

Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

Evaluation of procedural and jurisdictional aspects of EU Merger Control

I. Introduction

Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on some procedural and jurisdictional aspects of EU merger control. The questionnaire does not necessarily reflect the views of the European Commission and does not prejudice its future decisions, if any, on further action on these aspects.

A. Purpose of the consultation

The purpose of the present consultation is to gather information on particular aspects of the performance of EU merger control. This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide feedback on their experience/knowledge of issues under scrutiny and what action, if any, should be taken in this regard.

Input from stakeholders will be used in a Staff Working Document to evaluate procedural and jurisdictional aspects of EU merger control. The Commission will carefully analyse the outcome of this consultation and previous consultations as well as the findings of the evaluation as a whole before deciding whether it should take further action.

B. Background

Merger control constitutes one of the instruments of EU competition law. Its main objective is to ensure that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations.

In recent years (particularly in 2009 and from 2013 onwards), the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU Merger Control (the "White Paper", COM(2014) 449 final). The White Paper confirmed that EU merger control works well and that no fundamental overhaul of the system is needed, but envisaged specific amendments in order to make it more effective.

The key proposals of the White Paper were the following:

1. Introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition;
2. Making case referrals between Member States and the Commission more business-friendly and effective;
3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns; and
4. Fostering coherence and convergence between Member States with a view to enhance cooperation and to avoid divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

Based on the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system overall works well but welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification.

Recently, a debate has emerged among stakeholders and competition experts on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control. These jurisdictional thresholds are set out in Article 1 of the Merger Regulation and determine which transactions have a Union dimension and are reviewed, in principle, by the European Commission.

Some stakeholders have raised the question of whether the turnover-based jurisdictional thresholds allow capturing, under EU merger control rules, all transactions which can potentially have an impact in the internal market. This question may be particularly significant for transactions in the digital economy, but also in other industry sectors, such as pharmaceuticals, where acquisition targets may not have always generated substantial turnover yet, but nevertheless are highly valued and constitute, or are likely to become, an important competitive force in the relevant market(s).

Moreover, recent experience in enforcing the EU merger control rules has shown that certain technical aspects of the procedural and investigative framework for the assessment of mergers may merit further evaluation. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

Scope of the Evaluation

It therefore appears opportune to build upon the work undertaken so far in the context of the White Paper and prior consultations and complement it by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail:

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,^[1] the Implementing Regulation,^[2] and the Commission Notice on simplified procedure;^[3]
2. Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover;
3. Functioning of the case referral mechanisms set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on case referral;
4. Certain technical aspects of the procedural and investigative framework for the assessment of mergers.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

[2] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.04.2004, p. 1, as amended.

[3] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, OJ C 366, 14 December 2013, p.5 and its Corrigendum to the Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 011, 15 January 2014, p 6 (the "Commission Notice on simplified procedure").

II. Practical Guide to fill in the questionnaire

Please respond to all questions that you have knowledge about. Feel free to skip those questions that you cannot answer or are unsure about.

Replying to the questions:

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:
 - show you a message indicating that your draft reply has been saved,
 - give you the link that you will have to use in order to continue replying at a later stage,
 - give you the possibility to send you the link by email (we encourage you to use this option).
- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

- The submission of the final reply can only be done by clicking the "Submit" button that you will find in the last section "Conclusion and Submission".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("Case Id"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

III. About you

Please provide your contact details below:

*1. Are you replying as:

- ☐ a private individual
- ☒ an organisation or a company
- ☐ a public authority or an international organisation

*The name of your organisation/ company/ public authority/ international organisation

White & Case LLP

*Your full name

Dr. Katarzyna Czapracka, Local Partner

*Email address

kczapracka@whitecase.com

* Organisation represented

1.1 Please indicate which type of organisation or company it is.

- ☐ Academic institution
- ☐ Non-governmental organisation
- ☐ Company/SME/micro-enterprise/sole trader
- ☐ Think tank
- ☐ Media
- ☐ Consumer organisation
- ☐ Industry association
- ☒ Consultancy/law firm
- ☐ Trade union

* 1.1.1 Is it a multinational enterprise (groups with establishments in more than one country)?

- ☒ YES
- ☐ NO

* 1.1.2 How many employees does your company have?

- ☐ 1-9
- ☐ 10-49
- ☐ 50-249
- ☐ 250-499
- ☒ 500 or more

***1.2 Please provide a brief description of the activities of your organisation.**

White & Case LLP is an international law firm that serves companies, governments and financial institutions throughout the world. We advise clients worldwide on the complexities of proposed cross-border transactions (mergers, joint ventures). Being regularly involved in merger control proceedings before the European Commission and national competition authorities on behalf of its clients, White & Case LLP has extensive experience in the field of merger control.

With more than 180 lawyers in 23 offices, we offer our clients an integrated worldwide team of competition law professionals, providing a coordinated approach to the increasingly global competitive issues facing our clients: corporations, investment banks, partnerships, trade associations, information exchanges and individuals.

The international nature of our practice has enabled us to develop particular experience in advising on cross-border or international mergers and acquisitions, joint ventures. We also offer comprehensive advice on national requirements in over 70 countries worldwide. We have been privileged to handle some of the most complex multijurisdictional antitrust matters of recent times.

We are in constant direct contact with the world's most influential antitrust authorities through the multijurisdictional lawyers in our Washington DC, New York and Brussels offices. They work closely together with our other competition lawyers worldwide, allowing us to advise on the full range of competition issues in virtually all jurisdictions. Many of our other offices also offer comprehensive global antitrust counseling, including Tokyo, Mexico City, Paris, Moscow, Istanbul, Warsaw, London, Hamburg, Prague and Bratislava.

*1.3 Where are you based?

- ☐ Austria
- ☒ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Iceland
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Liechtenstein
- ☐ Lithuania
- ☐ Luxemburg
- ☐ Malta
- ☐ Netherlands
- ☐ Norway
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Other

*Please specify.

Wetstraat 62 rue de la Loi, 1040 Brussels

2. Transparency Register ([Register now](#))

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the [Transparency Register](#) and subscribing to its [Code of Conduct](#). If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to register now, please click on the link in the title. Then you can return to this page, continue replying to the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement available on the public consultation website for information on how your personal data and contribution will be used.

For registered organisations: indicate your Register ID number here:

* 3. Please choose from one of the following options on the use of your contribution:

- ☒ My/our contribution can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).
- ☐ My/our contribution can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication. I am aware that I am solely responsible if my answer reveals accidentally my identity).
- ☐ My/our contribution cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

*4. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

☒ YES

☐ NO

IV. Questionnaire

IV.1. Simplification

In December 2013, the Commission adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself (the so called "Simplification Package"). In particular, the Simplification Package:

- Widened the scope of application of the so-called simplified procedure for non-problematic cases;
- Streamlined and simplified the forms for notifying mergers to the Commission.

Through the Simplification Package, which entered into force on 1 January 2014, the number of cases dealt with under the simplified procedure has increased by 10 percentage points from an average of 59% over the period 2004-2013 to around 69% of all notified transactions over the period January 2014 to September 2016).

According to the Commission Notice on simplified procedure ("the Notice"), the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

- i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);
- ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);
- iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);
- iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)
- v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). 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.

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:

- This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;
- Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

These proposals are still being assessed. Your response to the following questions will contribute to that assessment.

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 a 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"):

	1	2	3	4	5	6	7
Your rating	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain.

The one-stop review at EU level for concentrations falling under the simplified procedure has created added value for businesses by lessening the administrative burden of complying with merger control rules for transactions that would otherwise have had to be notified in several EU Member States.

However, further improvements can and should be made. In particular, pre-notification discussions that have become de facto mandatory in all cases result in undue delays. In some cases, a lengthy debate ensues with the Commission as to whether the simplified procedure applies. In joint venture cases, complex questions relating to the Commission's jurisdiction are not uncommon. As a result, it is often easier and faster to obtain clearance at national level, even if it involves the submission of notifications in several EU Member States.

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);

- ☐ YES
☒ NO
☐ OTHER

Please explain

The introduction of the so-called “Super-Simplified Procedure” has not significantly reduced the burden on companies. Pre-notification talks are still required and can be time-consuming, in particular in joint venture transactions where complex jurisdictional questions are not uncommon. And pre-notification talks give no guarantee that there would be no complications after the filing is submitted. In one recent transaction involving an extra-EEA joint venture (relating to the construction of a gas pipeline in Mexico) we advised on, the filing was almost rejected as incomplete 22 days from the notification, after the case handler changed and new questions relating to the full-functionality of the joint venture came up. Transactions that have in essence no relevance for competition in the EEA should be simply exempted from the notification requirement. The substantial burden and costs related to notification are not justifiable in light of the risks that such transactions create for competition within the EEA. Exempting such transactions from the notification requirement would also allow the Commission to channel its valuable resources to its enforcement priorities. See also our response to question 8.a below.

(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);

- ☐ YES
☒ NO
☐ OTHER

Please explain

The simplified procedure is a welcome feature for transactions that are unlikely to give rise to competitive concerns and the upward adjustment of the affected market thresholds 20%/30% is also a positive development. However, proving that a concentration qualifies for the review under the Simplified Procedure has become more burdensome following the 2013 reforms, predominantly because the parties are now required to consider all “plausible markets”.

It would be less of a problem if plausible alternative markets were identified on the basis of previous Commission decisions and judgments by the EU Courts or industry reports. However, the Commission regularly requests market data for very narrow micro segments so it can be comfortable that the transaction would not lead to high market shares on any imaginable market. As a result, the timing of the EU merger control review has become less predictable and the pre-notification process has become more onerous for the notifying parties. When the Commission unveiled its 2013 package, it hoped that “the overall reduction of information requirements that result from the Merger Simplification Package [would] shorten the time that is needed for pre-notification contacts”. In fact, we have experienced increasingly lengthy pre-notification periods and more detailed requests for information driven by the requirement to report on all “plausible” markets. The notifying parties devote considerable resources to meet these requests, but the results of such onerous data-gathering exercises often consist of the parties’ internal best estimates and therefore have questionable value for the Commission’s analysis. The lack of deadlines and resulting uncertainty surrounding the pre-notification period can be a serious issue for the parties, especially in transactions where timing is of the essence.

(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);

- ☐ YES
- ☒ NO
- ☐ OTHER

Please explain

The 2013 Package has not impacted extra-EEA joint venture transactions to a significant degree, as they have been subject to the Simplified Procedure since 1994. This consultation presents an opportunity to address one of the most serious remaining flaws in the Commission’s merger control regime. See also our response to questions 6.c and 9-13 below.

(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).

- ☐ YES
☒ NO
☐ OTHER

Please explain

Joint to sole transactions have been subject to the Simplified Procedure rules since 2000. The 2013 package has not had a significant impact on joint to sole transactions.

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

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

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

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

We were involved in one case involving moderate combined market share where we proposed to proceed with the submission of a Form CO, but the Commission suggested we investigate our market shares first to see whether a Short Form CO would be available. It turned out that the parties were above the relevant thresholds in a limited number of markets.

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?

- ☒ YES
☐ NO
☐ OTHER

Please explain

The Commission should consider broadening the application of the simplified procedure to vertical transactions, as there are many cases in which such transactions are very unlikely to create competitive concerns. For example, transactions involving a vertical relationship where one party has a low market share on an upstream market that is national or wider and the other party has a high market share on a local downstream market are very unlikely to give the merged entity the ability to foreclose demand because the party with a high market share accounts for a very small share of total demand.

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?

- ☐ YES
☒ NO
☐ 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:

- ☐ YES
☒ NO

Please explain.

Further lessening or eliminating the notification requirements for 5b transactions (including transactions where there are no substantive overlaps) is necessary to align the burdens imposed on the notifying parties with the very remote risk of anti-competitive effects in the EEA posed by such transactions.

- Transactions falling under point 5b of the Notice:

☐ YES

☒ NO

Please explain.

The administrative burden and costs should be further reduced for 5c and Point 6 transactions. Where the parties' activities overlap but their combined share is clearly below the relevant thresholds, the parties should only be requested to produce information required to establish their approximate market share in the reportable markets. The Commission should also re-consider the amount of information it routinely requests where the parties' combined market share on the reportable markets is close to the relevant thresholds. In such cases, notifying parties often choose to proceed with a full notification to avoid the burdens related to undertaking a detailed market share investigation on all plausible markets and the related uncertainty in relation to the timing of the pre-notification process. In most cases, the only purpose of this exercise is to ascertain whether the simplified procedure could be used. The substantive assessment of the transaction obviously does not change if the parties' combined market shares are slightly above the relevant threshold in one or more narrow plausible markets.

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

☐ YES

☒ NO

Please explain.

It is impossible to justify the costs related to notifying transactions that could not conceivably give rise to any anti-competitive effects in the EEA. Joint ventures with no or limited activities in the EEA should be exempted from the EU merger control regime.

- Transactions falling under point 5d of the Notice:

- ☐ YES
- ☒ NO

Please explain.

As explained in the response to question 8.1, we do not believe that joint to sole transactions involve an acquisition of control, and should thus be exempt from notification.

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

For the reasons set out above, we have not seen a significant reduction in such costs.

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?

- ☒ YES
- ☐ NO
- ☐ OTHER

If you replied yes or other, 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;

- ☒ YES
- ☐ NO

Please explain.

Our view is that “no overlap” and “extra-EEA JV” transactions should be exempted from the notification requirement in light of the very remote risk of anti-competitive effects in the EEA posed by these transactions. It would defy the purpose of the reform if the exempted concentrations were instead scrutinized by multiple national authorities in EU Member States. Thus, in our view, all exempted concentrations should be considered compatible with the internal market.

The following transactions, which required a Commission notification, highlight the need to exempt the above types of transactions:

- Acquisition by Blackrock, First Reserve Management and GDF Suez of joint control over a company operating a gas pipeline in Mexico.
- Acquisition of joint control by TNK-BP (which acquired its stake from BP, its then-parent) in a gas pipeline in Vietnam.
- Acquisition of joint control by Goldman Sachs and Abertis Infraestructuras in a company managing and operating toll road concessions exclusively in Puerto Rico.
- Acquisition of joint control by Siemens and Sinara in a company manufacturing and selling Russian locomotives that could not be used on tracks in the EEA.
- Acquisition of joint control by Mitsui and Penske of a Lexus car dealership in Siberia.
- Creation of a JV by JCDecaux and Bolloré to provide outdoor advertising in Cameroon.
- Acquisition of joint control by Statoil and Svitzer of a tugboat operator on Grand Bahama.

We understand that the Commission is concerned that such an exemption could potentially result in competition or conglomerate issues evading merger control procedure. However, the exemption could be narrow enough to only apply to transactions giving rise to no conceivable competition law issues within the EEA. There is no justification for imposing significant burdens on parties in a situation where the risk of any anti-competitive effects in the EU is at best remote. To the extent that such risk exists, the Commission has sufficient powers to address it under Articles 101 and 102 TFEU.

There is also an argument for exempting joint control to sole control transactions. Such transactions are very unlikely to lead to any substantive competitive concerns. Moreover, when it comes to the liability of the joint venture parent companies for the conduct of the joint venture, both the Court of Justice of the European Union and the Commission treat the joint venture and its parent companies as a single economic entity. The Commission's practice in the field of merger control should be brought in line with this line of case law.

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);

- ☒ YES
☐ NO

Please explain.

White & Case would welcome the introduction of lighter information requirements/an initial short information notice for transactions with no, or limited, overlaps.

The period within which the Commission would decide whether or not to examine the case should be relatively short, to reflect the low risk posed by such transactions and to avoid unjustified delays. Since an information request would involve significant costs for the parties, we do not believe this to be an approach to no overlap, extra-EEA joint venture or to joint to sole control transactions.

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;

- ☐ YES
☒ NO

Please explain.

Self-assessment does not appear to be appropriate in cases where the Commission retains the jurisdiction to review the case. The costs involved in a thorough self-assessment would not be significantly lower than those involved in a notification, but such an exercise would not give the parties the certainty that follows from a Commission decision either way.

Thus, self-assessment should be reserved for instances where filing is entirely voluntary but the parties are nonetheless concerned that the transaction may have effects on the EEA market. For example, in line with our comments above, self-assessment could be appropriate in cases where there are no overlaps and for extra-EEA joint venture transactions.

8.4 Other

- ☒ YES
☐ NO

Please explain.

Simplification has to a large degree been a success and the Commission should be encouraged to take the process further where it is clear that there is no, or very little, risk of anti-competitive effects within the EEA.

In addition to the options outlined in questions 8.1 and 8.2, further or alternative steps to simplify the merger filing regime could include:

- allowing the Commission a period of time in which to open an investigation (like in the UK);
- introducing a non-suspensory voluntary filing regime;
- an automatic waiver for most of the information required in the Short Form CO to limit information to what is necessary to determine that the transaction will have no effect within the EEA, and allowing the Commission to justify why provision of certain information is necessary.

In any case, it would be appropriate for the Commission to launch a new consultation when it has more specific proposals for addressing the shortcomings of the current regime.

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.

Please see our responses above.

Further simplification of the treatment of extra-EEA joint ventures

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?

- ☐ YES
- ☒ NO
- ☐ OTHER

Please explain

We believe that the Commission's current approach in relation to extra-EEA joint ventures is a major flaw in an otherwise well-functioning EU merger control regime. If competition and consumers require protection from potential future anti-competitive effects brought about by extra-EEA joint ventures, then more appropriate tools exist or should be introduced where these are inadequate.

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

- ☐ YES
- ☐ NO
- ☒ OTHER

Please explain

Value has been created only to the degree that such transactions would otherwise have been subject to review before national competition authorities. In principle, however, White & Case would be in favor of an EU merger control exemption for extra-EEA joint ventures. This is also because the EU rules are often followed by the national competition authorities in Europe and beyond.

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?

- ☐ YES
- ☒ NO
- ☐ OTHER

Please explain

It is difficult to justify the imposition of any merger control-related costs with respect to transactions that could not conceivably give rise to any anti-competitive effects in the EEA. Extra-EEA joint ventures should be exempted from the EU merger control regime.

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

Extra-EEA joint ventures were subject to the simplified regime prior to the 2013 package, so such costs were not significantly reduced. Indeed, the additional information requirements discussed in the response to question 2.b may have resulted in additional costs for the parties.

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?

- ☐ The treatment of extra-EEA joint ventures is sufficiently simplified.
- ☒ 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;

- ☒ YES
- ☐ NO

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.

Excluding extra-EEA joint ventures from the scope of the Merger Regulation is appropriate. The risk of competitive effects associated with these transactions is very low regardless of the size and the EEA presence of the parent undertakings. We believe that the Commission's current position requiring notification of transactions relating to extra-EEA joint ventures is untenable for a number of reasons.

First, the requirement to notify extra-EEA joint ventures is at odds with established jurisprudence. In *Gencor*, the Court of First Instance held that the application of the EU merger regulation is only justified "when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community". It is also inconsistent with the views of the International Competition Network (ICN). The ICN's recommended practices for merger notification state: "jurisdiction should be asserted only with respect to those transactions that have an appropriate nexus with the jurisdiction concerned".

Second, the Commission is seen globally as an experienced and sophisticated competition authority. The Commission has the responsibility to set a good example for the rest of the world, as its policies and rules are often followed by national competition authorities in the EEA and beyond. Going against established ICN recommendations is not compatible with this responsibility. In fact, some countries follow the Commission, which leads to multiple needless reviews of JVs by jurisdictions where there is no local nexus.

Third, the requirement to notify transactions with no actual or foreseeable effect within the EEA diverts the Commission's resources away from scrutiny of concentrations that do effect competition within the EEA. From the industry's perspective, the current rules impose a disproportionate burden. Although the 2013 package decreased the amount of information required for extraterritorial JVs, this has only had a limited impact on the overall filing burden.

We further do not consider that any of the Commission's reservations present unsurmountable obstacles. Future transfers of EEA assets/shares/businesses by the parents into the joint venture could be subject to potential EU merger control notifications when they occur. Non-EEA transfers should of course remain exempt on the same basis that the creation of the joint venture was exempt.

"Expansion" is a far broader term than "merger", and is not prohibited under EU competition law. The case of an EEA joint venture should be no exception to this rule. Expansions in the natural course of business should not be caught by the EU Merger Regulation. The Commission has other tools available to it to deal with cases where the conduct of such an entity has a harmful effect on EEA markets.

That said, where such a transaction is caught by multiple Member State filing regimes, and where it makes sense in terms of costs and time, the parties should have the option to request a review by the Commission.

(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?

- ☒ YES
☐ NO

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.

In our view, extra-EEA joint ventures should be exempt from, not subject to lighter, EU merger control rules. It would defy the purpose of the reform if the exempted concentrations were instead scrutinized by multiple national authorities in EU Member States. Thus, in our view, all exempted concentrations should be considered compatible with the internal market.

However, in the absence of the desired exemption, a lighter regime is preferable.

Possible alternatives to exemption could include:

- allowing the Commission a period of time in which to open an investigation (like in the UK);
- introducing a short information notice period to advise the Commission of the transaction and allowing it a short period in which to take a position; or
- an automatic waiver for most of the information required in the Short Form CO to limit information to what is necessary to determine that the transaction will have no effect within the EEA, and allowing the Commission to justify why provision of certain information is necessary.

If the Commission retains the jurisdiction to review and require remedies in relation to extra-EEA joint ventures, then we do not believe that a self-assessment would be appropriate. The costs involved in a thorough self-assessment may not be significantly lower than those involved in a notification and it would not achieve the key commercial objective of certainty for the parties.

(iii) Other.

Please explain.

IV.2. Jurisdictional thresholds

The Merger Regulation only applies to concentrations of a Union dimension, which are those where the undertakings concerned meet the different relevant turnover thresholds set out in Article 1 of the Merger Regulation.

Article 1 of the Merger Regulation

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Union dimension as defined in this Article.

2. A concentration has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

4. [...]

5. [...]

Recently, a debate has emerged on the effectiveness of these turnover-based jurisdictional thresholds, specifically on whether they allow capturing all transactions which can potentially have an impact on the internal market. This may be particularly significant in the digital economy, where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues. With significant numbers of users, these services may play a competitive role. Moreover, relevant business models may involve collecting and analysing large inventories of data that do not yet generate significant turnover (at least in an initial period). Therefore, players in the digital economy may have considerable actual or potential market impact that may be reflected in high acquisition values, although they may not yet generate any or only little turnover. Acquisitions of such companies with no substantial turnover are likely not captured under the current turnover-based thresholds triggering a notification under the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has been suggested to complement the existing turnover-based jurisdictional thresholds of the EU Merger Regulation by additional notification requirements based on alternative criteria, such as the transaction value. The perceived legal gap may not only concern the digital industry, but also other industry sectors, such as the pharmaceutical industry. There have been indeed a number of highly valued acquisitions, by major pharmaceutical companies, of small biotechnology companies, which predominantly research and develop new treatments that may have high commercial potential, and do not yet generate any or only little turnover.

Moreover, the question of whether there is a legal gap needs to be assessed in the context of the case referral system in EU merger control. Even in instances where a merger does not have Union dimension based on the turnover of the merging parties, the Commission may obtain jurisdiction through a referral. According to Article 4(5) of the Merger Regulation, the parties to a merger may ask for referral of a case from the level of Member States to the Commission before it is notified, if the case is notifiable under the national merger control laws in at least three Member States and if the additional criteria set out in Article 4(5) of the Merger Regulation are met. Also, according to Article 22 of the Merger Regulation, national competition authorities may request the referral of a case to the Commission after notification, if the specific conditions of Article 22 of the Merger Regulation are met.

This section of the questionnaire gathers your views on the existence of a possible enforcement gap of EU merger control, and what would be its possible dimension and relevance. Moreover, this section also requests your views on possible policy responses, if such were to be warranted.

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]

[1] A well-known example of these transactions is the acquisition in 2014 of WhatsApp by Facebook, which fell outside the thresholds of Article 1 of the Merger Regulation but was ultimately referred to the Commission pursuant to Article 4(5) thereof. Information on merger cases reviewed by the European Commission is accessible via the search function on DG COMP's website at http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2.

- ☐ 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.

White & Case has advised clients from the digital economy on a regular basis. In our experience, if such transactions are not caught under the Merger Regulation, they are subject to review at the national level in one or more EU Member States.

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

- **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.

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.

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

Please explain.

Please see our response to question 19.

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

- **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 see our response to question 19.

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

Please explain.

In our view, the current absence of a complementary jurisdictional threshold based on the value of the transaction does not impair the goal of ensuring that all competitively significant transactions with cross-border effect in the EEA are subject to merger control at EU level. In fact, the statistics published by the Commission already indicate that the vast majority of transactions caught under the Merger Regulation do not raise competition concerns.

Under the current rules, transactions that do not satisfy the thresholds set by the Merger Regulation may be and are caught at the national level in EU Member States. Most potentially problematic transactions are caught in one or more EU Member States. Introducing a complementary jurisdictional threshold at the EU level would affect relationships within the ECN, as transactions that might otherwise be notified at national level would be "pulled up". That would likely lead to an even more EU-centric merger control model and put a greater burden on the Commission.

We are aware of other transactions in the software sector that were not caught at the EU level, but reviewed in one or more EU Member States. National competition authorities have the ability to refer transactions to

the Commission that give rise to significant cross-border effects on competition, and the parties also have the ability to refer it to the Commission if the transaction is caught in three or more EU Member States. Facebook/Whatsapp shows that the referral mechanism works.

The benefit of imposing the additional burden for the regulator and businesses is unclear in the absence of statistical evidence showing that a significant number of high-value-deals with cross-border effects on competition within the EU are not caught by the Merger Regulation. If more transactions are caught at the EU level, which is a likely consequence of the additional threshold, the Commission will have fewer resources to deal with its enforcement priorities. It would also likely result in additional burdens for businesses. As explained above, for non-problematic transactions, notification at the Member State level is often faster and less cumbersome. Moreover, if national competition authorities follow the Commission's initiative, which is quite likely, there would be additional significant costs imposed for businesses to assess transactions under the applicable merger control rules. Imposing additional merger control requirements may have a chilling effect on investment, in particular as regards private equity and venture capital transactions, which are a key feature for the financing and growing of new technologies.

A deal size threshold is a criterion that is difficult to apply in practice. For example, the US has a complicated framework for valuing transactions for merger control purposes, resulting in numerous questions that the US agencies receive from businesses assessing their transactions under the US merger control rules. In the US, the relevant value threshold is also part of the overall set of rules setting out the relevant thresholds, which are markedly different from the EU rules. The US threshold is set at a relatively low level (as compared, for example, to the test proposed by the German draft legislation), but that threshold is deemed appropriate as a part of the overall US threshold, which notably includes detailed exemptions for foreign-to-foreign transactions. The relevant EU threshold should be considerably higher or else hundreds of additional transactions would have to be reviewed at the EU level. In that context, ascertaining the local nexus to the EEA economy and cross-border nature of the transaction is of utmost importance for the debate of a deal size threshold. The local nexus test should be linked with the turnover generated within the EEA.

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

Please explain your answer.

IV.3. Referrals

The division of competence between the Commission and the EU Member States is based on the application of the turnover thresholds set out in Article 1 of the Merger Regulation and includes three corrective mechanisms.

The first corrective mechanism is the so-called "two-thirds rule". Pursuant to this rule, notification under the Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, even if the general thresholds under Articles 1(2) and 1(3) of the Merger Regulation are met. The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) of the Merger Regulation or to the Commission under Article 4(5) if certain conditions are fulfilled. The initiative for requesting such a referral prior to notification lies in the hands of the parties. However, pre-notification referrals are subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5) of the Merger Regulation.

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the Merger Regulation under certain conditions (Article 22 of the Merger Regulation). Conversely, a Member State may, in cases that have been notified under the Merger Regulation, request the transfer of competence to the national competition authorities under certain conditions (Article 9 of the Merger Regulation).

In relation to the current case referral mechanism foreseen by the Merger Regulation, the White Paper proposals aimed at making case referrals between Member States and the Commission more business-friendly and effective.

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;
2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely
 - an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
 - and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and
3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

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

Please explain.

There is clearly scope for improvement to the referral system, and the changes envisaged in the 2014 White Paper are a step in the right direction.

The requirement to file two forms under Article 4(5) of the Merger Regulation makes the submission of such referrals disproportionately cumbersome and time-consuming. The requirement under Article 4(4) of the Merger Regulation that the parties admit that the concentration may "significantly affect competition in a market" is perceived as an obligation to make a self-incriminating declaration, which may explain why such referrals are very rare. The mechanism for referring cross-border cases falling below the EU jurisdictional thresholds to the Commission (Article 22 of the Merger Regulation) fails to provide sufficient legal certainty to businesses as to which authority will assess their case. In particular, Member States lacking jurisdiction to review the transaction under their national laws are currently able to join a referral request. This referral mechanism also allows for parallel Commission and national assessments contrary to the one-stop-shop principle, since the Commission only assumes jurisdiction with respect to the territory of the Member States that have requested or joined the referral request.

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

Please explain.

White & Case welcomes the efforts of the European Commission towards making the referral mechanism more effective and business-friendly. The Commission's proposals represent a significant improvement over the current system, as they contribute to making referrals simpler and faster for businesses while increasing the overall efficiency of the system. White & Case anticipates that following these changes more cases will be referred to the Commission, thereby correcting the trend of many cross-border cases being reviewed by

three or more Member States.

(1) Pre-notification referrals to the Commission at the request of the notifying parties (Article 4(5) EUMR)

The White Paper proposes abolishing the two-step procedure under Article 4(5) of the EUMR, which requires that parties first file a reasoned submission (Form RS) followed by a notification (Form CO), if they would like the Commission to deal with a case that is notifiable in at least three Member States but does not meet the EU jurisdictional thresholds. Should this proposal be adopted, parties would be able to notify the transaction directly to the Commission, and the latter would inform the Member States that would be competent to review it under their national laws. Should one or more of those Member States oppose the referral within 15 working days, the EC would give up jurisdiction and the parties would notify the transaction to the competent Member States. In addition, the Commission proposes sending the parties' initial briefing paper or case allocation request to the Member States in order to inform them of the transaction at an early stage.

White & Case welcomes these proposals, as they provide a significant improvement to the currently burdensome and lengthy referral process. In our view, they will lighten the administrative burdens placed on businesses to request referrals and will likely increase the use of the referral procedure. Given the very low percentage of Article 4(5) requests that have been vetoed by the Member States so far, the justification for the requirement to first file a Form RS (i.e. allowing Member States to veto a referral before a formal notification is filed with the Commission) no longer carries significant weight.

The proposal to send the parties' initial briefing paper or case allocation request to the Member States could reduce the uncertainty faced by businesses, as it could allow Member States to decide whether or not to veto the referral earlier on during the 15-working-day period. This would reduce the resources invested by the Commission and the parties on a case that may be eventually reviewed by a Member State. Nevertheless, given that at that stage transactions (and in particular those involving publicly listed companies) are often highly confidential, it is essential that NCAs adequately protect the confidential information shared with them.

(2) Post-notification referrals to the Commission at the request of Member States (Article 22 EUMR)

The White Paper proposes some important changes to the mechanism for referring cases to the Commission once the transaction has been notified under Article 22 EUMR. White & Case supports these changes. By avoiding parallel investigations by the Commission and one or more NCAs, this proposal will increase legal certainty (by reducing the risk of diverging decisions) and reduce administrative costs for businesses (as they will be dealing with a single authority rather than several). The proposal will also increase the efficiency of the system by furthering the one-stop-shop principle.

The envisaged early information system between the Commission and NCAs is also a positive development, as it will increase coordination among competition authorities and reduce the risk of a patchwork of EU and Member State investigations over the same transaction. However, the notice should only include information that is strictly necessary, and Member States must commit to protecting confidentiality.

(3) Pre-notification referrals to a Member State at the request of the notifying parties (Article 4(4) EUMR)

As a result of the change, notifying parties will no longer be required to admit explicitly that the proposed transaction “significantly affects competition”, which we welcome. However, the requirement under Article 4(4) EUMR to file two forms (Form RS and Form CO) imposes a significant burden on businesses and, as such, may deter parties from using this procedure.

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

Please explain.

Overall, the White Paper proposals provide a satisfactory response to the issues identified above. However, we believe that there is still room for further fine-tuning in order to make the system even more effective and business-friendly and, in particular, to expedite the process. For example, the period granted to Member States for vetoing the referral could be reduced from 15 to 10 working days. In addition, the pre-notification discussions with the Commission could also be expedited, particularly in cases that do not give rise to significant competitive concerns.

IV.4. Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- 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.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- 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).
- 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.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- 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.
- 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.

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?

There is scope to improve the EU merger control system. We welcome in particular the proposals relating to the amendments of Articles 4(1) and 5(4) and the introduction of more flexibility in Phase II investigations.

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?

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

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 defence 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

Please explain.

The extension of the procedure by 15 additional working days is insufficient in complex cases. There should be more flexibility for the parties to negotiate remedies with the Commission, depending on the nature of the remedies offered. Since it is for the notifying party to propose remedies, the notifying party should also have the ability to extend the deadline to allow for the negotiation of the remedies package.

V. Submission of additional information

Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. The maximal file size is 1MB. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

