a transaction);
  - c. Possible changes to the case referral system; and
  - d. Certain other technical aspects of the procedural and investigative framework.
4. The CMA notes that the Commission has previously sought views on a number of proposed changes to the EUMR that are not explicitly mentioned again within the Evaluation Questionnaire. To the extent that these proposals remain under consideration, the CMA refers to the comments submitted on those proposals

---

<sup>1</sup> Available at [http://ec.europa.eu/competition/consultations/2016\\_merger\\_control/consultation\\_document\\_en.pdf](http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf)

<sup>2</sup> UK Competition and Market Authority's response to European Commission's consultation on the White Paper 'Towards more effective EU merger control', 3 October 2014, available at [http://ec.europa.eu/competition/consultations/2014\\_merger\\_control/uk\\_cma\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_merger_control/uk_cma_en.pdf)

<sup>3</sup> UK competition authorities' response to DG Comp's Consultation on Reform of the EUMR, of 20 September 2013 (available at [http://ec.europa.eu/competition/consultations/2013\\_merger\\_control/oft\\_and\\_cc\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_merger_control/oft_and_cc_en.pdf)).

in previous replies. Where appropriate (e.g., where the proposed changes previously considered are particularly relevant to matters considered in the Evaluation Questionnaire), the CMA has referred again to views submitted previously within this reply.

### ***Simplification of EU Merger Control***

5. As noted in previous submissions, the CMA supports the Commission's proposal to simplify the notification requirements in relation to certain transactions that will have no or limited impact on competition within the European Economic Area ("EEA") (e.g., the creation of a joint venture that will operate outside of the EEA and have no impact on European markets). The CMA welcomes the burdens that this should remove for businesses.

### ***The effectiveness of complementary jurisdictional thresholds***

6. The CMA continues to support the Commission's proposal to reconsider the effectiveness of the purely turnover-based thresholds currently used to determine EU jurisdiction.
7. In some sectors, depending on the nature of the product or service, the revenue earned by a company may understate its competitive significance. The CMA agrees with the Commission's position that this may be the case, for example, in markets where network effects are present, ie where there is commercial value in establishing a sufficiently large customer base and the expansion of a network is achieved through providing products or services at low prices (or at no price at all). Nevertheless, notwithstanding a potential "enforcement gap" in relation to such transactions at the EU level, there would be material risks incumbent in introducing of complementary jurisdictional thresholds within the currently well-functioning EU merger control regime.
8. Any changes to the EUMR intended to capture a wide range of transactions should therefore be based on credible evidence of a significant enforcement gap and be carefully tailored to address that gap, as well as being mindful of imposing unnecessary burdens on businesses.
9. The CMA refers to the views on these matters that have been submitted in its previous replies. Further comments on certain of the specific issues raised in the Evaluation Questionnaire are set below.

### ***The operation of referral mechanisms in digital economy transactions***

10. The Evaluation Questionnaire cites the 2014 acquisition of WhatsApp by Facebook as an example of a transaction that would not currently be captured by the turnover thresholds set out in Article 1 of the EUMR. This transaction

was, of course, ultimately investigated by the Commission pursuant to Article 4(5).

11. The fact that this transaction was ultimately reviewed by the Commission is therefore an indication that the current referral mechanisms work well (rather than that any “enforcement gap” exists). The Commission’s ability to review such transactions in Article 4(5) cases, is, however, dependent on the jurisdiction of individual Member States, and is therefore likely to depend on the existence of non-turnover based thresholds in at least three Member States. The CMA notes that three Member States – Spain, Portugal, and the UK – have each used non-turnover-based thresholds in the recent past, although the thresholds in Portugal have now been amended to the effect that there is no longer a notification threshold based exclusively on market shares. Accordingly, it may no longer be the case that there are three Member States that have non-turnover-based thresholds that would be triggered by such transactions (although the CMA notes that Germany is intending to introduce a new non-turnover-based threshold test which is currently under consideration in the Bundestag).
12. This suggests, in addition, that the Commission’s assessment of complementary jurisdictional thresholds should focus on addressing transactions that may raise competition concerns, but may not trigger an Article 4(5) or Article 22 referral.

#### *The effectiveness of non-turnover-based thresholds*

13. The Evaluation Questionnaire seeks views on the specific complementary jurisdictional criteria that would be helpful towards ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control review at EU level.
14. Within the context of the UK’s voluntary merger control regime, the “share of supply” test has enabled the UK competition authorities to investigate the competitive effects of a number of transactions in the digital sector, such as the acquisition by Google of Waze<sup>4</sup> and the acquisition by Facebook of Instagram,<sup>5</sup> which would likely not have met a purely turnover-based test.
15. In the CMA’s experience, the share of supply test has worked well within the UK’s voluntary system of merger control. The use of such a test – which

---

<sup>4</sup> Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited, OFT decision ME/6167/13 of 11 November 2013 <https://www.gov.uk/cma-cases/motorola-mobility-holding-waze-mobile-ltd>.

<sup>5</sup> Anticipated acquisition by Facebook Inc of Instagram Inc, OFT decision ME/5525/12 of 14 August 2012 <https://www.gov.uk/cma-cases/facebook-instagram-inc>.

requires a degree of judgment on the part of a competition authority and notifying parties – may, however, be more challenging and burdensome within a system of mandatory merger control, where more certainty is likely to be required as to whether threshold tests are met.

16. A “deal size threshold” i.e., a threshold test based on the value of a transaction, as mentioned in question 19 of the consultation, may be more straightforward for the notifying parties to apply in the context of the compulsory EU merger control regime as they are likely to be able to identify when the threshold is met. However, such a test would, of course, need to be carefully framed in order to provide sufficient legal certainty and guard against the risk of circumvention and to ensure the type of transactions which may lead to harm to competition are likely to be caught. This is particularly the case for transactions where the consideration is comprised of shares or assets (which will fluctuate over time) and where post-closing arrangements form part of the “price” that will ultimately be paid by the acquirer. In particular with regard to share deals, any threshold test would need to take volatility into account, for example by setting a specific date relevant for valuation. In addition, the CMA considers that such a threshold would need to be regularly assessed in order to ensure that it remained effective (by capturing the transactions that it was intended to address without imposing an undue burden on business).

#### *Ensuring the existence of an EU dimension*

17. The Evaluation Questionnaire rightly highlights, in Question 21, the importance that the transactions that are covered by any complementary threshold should have a ‘significant economic link with the EEA’. The Evaluation Questionnaire suggests that either a “measurable impact” test or “industry-specific criteria” could be used to ensure a local nexus.
18. The CMA has concerns about how a general clause stipulating that concentrations which meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA (i.e. an effects based test)) would operate in practice. This test would require a degree of judgment on the part of the Commission and merging parties on a case-by-case basis. As with a market share-based threshold, such a test may not provide sufficient certainty within a system of mandatory merger control (even where additional guidance on its interpretation is provided).
19. The use of “industry-specific” criteria to determine whether an economic link exists would require detailed consideration (in particular because, in practice, the boundaries between specific industries can be difficult to define with clarity).

20. In addition, neither of these tests would ensure that the principles of subsidiarity and proportionality, which underpin the EU system of merger control, are appropriately taken into account. Accordingly, additional criteria such as, for example, a minimum number of customers/users across a certain number of Member States (or some other metric intended to capture cross-EU economic activity) would be necessary to ensure that the complementary thresholds capture cases with an EU dimension where the Commission may be best placed to consider the case, rather than the competition authority of a Member State.

### ***Possible changes to the case referral system***

21. The CMA agrees with the position set out in the Evaluation Questionnaire that there is scope for simplification of the EU case referral system, in particular to reduce the burden on the notifying parties and to ensure that the division of competences between the Commission and Member States (and amongst Member States) operates as effectively as possible.

### ***Referrals pursuant to Article 4(5) of the EUMR***

22. The CMA agrees with the Commission's proposal to streamline Article 4(5) referral process by allowing the parties to submit a Form CO directly to the Commission, without the need to submit a Form RS. This should reduce the burden on the notifying parties without prejudicing the Commission's consultation and engagement with Member States.
23. The CMA considers that this reform should be accompanied by a mechanism to ensure that Member States are notified about an Article 4(5) request quickly (e.g., as soon as the Commission initiates discussions with notifying parties about a possible Article 4(5) referral request).
24. The CMA also agrees with the EC's proposal in its White Paper to automatically reject jurisdiction, and therefore avoid a partial referral, where one Member State with jurisdiction to review the merger opposes an Article 4(5) referral request (although the Evaluation Questionnaire does not explicitly mention this proposal). The elimination of the EC's discretion in such circumstances should help to optimise procedural efficiency but reducing the scope for duplication and fragmentation between EC and national merger control processes that might otherwise arise. The CMA therefore considers that such a proposal is a key aspect of a well-functioning referral mechanism.
25. For the avoidance of doubt, the CMA notes that jurisdictions such as the UK, in which the merger control regime is voluntary, should be considered as having jurisdiction to review a merger for the purpose of an Article 4(5) referral request.

#### *Referrals pursuant to Article 4(4) of the EUMR*

26. The CMA agrees with the Commission's proposal to change the substantive test in Article 4(4) EUMR that currently requires the parties to submit that a merger may "*significantly affect competition in a market*" within a Member State. As noted in the CMA's previous submissions, this should eliminate any perceived element of "self-incrimination" that this legal requirement may entail and should, in turn, help to encourage notifying parties to make efficient use of the referrals system.
27. As a general matter, the CMA reiterates the importance of early engagement between the Commission and Member States within Article 4(4) referral processes. Such early engagement is key to enabling Member States to prepare for the potential referral of a merger, in particular by initiating pre-notification discussions with the notifying parties. This reduces the post-referral review period in Article 4(4) referrals and is particularly relevant in jurisdictions, such as the UK, in which the statutory deadline for the review of a merger commences immediately after the referral of a merger from the Commission.
28. The Commission, in its White Paper, has previously sought views on whether the 15 working day period currently provided to Member States to agree or disagree to referral requests under Article 4(4) and Article 4(5) could be shortened (although the Evaluation Questionnaire does not explicitly mention this possible change). The CMA reiterates that it would not consider it appropriate to reduce these consultation periods. It is important that sufficient time is provided for Member States to be able to consider carefully whether the Commission or a Member State is better placed to review a transaction and to communicate a reasoned position to the Commission. The CMA considers that a consultation period shorter than the current 15 working day period would not be suitable for this purpose.

#### *Referrals pursuant to Article 9 of the EUMR*

29. The Evaluation Questionnaire does not appear to propose any specific changes to Article 9.
30. As the CMA has noted in previous replies, there may be scope to improve the operation of certain aspects of the Article 9 referral process including, in particular, by:
  - a. Reducing the deadline by which the Commission has to decide on an Article 9 referral request, in particular the 65 working days deadline (which would avoid a long period of uncertainty and potentially reduce the overall merger review period in case of referral); and

- b. Eliminating the possibility of a “tacit” rejection of an Article 9 referral request (so that the Commission would be required to expressly reject an Article 9 request and reason its decision).

#### *Referrals pursuant to Article 22 of the EUMR*

- 31. The CMA continues to support the Commission’s proposals set out in the Evaluation Questionnaire to improve and simplify the Article 22 referral process. The CMA considers that the proposed changes may reduce some of the uncertainties previously experienced with the current Article 22 referral process and allow the benefits of the one-stop-shop system to be fully realised.
- 32. The CMA notes that there are certain other potential changes to the Article 22 referral process (raised by the Commission in previous consultations but not explicitly considered within the Evaluation Questionnaire) that would have similar beneficial effects.
- 33. In particular, the CMA notes the merit in additional measures that would reduce the information “gaps” that could arise where merger control filings are Member State level are “staggered” (which may impede individual Member States in considering whether assessment at the Commission level would be more appropriate on the facts of a given case).
- 34. It is not clear whether it is envisaged that measures to address these “gaps” would be included within the proposals set out in the Evaluation Questionnaire. The CMA therefore reiterates that the introduction of a mandatory early notification system for multi-jurisdictional mergers would be an important aspect of a suite of measures intended to reduce the uncertainty around the current Article 22 referral process and ensure that the benefits of the one-stop-shop system are fully realised.

#### ***Other technical aspects of procedural and investigative framework***

##### *Investigation time limits in Phase II merger cases*

- 35. The Evaluation Questionnaire proposes introducing “*additional flexibility*” regarding the time limits in the Commission’s investigations, in particular in Phase II merger cases.
- 36. In principle, the CMA supports the Commission’s proposal. The CMA notes that unnecessarily long merger control proceedings can impose an undue burden on merging parties. An extension of the time limits could, however, be used to further enhance the decision-making process in complex cases, in particular by strengthening the parties’ right to be heard and helping the Commission to take appropriate account of those views. It would, for example, also help to

ensure that Advisory Committee members are provided with timely access to documents (such as the statement of objections or draft decisions),<sup>6</sup> and are able to submit their views for the Commission's consideration in good time. In this regard, this proposal could lead to more robust decisions which in turn would benefit European consumers and businesses.

*Potential revocation of referral decisions based on deceit or false information*

37. The Evaluation Questionnaire also proposes amending the EUMR to clarify that a referral decision, based on deceit or false information for which one of the notifying parties is responsible, may be revoked.
38. There would, of course, be strong arguments for revoking a referral decision issued on such a basis. However, the potential effects of such a revocation (assuming that this would restore the legal force of Article 21(3), remove a Member State's jurisdiction, and render any decisions made under national law *ultra vires*) would require such a mechanism to be carefully framed.
39. In particular, there should be an appropriate procedural framework that would enable proper consideration of:
  - a. The period of time within which the Commission could consider whether such a revocation should be made (and, in particular, how this interacts with the timing of merger control procedures at the Member State level);
  - b. Whether the merger would continue to meet the legal criteria for referral (notwithstanding that the original referral decision was based on false information or deceit), or whether there were reasonable grounds to consider that the Commission or other Member States would be better placed to review the merger; and
  - c. Whether a partial revocation might be more appropriate (e.g., where a Member State has already completed the review of the merger for a given jurisdiction, particularly where measures have been taken to address concerns identified within that review).

---

<sup>6</sup> See paragraph 17 of the [Working Arrangements for the functioning of the Advisory Committee on concentrations](#).