13 January 2017

INTERNATIONAL BAR ASSOCIATION
ANTITRUST COMMITTEE

SUBMISSION TO THE DIRECTORATE-GENERAL FOR COMPETITION OF THE COMMISSION OF THE EUROPEAN UNION REGARDING THE CONSULTATION ON EVALUATION OF PROCEDURAL AND JURISDICTIONAL ASPECTS OF EU MERGER CONTROL

13 January 2017

To:

Unit A-2, Directorate-General for Competition
European Commission
1049 Bruxelles / Brussel
Belgique /België

Ref.: HT.3053

By email and electronic submission: COMP-A2-MAIL@ec.europa.eu

Dear Sir,

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis on international competition policy issues. Further information on the IBA is available at http://www.ibanet.org.

This submission is made to the Directorate-General for Competition of the European Commission on behalf of the Merger Working Group ("***the Working Group***") of the Antitrust Committee of the IBA.

The Working Group is grateful for this opportunity to comment on the proposed consultation and appreciates the willingness of the DG Competition to consider its comments and suggestions. The Working Group's comments and recommendations draw on the members' experience of competition law and practice in the European Union and internationally.

The Co-Chairs of the Working Group and Officers of the Antitrust Committee of the IBA would be delighted to discuss the following submission in more detail, should that be of interest.

Sincerely,

Janet McDavid

Pieter Steyn

Co-Chairs, Antitrust Committee

I. INTRODUCTION

This submission is made to the European Commission's Directorate General for Competition ('**Commissio**n') on behalf of the Working Group ('**Working Group**') of the Antitrust Committee of the International Bar Association ('**IBA**').[1]

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org.

The Working Group hopes to contribute constructively to the Commission's consultation on its proposals. The Working Group's comments draw on the vast experience of the IBA's members in merger control law and practice within the EU and other major merger control merger control jurisdictions across the globe. The contributors to the Working Group's submission are listed in Annex 1.

The Working Group appreciates the Commission's ongoing efforts to review and revise the EU Merger Regulation (the '**Merger Regulation'** or '**EUMR**') to make the EU system of merger control more effective and efficient. The Working Group welcomes, in particular, the Commission's consideration of further refinements to the simplified procedure, as well as the referral system and certain technical aspects of merger control. With respect to possible amendments to the Merger Regulation's jurisdictional thresholds, the Working Group appreciates the Commission's assessment of whether an enforcement gap exists, but respectfully submits that there is not a sufficient justification for amending the thresholds at this time.

II. SUMMARY

Simplified Procedure

The Working Group welcomes the Commission's review of the simplified procedure. Overall, the Working Group believes that it has had positive effects on the review of transactions under the Merger Regulation, primarily by making more transactions eligible for simplified treatment. The Working Group, however, believes that further refinement can be achieved saving valuable resources both for business and the European Commission itself without creating risks to competition. Specifically, the Working Group recommends that:

- Transactions falling within the Merger Regulation's jurisdiction but having no plausible link with the EEA - namely, 'extra-EEA joint ventures', be deemed to be approved under a block exemption or similar mechanism;

[1] This submission does not necessarily reflect the views of the organisations at which individual members of the Working Group are employed.

- Other non-problematic transactions, such as transactions involving a lack of horizontal overlap or vertical link, and transactions involving a change from joint to sole control, while also remaining within the Merger Regulation's jurisdiction, be eligible for a lighter procedure, either involving a brief information notice in lieu of a Short Form CO or a system of self-assessment;

- The Short Form CO be refined to eliminate the requirement on parties to identify 'all plausible markets' and limit the obligation to submit internal documents, to avoid burdensome and disproportionate requirements in the context of transactions that are not likely to raise any competitive concerns.

Jurisdictional Thresholds

The Working Group recognises the Commission's concern that the Merger Regulation's current thresholds may prevent it from being able to review certain transactions that may impact competition. However, at this time, the extent of any such enforcement gap is unclear, and it is equally unclear whether a significant change to the Merger Regulation's thresholds would be necessary or proportionate to address any perceived enforcement gap. In this respect, the Working Group submits that more research and assessment is needed.

In any event, it is notable that the notification thresholds in Germany are in the process of being amended to include a threshold based on transaction value. The Working Group submits that this presents the Commission with a valuable opportunity to gather information on the effects of introducing such a test and assess the existence and extent of any enforcement gap and the appropriateness of a threshold test based on transaction value as well as practical challenges associated with such a test.

If the Commission nevertheless considers that there is sufficient evidence for a gap that should be addressed through an amendment to the Merger Regulation's thresholds (with the cumbersome legislative process and heavy resources that such an amendment would require), the Working Group looks forward to an opportunity to provide more detailed comments on specific proposals. The Working group submits that any such proposals should comply with ICN recommended practices and ensure legal certainty (clear jurisdictional test), sufficient nexus with the jurisdiction concerned, and avoid over-inclusion of benign transactions that would unnecessarily raise transactional costs and deter economically beneficial investments, in particular in innovative start-up companies the business model of which may also include the existence of an effective and easily implemented exit option.

Referrals

The Working Group is of the view that the current referral system generally works well, although certain additional amendments are appropriate. In particular, the Working Group considers that Articles 4, 9, and 22 of the EUMR should be amended to shorten the time limit for a National Competition Authority ('**NCAs**') and the Commission, as the case may be, to decide on referral requests.

Technical Aspects

Finally, the Working Group welcomes the Commission's consideration of certain technical aspects of notification. In particular, the Working Group offers recommendations in respect of timing of merger reviews. Specifically:

- The Working Group submits that the submission of remedies in Phase 2 cases should automatically trigger a 15 working day extension, if offered after a Statement of Objections is issued and irrespective of whether this occurs before or after the 55th working day.

- The Working Group also suggests that the Commission consider expanding the extension of time in Phase 1 cases to 15 working days instead of 10 working days in cases where remedies are offered. This would facilitate market testing and avoid the need to conduct a Phase 2 investigation as a result of insufficient time in Phase 1 to assess remedies.

III. SIMPLIFICATION (IV.1)

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

(1 = "did not create much added value"; 7 = "created much added value"):

Response: 6

The Working Group welcomes the Commission's initiative to review the impact of the Simplification Package. As a starting point, the one-stop shop review under the Merger Regulation creates efficiencies by – among other things – eliminating the need for multiple reviews of transactions fulfilling the Merger Regulation's thresholds. As such, the one-stop shop review has enhanced the overall efficiency of enforcement and created value for businesses and consumers.

The one-stop shop review at the EU level for transactions that fulfil the criteria for the simplified procedure has created further significant benefits by reducing the burden with respect to transactions that are unlikely to create any competitive harm. This has reduced time and costs for companies that are parties to transactions, and the Working Group believes that the Simplification Package has thus created added value for both businesses and consumers by expanding the categories of cases that may benefit from the simplified procedure. Indeed, statistical data confirms that a larger proportion of notified transactions – 10% more – have been handled under the simplified procedure following the introduction of the Simplification Package.

While the Working Group believes that the Simplification Package has contributed to refining the process for dealing with straightforward transactions, the Working Group believes that there are some areas where further improvements could be made. These are detailed in our responses below.

Further simplification of the treatment of certain categories of non-problematic cases

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);
Response: Yes

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);
Response: Yes

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);
Response: Yes

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).
Response: Yes

Treating cases that are unlikely to present any competition concerns under the simplified procedure significantly reduces burdens on companies compared to the normal procedure. The amendments to the simplified procedure in the 2013 Simplification Package overall enhanced the scope of transactions benefiting from simplified treatment and streamlined notification requirements and procedures in respect of the most benign cases.

However, in certain respects, the Simplification Package also increased certain burdens for parties to transactions treated under the simplified procedure by introducing certain new requirements, discussed in response to Question 6, below.[2] Thus, while the simplified procedure continues to benefit companies compared with the normal procedure, the Working Group suggests that further refinements should be considered.

Transactions falling under point 5(a)

The application of the simplified procedure to joint venture transactions with no or limited

[2] *See* Submission of the Working Group of 19 June 2013 in response to the Commission's consultation on Proposed Changes to the Simplified Procedure Under the EU Merger Regulation and Related Changes.

activities in the EEA is beneficial, reducing burdens for companies and for the Commission compared with the normal procedure. These transactions were already eligible for simplified treatment in the Commission's prior notice on the simplified procedure[3] But the Simpliifcation Package reduced information burdens for these types of transactins creating a de facto category of "super simplified" treatment. The Working Group welcomes this development and applauds the Commission for simplifying the notification requirements for such offshore joint ventures. However, the notification burdens remain significant in light of the fact that such transactions can have no conceivable impact on competition in the EEA and we provide further comments on their treatment below.

Transactions falling under point 5(b)

The application of the simplified procedure to transactions having neither a horizontal nor a vertical overlap is beneficial, and certainly reduces burdens compared with the normal procedure.

However, these transactions were also eligible for simplified treatment in the Commission's prior notice on the simplified procedure. Point 22 of the Notice further suggested that pre-notification may be dispensed with for this category of transactions, which, where appropriate, represents further cost and time savings compared with the normal procedure. The Working Group, however, believes that this dispensation with the requirement to pre-notify has not really been used in practice and further guidance could be provided in this respect.

Transactions falling under point 5(c) or point 6

The Simplification Package expanded the number of transactions with limited horizontal overlaps and vertical links that qualify for the simplified procedure under point 5(c) or point 6 by increasing the applicable market share thresholds and by introducing a new threshold based on HHI deltas.. In addition the Simplification Package did helpfully clarify that in relation to the acquisition of joint control over a JV, relationships that exist only between the parents outside the field of activity of the joint venture are not considered horizontal or vertical relationships for the purposes of determining whether the simplified procedure should apply.

These amendments are to be welcomed, and clearly enhance procedural efficiency in the sense that a larger number of transactions that are unlikely to present any competitive concerns can use the simplified procedure, reducing burdens for companies and conserving Commission resources compared with what is required for the normal procedure.

Transactions falling under point 5(d)

The application of the simplified procedure to transactions involving a change from joint to sole control is beneficial, and certainly reduces burdens compared with the normal procedure. However, these transactions were also eligible for simplified treatment in the Commission's prior notice on the simplified procedure. The Simplification Package – importantly –

[3] Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 (2000/C 217/11).

confirmed that this category of transactions would continue to be eligible for the simplified procedure. Apart from this, the Working Group believes that its further impact on this category of transactions has been limited and further simplification could be achieved as we note in our comments below.

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase: [Yes/No]

As this question concerns specific individual cases, not policy initiatives, we have chosen not to respond to this question.

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

(ii) Post notification: [Yes/No]

As this question concerns specific individual cases, not policy initiatives, we have chosen not to respond to this question.

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

4. Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure? [Yes/No]

As this question concerns specific individual cases, not policy initiatives, we have chosen not to respond to this question.

Please explain under which category of simplified cases it fell and the reasons why the case was notified under the normal procedure.

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

Response: Yes

Please explain

The Working Group welcomes the Commission's consideration of additional categories of cases that are not likely to raise competition concerns. In the view of the Working Group, the current categories covered in points 5 and 6 of the Notice are generally comprehensive.

However, the Working Group notes that point 5(c) applies to cases involving limited horizontal overlaps, where the combined market share of the parties to the concentration is less than 20%. However, the Commission's horizontal merger guidelines contain guidance on the level of market share below which the Commission is likely to find that a transaction is non-problematic and is '*not liable to impede effective competition*'. That figure is set at 25% in the Commission's horizontal merger guidelines[4] and in the recitals to the Merger Regulation itself.[5] The Working Group thus suggests that the Commission consider whether there is scope to increase the horizontal market share threshold for transactions to qualify for the simplified procedure to 25%.[6]

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

Response: Other

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- **Transactions falling under point 5a of the Notice:**

Response: Other

- **Transactions falling under point 5b of the Notice:**

Response: Other

- **Transactions falling under point 5c or point 6 of the Notice:**

Response: Other

- **Transactions falling under point 5d of the Notice**:

[4] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings,* para. 18.
[5] See Merger Regulation, recital 32.
[6] *See* Submission of the Working Group of 19 June 2013 in response to the Commission's consultation on Proposed Changes to the Simplified Procedure Under the EU Merger Regulation and Related Changes.

Response: Other

In the Working Group's experience, the simplified procedure is a positive and efficient tool. It enables the Commission to review transactions with a Community dimension on a 'one stop' basis, while appropriately reducing burdens on companies whose transactions are unlikely to result in harm to competition.

The simplified procedure, however, still involves significant costs to companies, both in terms of time and internal/external expenses. In many cases, the Working Group submits that costs exceed what is necessary to achieve the objective of the Merger Regulation. The Working Group believes that there are opportunities for the Commission to streamline the simplified procedure further, without compromising the Merger Regulation's objective. These opportunities are summarized below and addressed in greater detail in the response to Question 8, below.

Streamlining the Approval of Certain Transactions

At a broad level, the Working Group believes that the costs to businesses notifying certain transactions, notably including 'offshore' or 'extra-EEA' joint venture transactions, is disproportionate, even under the simplified procedure (point 5(a)). These transactions have no conceivable impact on competition in the EEA and thus it could be argued that they do not clearly satisfy the criteria of the effects doctrine which would justify the application of EU law to them under aspects of public international law,[7] even when they fulfil the jurisdictional thresholds of the Merger Regulation. Yet, the internal and external costs of notifying these transactions are significant and thus disproportionate. These transactions could therefore be excluded from the scope of the EUMR. However, the Working Group submits that – as long as such transactinos could be caught by the national laws of EU member states – via similar overreach –it would be preferable to retain the benefit of the one stop shop and continue to subject those transactions to the jurisdiction of the Commission under the EUMR (where all the EUMR criteria are met) but under an automatic exemption procedure. Such transactions could be deemed to be approved by the Commission, through a block exemption or similar mechanism. This is further addressed in response to Question 8, below.

The Working Group further believes that the cost and effort of notifying certain categories of transaction, in particular, transactions involving a change from joint to sole control and transactions involving no overlap, are disproportionate. These transactions are also generally unlikely to result in any harm to competition. For these transactions, the Working Group recommends that the Commission consider either implementing a form of self-assessment or replace the Short Form CO with a short information notice. This is further addressed in response to Question 8, below.

Possible Reforms to the Short Form CO Requirements

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[7] Since 2009, the Swiss authority considers that extra-Swiss JVs are not subject to any merger control notification even if the parent companies fulfill the Swiss threshold if the JV does not have any activity/sales (current or planned) in Switzerland. The Swiss authority, in line with ICN recommended practices, considers that even if the notification thresholds are technically fulfilled, the transaction does not have any effect in Switzerland and is therefore outside of the scope of the Swiss Cartel Act. The experience by the Swiss authority seems to be positive. There are no signs that this approach will be changed or challenged.

At a more granular level, the Working Group believes that the Simplification Package introduced certain requirements that create new and disproportionate burdens for parties to transactions that by their nature are unlikely to harm competition. These include the new requirement that parties identify '*all plausible market definitions*' and the requirement to submit internal documents in response to Item 5(3) of the Short Form CO. The Working Group recommends that the Commission consider relaxing or eliminating these requirements for the reasons that follow:

'All Plausible Market Definitions'

As part of the Simplification Package, Point 8 of the Notice requires that notifying parties seeking to benefit from the simplified procedure under points 5 or 6 of the Notice identify '*all plausible market definitions*'. Point 8 also provides that notifying parties must provide '*data and information relating to the definition of such markets*,' and that discussions of alternative plausible markets should take place during pre-notification.

Experience has shown that pre-notification consultations with the Commission case team and the decision as to whether a concentration qualifies for the simplified procedure can become burdensome and time consuming, in particular because of the market definition process. In the Working Group's experience, the requirement for parties to identify "all plausible market definitions" creates undue burdens and increases the workload of parties who already frequently struggle to provide market data, which is often not readily available. In addition, it can be time consuming and costly for parties to develop reasonable estimates for the markets in which they compete. Providing estimates for various alternative market definitions – which may not reflect market reality – can add significant time and cost burdens. In addition, the parties are responsible for the correctness of the data provided to the Commission, which is difficult when parties can only guess at the size of markets and market shares under hypothetical market definitions that may not reflect day-to-day business operations.

It is essential to keep in mind the context in which these burdensome requirements arise; specifically, transactions that are subject to the simplified procedure by their nature are unlikely to present any risk to competition. The Working Group thus suggests that the Commission consider refocusing the requirement that notifying parties identify all plausible market definitions, for example by replacing it with a requirement that notifying parties identify all reasonable alternative market definitions and applying this requirement more pragmatically in practice (by providing guidance that only truly reasonable market definitions on the basis of Commission precedent and established practice would be considered rather than hypothetical "nice to have" market segments). This would appropriately reduce the burden on companies and would not create any risk of undermining the objective of the Merger Regulation.

Short Form CO, Section 5(3) Documents

As part of the Simplification Package, the Commission introduced a new requirement in the Short Form CO requiring companies to concentrations with a reportable market(s) to submit certain internal documents. Specifically, this includes '*copies of all presentations prepared by or for or received by any members of the board of management, or the board of directors, or the supervisory board, as applicable in light of the corporate governance structure, or the* *other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing the notified concentration.*' (Short Form CO, Section 5(3)).

While the Working Group understands the Commission's wish to review internal documents analysing the notified concentration, the Working Group submits that this requirement is still burdensome and may be unecessary in the case of transactions assessed under the simplified procedure, which are presumed not to raise competition concerns (the requirement did not exist prior to the recent reform of the Short Form CO). Significant information is still required by the Short Form CO (unlike e.g. under the HSR notificiation forms in the United States) and in pre-notification to ensure that the transaction qualifies for the simplified procedure. It is therefore difficult to see why additional document production is required for transactions that are unlikely to create any risk to competition.

Overall, while the Working Group believes that the simplified procedure continues to provide significant cost savings compared with the normal procedure, certain requirements remain burdensome – such as those identified above. The Working Group suggests that the Commission consider further streamlining the simplified procedure to eliminate requirements that are disproportionate for transactions that present no material risk to competition.

7. To which extent have such costs (in terms of workload and resources spent) been reduced by the 2013 Simplification Package? Please explain.

The Working Group believes that the Simplification Package reduced the time and cost associated with notifying transactions by increasing the scope of the simplified procedure as explained above, and thus enabling more transactions that present little or no risk to competition to benefit from simplified treatment. This is confirmed by statistical data, indicating that the proportion of notified transactions that benefit from the simplified procedure has increased by 10% since the introduction of the Simplification Package in late 2013.

However, as noted in response to Question 6 above, the Simplification Package introduced certain new burdens, which limits the reduction in costs attributable to this reform. By reducing these burdens going forward the Working Group believes that further appropriate cost reductions will be realized.

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

Response: Yes

<u>If you replied yes or other</u>, do you consider that there is scope for further simplification by, in particular:

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the

Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

Response: Yes

Please explain.

While the Working Group believes that certain transactions categorized under point 5(a) of the Notice, namely extra-EEA joint ventures, arguably do not fall within the scope of EU law under public international law and the effects doctrine, the Working Group submits that such cases should continue to benefit from benefit from the "one stop shop" jurisdiction under the Merger Regulation to the extent that national laws of EU member states continue to apply to such transactions via similar extraterritorial overreach. While remaining within the EUMR, however, such joint ventures should be relieved from the obligation to notify and should be deemed approved automatically, for example, via a block exemption regulation. In addition, the Working Group believes that consideration should be given to whether the notification of certain transactions, including those resulting in a change from joint to sole control (point 5(d)) and those without an overlap (point 5(b)), could also be further streamlined.

Transactions falling under point 5(a) – Extra-EEA joint ventures

Extra-EEA joint ventures are those that will be active on markets outside of the EEA and which do not and will not foreseeably generate EEA turnover. These extra-EEA joint ventures fall within the scope of the Merger Regulation solely as a result of the EEA turnover of their parent companies' corporate groups, which are often themselves established outside of the EEA. Although as a matter of international public law, it may be argued that EU law should not be applicable to these transactions where they can have no plausible impact on competition within the EEA, they must still be notified to the Commission. The Working Group thus believes that requiring the notification of these transactions, even under the simplified procedure, is not clearly in line with ICN recommended practices, creates a disproportionate burden on parties and unnecessarily diverts Commission resources to matters that do not affect competition in the EEA. Beyond the wasteful effects of such an approach with regard to EU notification requirements, such an approach also creates an unhlepful international precedent that – given the influence of EU law as guidance to legislators in other jurisdictions – is likely to increase merger control burdens by increasing the notification requirements in multi-jurisdictional cases.[8]

Nevertheless, he Working Group accepts the benefits of these transactions remaining subject to the Merger Regulation when the jurisdictional thresholds are met if otherwise the national laws of EU members states would – via similar over-reach – apply to these transactions, as this would enable them to benefit from the 'one stop shop' and be assessed at the Community level. At the same time, the Working Group recommends that the Commission deem extra-EEA joint ventures to be approved under a block exemption or similar mechanism. In other words, where certain criteria are met, parties to an extra-EEA joint venture could, with certainty, consider their transaction to be approved.

[8] *See* Submission of the Working Group of 19 June 2013 in response to the Commission's consultation on Proposed Changes to the Simplified Procedure Under the EU Merger Regulation and Related Changes, pp. 13-14.

The Working Group believes that such an approach would significantly reduce burdens on companies, ease the burden on scarce Commission resources and would not create any material risk to competition in the EEA. It would also send a strong signal to other jurisdictions which may consider applying their laws to extraterritorial transactions which lack local effects that such transactions should not be subject to local notification requirements.

Transactions falling under point 5(b) – no overlap and point 5(d) – joint to sole control

The Working Group considers that a more streamlined approach could be applied to transactions falling under point 5(b) and point 5(d) of the Notice – i.e., transactions involving no overlap or vertical relationship, and transactions involving a change from joint to sole control. These transactions are generally unlikely to result in harm to competition in the EEA, yet must be notified when the Merger Regulation's thresholds are met.

These transactions should remain subject to the Merger Regulation, as this enables them to benefit from the 'one stop shop'. However, there is significant scope to simplify the treatment of these transactions. Specifically, the Working Group recommends that the Commission consider either implementing a form of self-assessment, or alternatively introduce a light information notice in lieu of requiring a Short Form CO. This is further addressed in response to Question 8.2 (information notice) and 8.3 (self-assessment), below.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

Response: Yes

Please explain.

As explained above, the Short Form CO is much less burdensome than the full Form CO used in the normal procedure. However, the Short Form CO still imposes heavy burdens on parties to transactions that presumably will not create harm to competition and are thus disproportionate for transactions that are incapable of impacting competition in the EEA.

One way that this burden can be alleviated is to replace the Short Form CO with an information notice in certain cases. This could include cases involving neither a horizontal overlap nor vertical link, or cases involving a change of joint to sole control. (As mentioned in response to Question 6 and 8, the Working Group believes that transactions falling under category 5(a) (extra-EEA joint ventures) should be deemed approved without a notice or notification of any kind.)

The design details associated with the introduction of an information notice will be important to ensure that legal certainty is not sacrificed. The Working Group suggests that, conceptually, an information notice would require the parties to provide basic information – for example, about themselves, the transaction and the industries involved but that it would not include market data, in particular market shares (as this immediately creates burdens in light of the fact that it is not straightforward to identify "relevant markets"). The Commission would then have a limited amount of time, for example, 15 working days, in which to decide whether to investigate during which the suspension obligation would apply. If the Commission decided to investigate, parties would be obliged to submit a Short Form CO. On the other hand, if at the end of 15 working days the Commission declined to investigate or did not react, the parties could close the transaction with legal certainty. No decision would need to be published.

The Working Group believes that an information notice requirement for certain transactions could significantly streamline the burden on parties to transactions that are not capable of impacting competition in the EEA. At the same time, such a system could include safeguards that would enable the Commission to investigate if it considered further assessment necessary. Thus, such a system would reduce administrative burdens on parties and reduce burdens on Commission resources, without creating risks to competition in the EEA.

8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

Response: Yes

Please explain.

As an alternative, a self-assessment system could also reduce burdens on parties and the Commission with regard to certain, non-problematic transactions that would otherwise be notified using the Short Form CO – namely, transactions falling under points 5(b) or 5(d) of the Notice. Self assessment can, however, reduce legal certainty and create additional complications (in particular in light of the referral system, the interaction that such cases would have with national requirements, the Commission's powers to intervene in certain situations etc.).

If the Commission were minded to introduce self-assessment for certain categories of transactions eligible for the simplified procedure, the Working Group suggests that certain procedures be introduced to guard against a loss of legal certainty as far as possible. In particular, the Commission should introduce clear guidance to help parties understand the cases in which the Commission is likely to intervene. This will help parties determine whether their case is appropriate for non-notification under a self-assessment scheme. In addition, to ensure that legal certainty is not sacrificed, parties should also have the opportunity to voluntarily notify their transactions to the Commission – even if their transaction qualifies for self-assessment.

In addition, any system of self-assessment would also need to be accompanied by a firm time limit after which the Commission cannot intervene. In the UK system, for example, the Competition and Markets Authority ('CMA') can intervene only within four months of the transaction being made public, or the time when the CMA was told about it.[9]

Overall, assuming appropriate safeguards are put in place, the Working Group believes that a system of self-assessment would also be an appropriate way to reduce the disproportionate burdens of notification on clearly non-problematic transactions while not creating risks to competition.

8.4 Other

Response: No

Please explain.

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

Risks and possible mitigation are discussed in response to Questions 8.1-8.3, above.

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ('extra-EEA joint ventures') can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

Response: No

Please explain.

The Working Group believes that the requirement to notify extra-EEA joint ventures with a

[9]Mergers: Guidance on the CMA's jurisdiction and procedures, Section 4.3, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf

Community dimension creates significant burdens for parties to such transaction, and diverts Commission resources from matters that can potentially impact the EEA. Correspondingly, the Working Group believes that the review of such transactions by the Commission has not contributed to the protection of competition and consumers in Europe. To the contrary, competition and consumers in Europe would be better protected if the Commission focused its scarce resources on matters that actually impact the EEA. In the Working Group's view, such transactions, if made subject to the application of the Merger Regulation for practical purposes (i.e., preserving the one stop shop-principle) should be deemed to be approved under the Merger Regulation.

10. Has this one stop shop review at EU level of extra-EEA joint ventures created added value for businesses and consumers?

Response: No

Please explain.

As explained in response to Question 1, for most types of transactions, the Working Group believes that the one-stop shop review of concentrations creates value for businesses and consumers, where there would otherwise exist a burden of multiple notifications at national level. This extends to extra-EEA joint ventures that fulfil the Merger Regulation's jurisdictional thresholds.

The Working Group believes that extra-EEA joint ventures should be deemed to be approved under the Merger Regulation, which would also enable them to continue to benefit from 'one stop shop' review. An alternative scenario could involve an extra-EEA joint venture being subjected to multiple Member State-level notifications, which would be a potentially more burdensome and less efficient outcome. The Working Group believes that ideally the Commission and the national competition authorities would reach a consensus that – in light of public international law and ICN recommended practices and the fact that such transactions are truly non-problematic in substance in any event – such transactions are outside the scope of their respective merger control laws. Failing such a consensus, the 'one stop shop' review thus continues to be an important feature of the Merger Regulation, including for extra-EEA joint ventures.

11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

Response: No.

Please explain.

The notification of extra-EEA joint ventures requires the submission of a Short Form CO, which, while abbreviated compared with the full Form CO, still requires significant information – which imposes burdens of time and cost on the parties. The Working Group believes that extra-EEA joint ventures present no material risk to competition in the EEA (in fact they have no real nexus with the EU) and therefore considers that the costs incurred by businesses to notify extra-EEA joint ventures are disproportionate to the risk that such transactions actually present. In addition, there are further costs associated with the need to file notifications in jurisdictions outside the EU that model their laws in light of EU law and apply their laws to transactions that do not produce any effect in these jurisdictions. For this reason, the Working Group believes that the Commission should deem extra-EEA joint ventures with a Community dimension to be approved without the need for the parties to submit a notice or notification, and without the need for the Commission to issue a decision.

12. To which extent have such costs been reduced by the 2013 Simplification Package? Please explain.

In the Working Group's view, the Simplification Package did reduce the cost of notifying extra-EEA joint ventures somewhat but did not go far enough. The Working Group notes that, for these transactions, the Simplification Package introduced a 'super-simplified' notification, requiring information concerning the transaction, the parties' business activities and turnover figures. In practice, however, experience has shown that the super-simplified approach – while welcome – has not reduced costs significantly because in practice information burdens are still material (including often on jurisdictional issues such as joint control and full functionality or questions relating to the market activities of the parties). The Working Group believes that the more appropriate approach would be to deem such transactions approved without the need for parties to submit a notice or notification, and without the need for the Commission to issue a decision.

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

Response: There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address/dispel such risks.

As explained above, the Working Group believes that extra-EEA joint ventures could be deemed to be approved under the Merger Regulation without creating any risk to competition.

The Working Group appreciates the Commission's concern over specific risks that should be associated with simply deeming extra-EEA joint ventures approved under the Merger Regulation. However, the Working Group does not believe that these concerns present significant risks in practice. In the event that the scope of activity of the joint venture is expanded at a later stage, the Commission has tools to review that activity. For instance, future transfers of EEA businesses from parents to an extra-EEA joint venture would presumably be subject to the Merger Regulation if the thresholds were met, or alternatively could potentially be reviewed by national competition authorities in the EEA. This would enable the Commission (or NCAs)) to review and approve expansions of extra-EEA joint ventures into the EEA. To the extent that a joint venture organically expanded into the EEA, this should not be caught by the Merger Regulation, as the Merger Regulation is designed to regulate changes to the structure of markets, not their day-to-day operation (similarly a strsaightforward foreign to foreign acquisition outside the EUMR, on the basis that the target, for example, has not sales in the EU or sales below the thresholds, would not be revisited if that target subsequently organically expanded its activities within the EU). In this respect, it is more appropriate that the Commission rely on Articles 101 and 102 TFEU to address concerns relating to future organic entry or expansion in the EEA. In either case, if the Commission were to simply deem extra-EEA joint ventures as approved without further investigation, the Commission would still have tools to address future 'expansion' into the EEA.

(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

Response: Yes

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

As explained in response to Questions 6 and 8 above, the Working Group considers that extra-EEA joint ventures present a unique category of cases that generally are incapable of plausibly impacting competition in the EEA in any way (Unless there is an intent of the acquiring parties to henceforth use the JV to compete in the EU). These types of transactions, if remaining subject to the Merger Regulation's jurisdiction where thresholds are met, should be deemed to be approved without a notice or notification from the parties, and without the need for the Commission to issue a decision. The Working Group believes that this could be accomplished through the promulgation of a block exemption or similar mechanism, which would alleviate the burden of notifying this category of transaction, while not sacrificing legal certainty.

The Working Group also believes that a light information notice system or self-assessment can reduce burdens. However, extra-EEA joint ventures present such an attenuated risk that they warrant a system in which they can be simply presumed not to significantly impede effective competition. Thus, a light information notice or self-assessment (beyond confirming that the transaction is truly an extra-EEA joint venture) is not necessary to protect EEA consumers in the unique case of extra-EEA joint ventures.

(iii) Other.

Please explain.

IV JURISDICTIONAL THRESHOLDS (IV.2)

The Working Group generally considers that the current turnover-based threshold system – together with the referral system – has worked very effectively in the past to ensure that the Commission and NCAs review relevant merger cases. It recognises the Commission's concern that some transactions commanding high deal values but without significant turnover of the target in the EU may nevertheless merit a merger control review and that an enforcement gap may exist that cannot be addressed with the application of behavioural rules that would usually be the appropriate tool to deal with such non-structural changes in the market place. At the same time, the Working Group sees little empirical evidence to back up that claim.

On balance, however, the Working Group currently does not see the need to extend the scope of the Merger Regulation by introducing a deal-value threshold. The residual jurisdiction of the NCAs, and the case referral system, ensure that relevant cases can be subjected to merger control review. In any event, any amendment to the current system involving deal value thresholds would need to be carefully balanced between an objective and observed need to capture relevant cases using clear, foreseeable and easily applicable rules while avoiding undue filing (and timing) burden on the parties. It would also need to take into account the chilling effect such rules may have on entrepreneurial activities aimed at setting up new and innovative ventures that rely on quick and effective exist strategies . Moreover, the Working Group is aware that Germany is currently revising its merger control thresholds to include a threshold based on transaction value. The Working Group suggests that the experience in Germany would provide the Commission with an opportunity to assess the extent of any enforcement gap and the appropriateness of a threshold based on transaction value.

I. Arguments against the introduction of deal-value thresholds

Barring further evidence to the contrary, the Working Group does not see any need to introduce deal-value based thresholds to the EUMR. Moreover, the solutions put forward in the consultation would be liable to introduce considerable legal and practical issues of implementation that would likely outweigh any perceived benefits.

1. No compelling evidence of an enforcement gap

Apart from *Facebook/WhatsApp* and *AbbVie/Pharmacyclis* the Commission does not point to any other examples that demonstrate a gap (and those examples are not evidence of a gap either in substantive terms). There is effectively no compelling empirical evidence indicating a need for change. The Commission has not set out how many cases it would hope to capture by introducing a deal-value threshold.

Accordingly, the Working Group urges the Commission to undertake a robust research exercise to determine the existence (and extent) of any perceived enforcement gap before concluding on what measures may be useful to implement.

To the Working Group's knowledge, there have been no cases that have failed to be reviewed (either at national level or by the Commission) that would only have been picked up if a deal-value threshold had been in place. The limited impact of a deal value threshold has already been evidenced at national level (indeed, with proportionately lower thresholds): the German government expects that, based on its own research, the introduction of a deal-value threshold of EUR 400 million in Germany would likely trigger on average three additional filings per year to the Federal Cartel Office , while remaining silent on whether any of these cases would in fact be worth reviewing in the first place.

Conversely, it is not convincing to argue that a targeted deal-value threshold would only have a targeted effect on the most relevant cases, with limited impact on businesses: it underestimates the considerable additional burden on businesses and their advisers to ascertain whether or not a filing is required in the first place, in particular if such threshold goes beyond objectively quantifiable, readily accessible data (see point 3. below). In addition this approach ignores the fact that it may actually be more pro-competitive and beneficial in economic terms to treat situations of acquisition of start-ups in a more flexible manner and to avoid increasing transactional burdens unnecessarily so that there are no chilling effects on such economic activity.

2. *Facebook/WhatsApp* demonstrates that the current system works

Moreover, the cases cited by the Commission as inspiration for a deal-value threshold – principally, *Facebook/WhatsApp* – illustrate that the perceived enforcement gap does not exist, neither from a substantive nor jurisdictional point of view.

First, *Facebook/WhatsApp* was reviewed and cleared by the Commission without remedies in Phase I. It thus ultimately proved to be a "false positive" – i.e. a case in which objectively, the Commission did not need to intervene in the first place on competition grounds.

Second, the case shows how the referral system remains a powerful tool to ensure that relevant cases are being reviewed where appropriate: the Commission obtained jurisdiction in *Facebook/WhatsApp* following a request for referral by the parties pursuant to Art. 4(5) EUMR. This referral right is complemented by Art. 22 EUMR, granting the Commission jurisdiction if referred to it by one (or more) of the NCAs.

The Working Group considers that the current thresholds, in conjunction with the referral system, are well-placed to pick up any relevant cases. At the same time, the Working Group supports efforts to update and improve the system of referrals. Please refer to section IV.3 below.

3. Substantial difficulties in establishing efficient, and practicable system

(a) Apart from the lack of evidence, any amendment to the current system would face substantial practical difficulties in implementation and application, primarily in relation to (a) the requirement to establish a clear local nexus of a transaction with the EEA; and (b) the level and calculation of the deal value. Determining local nexus

Establishing a clear, objectively quantifiable nexus of the target with the EEA is an indispensable prerequisite for a practicable merger control system, in particular in the absence of (the target's) EU-wide turnover as a proxy. The Working group recalls that the need for such a clear, objectively quantifiable nexus is recognized in the ICN's Recommended Practices for Merger Notification Procedures, points I. and II.

In the consultation, the Commission sets out a number of suggestions on how to establish local nexus. Taken as a whole and individually, the Working Group considers these to be insufficient and ultimately impracticable, thus running the risk of increasing burden on businesses without any corresponding benefits for administrative enforcement:

- A general clause referring to the likelihood of "a measurable impact within the EEA" would not be in line with ICN principles on merger control. The notion of "measurable impact" is unclear; it is subjective and would inevitably require considerable resources (both for businesses and the Commission) to clarify cases, over and above accompanying explanatory guidance. Limiting this to specific industries would likely complicate the system even further;[10]
- the notion of a "maximum worldwide turnover" threshold as proxy for determining an EU-nexus is an unsatisfactory approach since it mingles worldwide turnover with the notion of establishing an EU-nexus; it is also likely to be difficult to implement in practice.
- a "value-to-turnover ratio" threshold may in fact have a distorting effect on the parties' negotiations (and indeed, competition): potential purchasers may use the multiple as a *de facto* ceiling for purchase price to eschew a filing requirement.

(b) Deal value calculation

The complexities of deal structures mean that the proper calculation of the deal value can be a tricky exercise; the value may also quickly and materially change over time. For example, earn-outs and other performance-based price components may complicate the deal value calculation.

Depending on whether the deal value is calculated on the date of signing, closing, or the date of the notification, the deal value may also fluctuate significantly. *Facebook/WhatsApp* is an example: the deal value ultimately increased from USD 19 to 22 billion due to the rise in value of Facebook's shares tendered as part of the consideration.

[10] Indeed, the German approach, adding a requirement that the target "is active to a considerable extent within Germany" is not satisfactory for the same reason.

In any event, any threshold would need to be sufficiently high to make sure that only cases with a Community dimension are caught or have complicated geographic allocation rules with regard to value.

4. Basic requirements for deal-value based thresholds

The Working Group considers that, in light of the above cost-benefit-analysis, a deal-value threshold is not warranted in terms of policy, and would likely face considerable issues of practicability.

In any event, the following criteria should be taken into account if the Commission were to further consider the introduction of a deal-value threshold:

- any deal-value threshold should be set at a suitably high level to ensure that only cases capable of having a Community dimension are being captured;
- the existing worldwide combined turnover threshold of EUR 5 billion in the last financial year should be kept;
- the existing turnover threshold of EUR 250 million should continue to apply to one of the parties of the transaction (usually, the acquirer); and
- it is crucial to develop a clear and practicable test for establishing local nexus. The Working Group urges the Commission to adopt a test that can be easily determined by the parties and is based on objectively quantifiable data. If at all, and with a view to harmonizing the existing systems, the Commission may wish to consider the US approach of establishing local nexus by reference to domestic assets. At the same time, the Working Group acknowledges that the US system is complex, having developed considerably since its inception. It requires considerable resources on the part of the Federal Trade Commission and Department of Justice to give clear, reliable guidance as to the application of the rules to specific cases. The Working Group would expect that similar commitment would be required by the Commission as well.

II. Conclusion

Considering the arguments above, the Working Group concludes that, absent a rigorous assessment of the perceived enforcement gap, extending the scope of the EUMR to include a deal-value threshold is not warranted at this time. The current proposals run the risk of unnecessarily increasing red tape for businesses and the Commission, which is likely to outweigh any perceived benefits of obtaining jurisdiction over a limited number of cases which may or may not have competitive effects in the EEA. Moreover, the Commission currently has the opportunity to assess the experience of Germany, which is in the process of amending its thresholds to include a threshold based on transaction value. This may help assess the extent of any enforcement gap and the appropriateness of a threshold based on transaction value.

If the Commission were to consider, nonetheless, that there is a gap which can best be assessed through an amendment to the thresholds, the Working Group looks forward to an opportunity to provide more detailed comments on specific proposals. For the time being, the Working Group notes that any changes should be in line with the ICN Recommended Practices for Merger Notification Procedures, points I. and II, in that they, should be sufficiently clear and ensure that only transactions with a local nexus would be captured.

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14. In your experience, have you encountered competitively significant transactions in the digital economy in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

YES/NO/OTHER

Response: Other

If yes, please describe the characteristics of such transactions.

If yes, please give concrete examples.

If yes, please estimate how many of those transactions take place per year.

If yes, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

If no or other, please explain your answer.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV.2.**

15. In your experience, have you encountered competitively significant transactions in the pharmaceutical industry in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

YES/NO/OTHER

Response: Other

If yes, please describe the characteristics of such transactions.

If yes, please give concrete examples.

If yes, please estimate how many of those transactions take place per year.

If yes, do you consider that those transactions would typically qualify for a pre-

notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

If no or other, please explain your answer.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV.2.**

16. In your experience, have you encountered competitively significant transactions in other industries than the digital and pharmaceutical sectors in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?

YES/NO/OTHER

If yes, please describe the characteristics of such transactions.

If yes, please give concrete examples.

If yes, please estimate how many of those transactions take place per year.

If yes, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

If no or other, please explain your answer.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV.2**

17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?

Yes/No/Other

Response: Yes

Please explain.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV.2**

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover

of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

Yes/No/Other

Response: No

If yes, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

If no or other, please explain.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV.**

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

Yes/No/Other

Response: No

Please explain.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV.2**

As Questions 20-22 presume an answer of "yes" to Question 19, these questions have not been answered.

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

- 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, complemented by specific explanatory guidance.

- Industry specific criteria to ensure a local nexus.
- Other
- Please explain your response and provide examples where appropriate.

22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

- YES
- NO
- OTHER

Response: TBC

Please state if any of the following criteria would be appropriate to ensure the desired efficiency [multiple answers are possible]:

- **A minimum level of aggregate worldwide turnover of all undertakings concerned.**
- **A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.**
- **A maximum level of the worldwide turnover of the target business, in cases where the latter does not meet the Union-wide turnover thresholds (with the aim of only covering highly valued transactions where the target has a strong potential for instance to drive future sales but not cases where the target already generates significant turnover but outside of the EEA).**
- **The requirement that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple. (Example: transaction value = EUR 1 billion, worldwide turnover of the target = EUR 100 million, ratio/ multiple = 10. The aim of this requirement would be to identify transactions where the valuation of the target company exceeds its annual revenues by several multiples, which could signal high market potential of the target.).**
- **Other.**

Please explain your answer.

Please refer to the Working Group's discussion of jurisdictional thresholds at **Section IV**.**2.**

V REFERRALS (IV.3)

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

YES
NO

OTHER

Response: Other

Please explain.

The Working Group generally considers the case referral system to be a suitable system for allocating merger cases to appropriate competition authorities. However, in a number of cases, finding the 'right' authority poses procedural challenges, in particular as this process may have a significant impact on the timing of the review and decision-making process. Given the time-sensitive nature of many transactions, reducing the burden on the parties, especially but not exclusively from a timing point of view, can have an appreciable impact on their ability to successfully complete a transaction and realise its benefits. The Working Group therefore holds the view that there is room for improvements and welcomes the Commission's aim of making the process of referring cases from the NCA level to the Commission and *vice versa* more effective. Given the practical experiences gathered during the last decade, the Working Group believes that the system has achieved a level of maturity which allows the process to be streamlined and thereby made more efficient, resulting in less unnecessary burden on businesses.

24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating merger cases to the more appropriate competition authority and/or reducing burden on businesses?

YES
NO
OTHER

Response: Other

Please explain.

General

The Working Group generally agrees with the Commission's proposals and welcomes the Commission's willingness to consider the procedural challenge of effectively and efficiently allocating merger review cases to the best placed authority within the EU. Based on its experience, the Working Group recognises that parties already under the existing referral rules *do* request a referral in many cases that would benefit from a referral. The Working Group would therefore not necessarily expect the proposed changes to result in a significantly greater number of requests for referrals. Nevertheless, the Working Group believes that the modernization of the referral processes would result in a more efficient use of resources for the undertakings concerned, as well as for the Commission.

However, the Working Group does not agree with all of the Commission's proposed amendments as set out further below. Also, the Working Group suggests additional amendments to the current referral regime, in particular as regards the time limits for the NCAs and the Commission to decide on referral requests (see Q.25).

25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

YES
NO
OTHER

Response: Yes

Please explain.

Article 4(5) EUMR: Pre-notification referral from Member States to the Commission

The Working Group supports the general approach outlined in the White Paper and accompanying Staff Working Document ('**SWD**') in relation to pre-merger referrals to the Commission under Article 4(5) EUMR.

The Working Group believes that significant benefits can be obtained by abolishing the current two-step procedure and combining the referral request and the substantive notification of the transaction in a single submission to the Commission. Such submission could be based on a Form CO with an additional section setting out the reasons why a referral is appropriate. A single submission would save significant resources and time, both for the undertakings concerned and for the Commission; it would also not constitute a significant deviation from the status quo, given the similarities of the current Forms RS and CO.

The Working Group has no fundamental objections to the Commission's proposal of sending the case allocation request to the NCAs so as to give them notice of the transaction during the pre-notification stage except in situations where added confidentiality is needed (situations where the Commission itself allows the use of code names to protect confidentiality would not be suitable for transmission to a large number of bodies across the EU). The Working Group considers that, in any event, the parties' initial briefing paper, which generally contains detailed confidential information, should not be within the scope of the pre-notification contacts between the Commission and the NCAs. In order to ensure confidentiality (which may be critically important for unannounced transactions), such pre-notification information sharing between the Commission and the NCAs should in any event only be made with the express consent of the parties in cases where the parties consider – at their absolute discretion – that such a level of confidentiality is not crucial to their transaction. In addition, information should only be shared for the specific purpose of assessing the referral request and to the extent necessary for this purpose. In all other cases, information sharing should be governed by the general rules of cooperation amongst authorities.

As regards the Commission's proposal to maintain the current 15 working-day time period under Article 4(5) EUMR for the NCAs to evaluate referral requests, the Working Group submits that this time period could be shortened to 10 working days without adverse effects. Shortening this time limit appears justified in light of the changes to the Article 4(5) EUMR process envisaged by the Commission. Indeed, the proposal would require that the parties put forward all the information that is necessary for the evaluation of both the referral request and the transaction within their submission. Further, the proposal would allow the Commission to provide the initial briefing paper or the case allocation request to the Member States in non-confidential cases or with the parties' consent as explained above. As a result, NCAs will have immediate and direct access to all the relevant information through a single resource, which should facilitate and thus accelerate their assessment, making a 10 working-day period adequate.

However, the Working Group suggests that the Commission should reconsider the proposal for the referral process and the substantive review to run in parallel. While this would save time by effectively eliminating the separate referral process, it would also have significant downsides: the substantive review would be burdened by jurisdictional uncertainty – a significant downside from a legal as well as a practical point of view, as it would detract from the task of establishing the relevant facts and reaching a substantive conclusion expeditiously. The Working Group would suggest maintaining a staggered process, but imposing tighter deadlines for the Member States to respond to a request for referral, as set out above.

The Working Group considers in addition that, in order to accelerate the process even further, it would be appropriate for the Commission to be bound to communicate the referral request to the Member States at the latest on the working day following the day on which it receives the submission.

Article 22 EUMR: Post-notification referral to the Commission

The Working Group generally welcomes the Commission's proposals regarding the post-notification referral procedure under Article 22 EUMR, and to align both procedurally and substantively the article's referral mechanism with that under Article 4(5) EUMR However, the Working Group considers certain additional amendments that would improve the referral system under Article 22 EUMR even further.

The Working Group suggests the following additional amendments to Article 22 EUMR:

- In order to achieve consistency, the Working Group believes that Article 22 EUMR would benefit from the same threshold as under Article 4(5) EUMR (*i.e.,* for the referral to be possible, the transaction should be notifiable in at least three Member States). This requirement would ensure, as in the case of Article 4(5) EUMR, that only cases with more than purely local relevance can be subject to a referral from Member States to the Commission.
- The need for the Commission to take a formal decision accepting a referral request under Article 22 EUMR should be abolished, in line with the process under Article 4(5) EUMR. The Working Group believes that the reasons (from a substantive and procedural point of view) for making this an automatic process would apply to cases under a modernized Article 22 EUMR as well as to cases under Article 4(5) EUMR.
- Time limits should be shortened. The Working Group believes that decisions by the NCAs as to whether a referral pursuant to Article 22 EUMR is appropriate can be made and communicated within 10 working days from the notification of a transaction instead of the proposed 15 working days. Other NCAs can assess whether the transaction constitutes a *prima facie* case for a referral within an even shorter period of time; the Working Group suggests that five working days should be sufficient for this purpose. Keeping the associated suspension period short would ensure that the review process is

not held-up for longer than is strictly necessary to effectively consider whether a referral is appropriate.

- The Working Group welcomes the proposed abolishment of the need to 'opt in' for other NCAs and the power of NCAs to 'opt out' of the referral.
- Given the prevalence of merger control regimes throughout the EU, the Working Group believes that only NCAs that have jurisdiction over the transaction should be allowed to request a referral.
- In line with Article 4(5) EUMR the Working Group believes that the Commission should obtain jurisdiction over the transaction with regard to the whole of the EU if three or more national authorities which have jurisdiction over the matter request a referral, with the exception of those Member States in which the transaction has already been reviewed and cleared by the local NCA.
- The Working Group believes that a suspension of all national proceedings from the day on which the referral request is communicated to the local NCA is an appropriate solution to avoid, to a reasonable extent, decisions being taken at national level (even though it is difficult to see how such a risk would arise except in exceptional situations).

Article 4(4) EUMR: Pre-notification referral to one or more member state

The Working Group supports the Commission's proposal to amend the substantive threshold for referrals under Article 4(4) EUMR in order to remove any possible actual or perceived 'self-incrimination' element. The Working Group also agrees with the Commission that it is not possible to abolish the Form RS with regard to Article 4(4) EUMR referral requests.

However, in parallel to the changes proposed in relation to Articles 4(5) and 22 EUMR, the relevant time periods under Article 4(4) EUMR could be shortened to a maximum of 10 working days for the response from the NCA (instead of current 15 working days) and 15 working days for a final decision on jurisdiction by the Commission (instead of current 25 working days). When the undertakings concerned are seeking a referral away from the Commission, such a request is very unlikely to be made lightly. In most cases, the request will have already been discussed with the Commission and possibly the NCAs concerned before a formal submission is lodged. NCAs are unlikely to oppose a transfer of jurisdiction, resulting in a high likelihood that the referral request will be accepted. Nevertheless, the Working Group does not suggest a combining of the substantive and procedural filings, as the Commission would lose jurisdiction for the substantive assessment in the case of a successful referral request.

Article 9 EUMR: Post-notification referral to one or more Member State

As regards the Commission's proposal on post-notifications in the SWD, the Working Group holds a different opinion.

The Working Group notes that referral of a case to a Member State post-notification is extremely burdensome as it results in delays in the review of the case and multiple reviews. As such, post-notification referrals should be used sparingly and re-allocation of jurisdiction in this manner should take place in the most effective and expeditious manner possible. With this aim in mind, there seems to be limited need for an extension of the deadline for post-notification referrals in Phase II. As a result, the Working Group would in fact advocate for the abolition of this deadline and for shorter overall referral deadlines which would provide the parties with certainty as to where their case will be reviewed (Commission and/or Member State level) at the earliest possible opportunity.

<u>Other</u>

- **Commission's power to revoke decisions in case of referral based on incorrect or misleading information**

With respect to the Commission's proposed amendments to Articles 6(3)(a) and 8(6)(a) EUMR with regard to the Commission revoking referral decisions, the Working Group is of the view that the proposed amendments would give rise to a number of practical difficulties, such as determining what the impact on the Member State's subsequent decision would be when a decision under Article 4(4) EUMR is revoked.

- **Procedures and timelines of the referral system**

The Working Group agrees that, if the Commission's proposed targeted transparency system is adopted, the existing procedures and timelines of the referral system could apply as from the date of submission of the information notice (or notification in the event that the acquirer decides to notify voluntarily).

VI TECHNICAL ASPECTS (IV.4)

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

In general, the Working Group believes that the Commission's proposals are directionally positive, and in many cases consistent with the Working Group’s prior submissions on these issues. In some cases, however, the Working Group believes that the Commission's proposals should be further clarified to ensure legal certainty and avoid the possible introduction of uncertainty into the merger review process. Further feedback on each of the Commission’s proposals can be found below.

a) **Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.**
As set out in our submission of 3 October 2014, the Working Group welcomes the Commission’s proposal to amend Article 4(1) EUMR to provide parties with greater flexibility in connection with transactions involving the acquisition of shares which are listed on a stock exchange but which take place without a public takeover bid. The Working Group agrees that amending Article 4(1) EUMR, and in particular the concept of “good faith intention”, could address some of the difficulties that can arise in connection with such transactions. It would also be useful because this aspect of Article 4(1) EUMR has not kept pace with market realities.

The Working Group looks forward to working with the Commission in connection with specific amendments. In addition, the Working Group encourages the

Commission to propose guidance (in the Consolidated Jurisdictional Notice) clarifying what would in practice demonstrate "good faith intention" to acquire control via the acquisition of shares on the stock market (outside of a public bid). The 2014 SWD suggests that acquiring parties should "demonstrate a clear commitment to carry out the acquisition by preparing everything necessary (internally and externally) to proceed immediately". This requirement appears unduly rigid and the Working Group would welcome a more practical approach for demonstrating a "good faith" intention to acquire control. In particular, the Working Group encourages the Commission to take into account that parties who proceed within an acquisition of shares outside of a public bid may not be able to take measures which give rise to a disclosure requirement.

Finally, the Working Group assumes that transactions involving public takeover bids that currently make use of Article 7(2) EUMR would be unaffected by the proposed amendment to Article 4(1) EUMR.

b) **Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.**
As noted previously, the Working Group agrees that Article 5(4) EUMR could be amended with a more explicit explanation of the rules for calculating the relevant turnover of a joint venture. The Working Group agrees that the Consolidated Jurisdictional Notice (paragraphs 186-187.) provides some guidance concerning the allocation of joint venture revenue, but submits that this could usefully be clarified, both in the EUMR and the Consolidated Jurisdictional Notice.

c) **Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.**
The Working Group submits that the parties to notified transactions, and the Commission, share an interest in the efficient review of merger cases. However, in a limited category of highly complex cases, the current time limits can prove very challenging, particularly in cases involving complex remedies.

The Working Group therefore appreciates the rationale for the Commission's proposal set out in the 2014 SWD to introduce greater flexibility into Phase II timing by amending Article 10 EUMR. However, the Working Group emphasizes that amendments to increase flexibility should not have the effect of creating longer, more protracted merger reviews in cases where such review is unwarranted.

The Working Group believes that increasing the number of working days by which a Phase II investigation may be extended from 20 to 30 may be useful. The Working Group submits, however, that the same result could be achieved by adding a new provision to Article 10 EUMR providing for the review period to be temporarily, and exceptionally, halted by mutual agreement between the parties and the Commission. This may have the effect of allowing necessary flexibility in exceptional cases (some of which may require more than 10 additional working days), while preventing the unnecessary extension of Phase II investigations in cases that do not warrant it.

The Working Group also suggests that the Commission consider expanding the extension of time in Phase I cases to 15 working days instead of 10 working days in cases where remedies are offered. This would facilitate market testing and in certain cases would avoid the need to conduct a Phase II investigation as a result of insufficient time in Phase I to assess remedies.

Finally, the Working Group believes that Article 10(3)(1) EUMR could usefully be amended to clarify that the automatic 15 working-day extension for Phase II deadlines is triggered in all cases where commitments are offered following a Statement of Objections. For the sake of clarity, the Working Group further submits that Article 10(3)(1) EUMR should clarify that the automatic 15 working-day extension also applies in cases where the parties offer amended commitments following the 55th working day.

d) **Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).**

From a conceptual perspective, it is not clear whether changing the scope of Article 8(4) EUMR (in a scenario where the application of the EUMR remains limited to transactions involving the acquisition of decisive influence) to allow enforcement powers over partially implemented concentrations declared incompatible with the common market is warranted. If a minority stake is not subject to the jurisdiction of the EUMR in the first place, and could have been acquired lawfully without EUMR scrutiny if acquired as part of a separate transaction, or could be acquired subsequently, there is arguably no need or rationale for the Commission to order its divestiture. The Commission's enforcement powers should be limited to the part of the transaction that triggered the EUMR jurisdiction.

However, the Working Group does recognize that, in the interests of efficiency and from the perspective of the principle of the "one-stop shop" mechanism, there may be merit in amending Article 8(4) EUMR. This could avoid the lengthy "double investigation" of a transaction by the Commission and subsequently by an NCA with the jurisdiction to review non-controlling minority stakes, which occurred in the Ryanair/Aer Lingus case (albeit that this issue will arise only very rarely).

e) **Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.**

The Working Group believes that, in practice, ambiguity and unnecessary burdens can arise where an NCA requires notification of an intermediate step in a staggered transaction, where the Commission later assesses the transaction as a whole.

The Working Group welcomes the Commission's proposal as set out in the 2014 SWD to consider refining Article 5(2) EUMR to eliminate such ambiguity. However, the Working Group submits that any tailoring of Article 5(2) EUMR should – as the Commission proposes – focus only on targeting circumvention. It should not create additional notification obligations.

f) **Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.**

The Working Group submits that, where a so-called "parking" transaction is only and clearly temporary in nature, it should not be considered as a concentration and should be allowed to be implemented without prior notification and clearance. The Working Group encourages the Commission to correspondingly amend the **Consolidated Jurisdictional Notice** and provide further guidance amplifying the amendment.

g) **Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.**
As stated in its 2013 and 2014 submissions, the Working Group in principle agrees that non-public commercial information made available to notifying parties and third parties and their advisers should not be used or disclosed for other purposes.

The Working Group agrees that the EUMR could be amended to allow for appropriate sanctions against parties that improperly disclose such information. On the other hand, such sanctions should not deter counsel's discussions with his/her client(s) for development of arguments and planning purposes.

h) **Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.**
As stated in its 2014 submission, the Working Group does not agree with the Commission's proposed amendments to Articles 6(3)(a) and 8(6)(a) EUMR with regard to the Commission revoking referral decisions. The Working Group is of the view that the proposed amendments would give rise to a number of practical difficulties, such as, for example, determining what the impact on the Member State's subsequent decision would be when a decision under Article 4(4) EUMR is revoked.

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

The Working Group welcomes the Commission's efforts to review and improve the provisions of the EUMR whenever appropriate. The Working Group generally welcomes the technical improvements that the Commission discusses in its 2014 SWD.

The Working Group considers that the EUMR and the Consolidated Jurisdictional Notice could be revised to clarify the rules applicable to the acquisition of joint control over previously solely-owned subsidiaries and existing joint ventures, and in particular the extent to which such transactions would only be caught by the EUMR if the subsidiaries and joint ventures were full-function.

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had

been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

YES
NO
OTHER

Response: Yes

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defense and to propose and discuss commitments.

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

YES
NO
OTHER

Response: No

Please explain.

Please see the Working Group's response to Question 26 (c) above.