



## **UK Government Response to the European Commission's Consultation on 'Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control'**

### **Introduction and Summary**

1. This is the response of the UK Government to the European Commission's consultation on 'Evaluation of procedural and jurisdictional aspects of EU merger control'.
2. The UK is pleased that the proposals in the Commission's 2014 White Paper to extend the scope of the EU Merger Regulation (EUMR) to cover certain acquisitions of non-controlling minority share holdings under a mandatory notification regime, about which the UK had concerns, do not feature in the proposals now under evaluation.
3. In 2014, the UK noted in its response that it supported the other proposals in the White Paper, notably the proposed modifications to the case referral system, the removal of jurisdiction over certain full-function joint ventures and the exemption from notification of certain categories of transactions that do not normally raise competition concerns. The UK continues to support these proposals.
4. This response focusses on the new questions related to a possible enforcement gap in the digital and pharmaceutical sectors.

### **Simplification**

5. The UK agrees that there is scope for further simplification of EU merger control. The UK continues to support the proposal to exclude full-function joint ventures that operate outside the EEA and have no impact on European markets from the scope of the Commission's merger review. It also supports exempting certain

categories of transactions, which do not normally raise competition concerns, from notification.

## **Case Referrals**

6. The UK supports the Commission's proposals to simplify the case referral system, which should help to make the EU merger regime more efficient. As well as the proposed amendments to Articles 4 and 22 of the EUMR, the UK would also welcome consideration of whether the referral process from the Commission to Member State authorities under Article 9 of the EUMR could be more efficient and effective.
7. The UK notes that there may be further scope to resolve other uncertainties previously experienced with the current Article 22 referral process. In particular, the UK would welcome further consideration of measures to address the issues arising from the misalignment of the timings of the Member States' review procedures.

## **Jurisdictional thresholds**

8. The UK recognises that certain concentrations that fall below the turnover thresholds of the EUMR could raise competition concerns across multiple EU Member States.
9. The House of Lords Select Committee on European Union, in its report on online platforms and the digital single market, noted its concern that mergers where a large digital company acquires a less established business may escape merger scrutiny because the target company generates little or no revenue. It recommended consideration of a threshold based on the price paid for the target company or a version of the share of supply test used in the UK.
10. In the UK's voluntary merger notification regime, the share of supply test in UK law has enabled the Competition and Markets Authority (CMA) and its predecessor, the Office of Fair Trading, to investigate or assess the competitive effects of a

number of mergers in online markets effectively, including those involving targets with limited turnover. In particular, the concept of share of supply may require judgement on the part of the competition authority and notifying parties may not be able to identify easily where the test is met. The UK notes that experiences with the share of supply test under the voluntary UK merger notification system have been positive, with notifying parties being able to engage in early discussions with the CMA about this issue. It is not necessarily the case, however, that the test should simply be transposed to the EU or other jurisdictions with different legal systems and, typically mandatory, merger notification regimes.

11. A threshold based on the value of an acquisition may seem more appropriate in a mandatory notification regime as it will typically be more straightforward for the notifying parties to identify where the threshold is met. A threshold based on the value of an acquisition does, however, raise other issues, in particular how to ensure transactions that meet the threshold have a significant link with the EEA without placing an unnecessary burden on business. There are also cases in which it is less straightforward to assess the value of a transaction, for example, when the consideration is not in cash but in shares. A threshold based on transaction value also raises some risk of circumvention.
12. A new threshold based on the value of an acquisition could be worth exploring further. There are, however, a number of key questions that need to be answered before the case for a new threshold is made, which the Commission is exploring in its consultation.
13. The Commission mentions the 2014 acquisition of WhatsApp by Facebook. Another example is Google's 2008 acquisition of DoubleClick, into which the Commission undertook a Phase II merger investigation. The merger did not meet the EUMR thresholds but the Commission was able to investigate the case pursuant to Article 4(5) of the EUMR.
14. The Commission was ultimately able to review both of these acquisitions pursuant to Article 4(5) of the EUMR, which indicates that the referral mechanisms under the EUMR has worked well to enable investigation of these cases in at least some

notable instances, but may depend on the existence of non-turnover-based thresholds in a number of Member States. Evidence of transactions where there may be competition concerns that would be caught by a deal size threshold, but would not qualify for an Article 4(5) or Article 22 of the EUMR referral is necessary if the case for a new threshold is to be borne out.

15. EU regulation of mergers must be based on the principles of subsidiarity and proportionality. It is important, therefore, to establish that a merger has a Union dimension. A Union dimension may be relatively obvious in some cases such as Facebook's acquisition of WhatsApp, where the merger is capable of being reviewed under the competition laws of at least three Member States, but these cases can already be reviewed by the Commission pursuant to Article 4(5) of the EUMR. In cases that would not qualify for an Article 4(5) or Article 22 referral it is more difficult to establish whether a Union dimension exists. A deal size threshold alone is not sufficient as the competition effects of the deal could be entirely (or primarily) within a single Member State, in which case the authority of that Member State would be best placed to lead on the case, or outside of the EEA altogether.

16. The Commission is right to raise this issue at question 21 of its survey. The Commission asks what solutions might be appropriate to ensure that only transactions that have a significant economic link with the EEA would be covered by a deal size threshold. The Commission makes the following suggestions (and also invites other solutions):

- a. A general clause stipulating that concentrations which meet the deal size threshold can only be notified if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance;
- b. Industry specific criteria to ensure a local nexus.

17. The UK has concerns about how the suggested criteria would function in a system based on mandatory notification. Whilst the current thresholds in the EUMR are straightforward, the concept of "a measurable impact" is less so. The UK is concerned that it will be burdensome on businesses to establish whether certain deals may have a measurable impact in the EEA and that, given that this concept

will be open to some interpretation even with guidance, parties will feel the need to notify mergers to provide certainty even where a measurable impact in the EEA is absent.

18. Some of the proposal at question 22, in particular, a minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned, may go some way to addressing this concern. These additional criteria do not address subsidiarity and proportionality however. Additional criteria would be necessary to establish that these are cases that have a Union dimension where the Commission may be best placed to consider a case rather than the competition authority of a Member State.

19. Overall, it is important that any new threshold (and any associated guidance or criteria) does not place unnecessary additional burdens on merging businesses that are not justified by the aims of EU merger control.

## **Technical Aspects**

20. The UK supports the technical proposals to improve the merger regulation. These are sensible suggestions that should enable the EUMR to operate more efficiently and effectively.

### *Introduction of additional flexibility for investigation time limits*

21. The UK supports additional flexibility for investigation time limits. The Commission granted deadline extensions in over 50% of Phase II cases from 2004 to 2014 (at the request of the notifying parties or in agreement between the Commission and the notifying parties) under Article 10(3)<sup>1</sup>. Additional flexibility to extend the deadline may still require the notifying parties and the Commission to extend the time limit in the majority of cases. The Commission could also explore whether a slightly longer statutory Phase II time limit in the first instance might be more efficient. This could reduce the number of cases where an extension to the statutory time limit is necessary. In that case, the Commission might want to reconsider how other parts of the merger review procedure, such as the Advisory

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<sup>1</sup> Commission's Impact Assessment accompanying the 2014 White Paper.

Committee process, will fit into this new timetable and if there is room to improve the Advisory Committee process.