

Response to Question 18

The very nature of any threshold, in fact, 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”. The purpose of thresholds is precisely to make an ex ante selection on the basis of objective criteria that seek to capture transactions raising competition concerns. Such concerns can then only be established ex post, after a thorough review. Inevitably, under this approach, some transactions are not caught, despite their competitive significance. Some shots miss the target.

The goal of merger control, nevertheless, is not to capture all transactions. The Commission’s policy objectives should encompass a set of factors and balance interests where necessary.

Balancing interests. The Merger Regulation’s reform should be prompted by a reasoned consensus amongst stakeholders, which is itself based on a review of a critical mass of cases that significantly affected competition, but which were not reviewed by the Commission or national authorities.

In this respect, thresholds should act to maximize the chances of catching competitively significant transactions, while minimizing the burden on businesses. Thresholds should therefore be set at a level whereby the enforcement gap is reasonable in light of the increase in general economic welfare resulting from the absence of a notification obligation. In other words, an effective merger control regime should seek to limit both (i) the expenditure of private and public resources and (ii) the loss of economic welfare through ineffective competition law enforcement. This is a policy perspective that is generally shared in democratic market economies. We believe that an assessment of the value of additional thresholds should start from such premise, as set out below:

– Enforcement gap

Regarding the first issue, the enforcement gap appears to be small by any standard. Of all cases notified to the Commission, 6% are problematic on average. Paradoxically, that number is high in comparison to other authorities (See Report International Competition Network Merger Working Group Notification & Procedures Subgroup <http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>, p. . Thus, the net seems well-cast. However, this also shows that on average, 94% of shots have missed the target, while generating considerable private and public expenses. This is particularly true of the Commission’s burdensome filing regime, whereby the bulk of information requests are provided upfront. The high enforcement rate is partially explained by the twin-layered enforcement net, i.e., transactions not meeting the EU thresholds can be referred up by the parties or national authorities, where national thresholds are met. Facebook/WhatsApp is a good example of this. However, contrary to what the Commission appears to suggest, this case would not have fallen in the enforcement gap in any event, as the transaction was not found to harm competition.

More generally, it is unclear whether transactions in the digital economy or pharmaceutical industries would be problematic, where they do not (yet) generate revenues sufficient to be caught by the thresholds. If the revenues generated by such market players are still insufficient, then this leaves considerable uncertainty as to whether they would ever become successful and therefore potentially competitively significant. As noted in the ICN’s Recommended Practices for Merger Notification Procedures (“Recommended Practices”), “*notifications should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned*”.

Furthermore, although not raised in the present question, the EEA has an important and unique safety net. Transactions without an EU dimension are often reviewed by one or more Member States. The 6% enforcement rate is thus much higher than in most other jurisdictions, and the overall cost related to enforcement gaps much lower.

Finally, it should be recalled that merger control is not the only means to remedy harm to competition. While it is the only ex ante tool, ex post antitrust enforcement (both by the Commission and the Member States) provides yet another important safety net (also to be used with care).

– **Use of private and public resources**

Regarding the second issue, EU notifications generate significant private and public expenditures. While not questioning the appropriateness of the EU merger control regime, it is one that front-loads information, unlike many other regimes such as the US, Canada, or Germany. Simplification has arguably fell short of significantly impacting the resource intensiveness of EU filings. Rather, there is a general consensus amongst practitioners that the process has become even more data intensive over the years, with frequent and onerous internal document requests.

Against this background, any reform geared towards widening the net would appear to be highly questionable. Question 19 suggests that a complementary value-based threshold could reduce the enforcement gap. The ICN's Recommended Practices recommend that notification thresholds should be clear and understandable, based on objectively quantifiable criteria and data that is readily available to the parties. However, value-based thresholds do not meet such criteria. Few transactions have a straightforward valuation (in the form of a purchase price) set out in the transaction agreement. Most often, transactions are a combination of share (swaps), assets (swaps), and cash. The first two situations pose complex valuation issues. While not insurmountable, and while some jurisdictions (notably the US) embrace these as part of the merger thresholds, taking into account transaction or asset valuation adds significant complexity and a risk of legal uncertainty.

In sum, the enforcement gap is presently modest, while the burden on private and public resources is elevated. At this stage, a convincing case does not appear to exist in favor of broadening the enforcement net and increasing complexity and legal uncertainty, particularly if such wider scope is geared towards catching transactions whose economic relevance has yet to materialize.