

EUROPEAN COMPETITION LAWYERS FORUM

**Response to the European Commission's
evaluation of procedural and jurisdictional aspects
of EU merger control**

20 December 2016

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Part 1: Introduction and Summary

- 1.1 The European Competition Lawyers Forum is grateful for the opportunity to respond to the European Commission's proposals to amend the EU Merger Regulation.¹ This response has been compiled by the ECLF Working Group and does not purport to reflect the views of all ECLF members or of their law firms (or their clients).² Also, while the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.
- 1.2 The ECLF regards the Commission's current consultation as the launch pad for collecting views and fostering debate. It should not replace a robust empirical assessment of need nor a fully considered impact assessment. This response aims to provide comments on various aspects of the Commission's proposals and to answer the specific questions raised in the Commission's questionnaire. The ECLF would welcome a continued dialogue with the Commission, in light of other responses received by the Commission, to discuss in more detail possible amendments to the EUMR (and the scope for a more detailed empirical study of whether there is a need for a new value-based jurisdictional test).
- 1.3 In summary:
- (A) **Simplification:** The ECLF welcomes the Commission's moves to reduce the burdens and costs imposed on business by its merger control procedures. In particular, we believe that there is scope to further simplify procedures for certain categories of cases that generally raise no or only negligible competition issues, by adopting a simple information notice procedure. These proposals are addressed in Part 2 of this response.
 - (B) **Jurisdictional thresholds:** The ECLF has serious concerns that the introduction of an additional value-based jurisdictional threshold would substantially increase regulatory burdens for businesses when complying with international merger control rules, and with no real evidence that it would catch a meaningful body of problematic transactions that currently escape regulatory scrutiny. Accordingly, members of the ECLF Working Group either: (i) oppose any such new threshold, or (ii) urge the Commission not to press forward with proposals without first conducting a detailed analysis of whether there is sufficient need and what a suitable threshold should be. Even if a credible case for a value-based threshold is made, we believe that it is only in very exceptional circumstances that such cases would present significant competition concerns. Therefore, the imperative of not imposing unjustified regulatory burdens on business means that all such cases should in principle benefit from the simple

¹ These proposals are set out in the Questionnaire, *Evaluation of procedural and jurisdictional aspects of EU Merger Control*, dated 7 October 2016; the ECLF has responded to the Commission's Questionnaire online by providing a copy of this response. The Commission's proposals build on the Commission's White Paper, *Towards More Effective EU Merger Control*, and accompanying Commission Staff Working Paper, both dated 9 July 2014.

² It reflects discussions between members of the Working Group, including points raised and discussed with representatives of DG Competition's Mergers Policy unit at a meeting held on 9 December 2016.

information notice procedure advocated by the ECLF. These considerations are addressed in Part 3 of this response.

- (C) **Referrals:** While the ECLF broadly welcomes the Commission's proposals to simplify the referral mechanisms for the transfer of jurisdictions between the NCAs and the Commission, there are some respects in which members of the ECLF Working Group believe that further improvements could be made. In particular, the success of the Article 4(5) procedure could be extended by making it available to cases which meet just one Member State's national thresholds (rather than requiring three Member States to have jurisdiction). Also, the rationale for Article 22 no longer applies such that it seems appropriate to remove it and rely instead on an extended Article 4(5) mechanism. The referral procedures are considered in Part 4 of this response.
- (D) **Other technical aspects:** Finally, Part 5 explains that the ECLF is broadly in agreement with the various technical reforms proposed by the Commission, subject only to some minor aspects. In particular, the ECLF disagrees with the proposals that seek to extend the Commission's jurisdiction to confer remedial powers over non-controlling minority stakes (notwithstanding the Commission's recent policy decision not to seek to extend the jurisdictional reach of the EUMR over such stakes).

Part 2: Simplification (Questions 1-13)

- 2.1 The ECLF welcomes measures which aim to achieve reductions in costs and administrative burdens. That said, when identifying ways to simplify further the EUMR procedure the interplay with the Member States needs to be considered. For example, if the creation of a full-function joint venture, which is located and operating outside the EEA and does not have any effect on EEA markets, were to be taken outside the jurisdiction of the Commission, this may result in the same transaction triggering multiple national filings.³ The proposals for reform set out below seek to take account of this interplay.
- 2.2 The simplified procedure (in particular following the 2013 reforms) has made life easier for parties which meet the criteria. By expanding the categories of cases which are eligible for the simplified procedure – notably by raising the thresholds below which it is available – the Commission has generally reduced the burden on undertakings. This is broadly confirmed by the statistical increase in simplified procedure cases. That said, as developed further below, the ECLF cautions against an uncritical reliance on headline statistics which can obscure considerable burdens “behind the scenes”.

A. Proposal for a new “super-simplified” procedure

- 2.3 The ECLF supports reducing the administrative burden further for those cases which either cannot have an effect on competition within the EEA or whose effects would be at most negligible. These are the cases which currently fall under points 5(a), (b) or (d) of the Commission’s Notice on the simplified procedure. For these types of case the ECLF proposes a new “super-simplified” notification regime whereby the concentration retains an EU dimension but the parties are only required to file a simple information notice with basic information on the parties and confirmation that the relevant criteria of points 5(a), (b) and/or (d) are satisfied. The Commission should then have a short period (of no more than say 10 working days) in which either to publish a notice in the Official Journal or to require the parties to file a Form CO. In circumstances where the Commission has not requested a Form CO, and no new factors have come to light (from third parties or otherwise) that indicate that the concentration did not satisfy the relevant criteria, the Commission should promptly proceed to issue a short clearance decision (failing which the case is automatically cleared 25 working days after submission of the information notice). This mechanism is developed further below.

³ Full-function joint ventures, located and operating outside the EEA may currently trigger filings in the majority of EU Member States where the thresholds for an EU filing are not met.

Point 5(a) simplified cases: JVs with no (or limited) EEA presence

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| 5.(a) | 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. |

2.4 Point 5(a) simplified cases have been subject to the simplified procedure rules since 1994. The previous reform in 2013 therefore did relatively little to reduce the administrative burden on parties to such transactions. As such transactions are unlikely to give rise to anti-competitive effects within the EEA, they should benefit from the proposed new “super-simplified” procedure. It is important that these cases retain an EU dimension and continue to benefit from the “one-stop shop” to avoid undermining the administrative efficiencies through multiple national filings.

2.5 The Commission identifies *“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 the activity of the joint venture is expanded at a later stage).”* This reasoning should be applied in a cautious manner. First, genuine (subsequent) expansions through the contribution of EEA assets will give rise to a separate concentration requiring independent assessment and possible notification at the Member State or EU level. Second, any suggestion that “expansion” by virtue of organic growth should somehow warrant scrutiny of extra-EEA joint ventures is ill-conceived as merger control should properly govern the structure, and not the operation, of markets. The ECLF recognises, however, that a move to an even more simplified notification regime for joint ventures with no (or limited) EEA presence may justify a reduction in the relatively significant threshold of €100 million, together with a robust approach to anti-avoidance / related transactions issues.

Point 5(b) simplified cases: conglomerate mergers

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| 5.(b) | 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. |
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- 2.6 Point 5(b) simplified cases have been subject to the simplified procedure rules since 1994. The reform in 2013 appeared to reduce the administrative burden further by ostensibly dispensing with the pre-notification requirements (a procedure which has been termed the “super-simplified procedure”). As these cases are, by definition, highly unlikely to give rise to any effects in the EEA, they should benefit from the proposed new super-simplified regime. Again, it is important that these cases retain an EU dimension and continue to benefit from the “one-stop shop” to avoid undermining the administrative efficiencies through multiple national filings (for example, Spain can require a filing based solely on the parties’ individual market shares, irrespective of any vertical or horizontal links).
- 2.7 The Commission expresses concern that *“by exempting from notification all cases without horizontal or vertical overlaps, the Commission may not be able to examine certain concentrations that could raise competition concerns.”* The ECLF considers that this ought not to be a concern in practice as, under the regime outlined below, the Commission will retain the right to require formal notification of the relevant transaction if appropriate (i.e. in exceptional circumstances).

Point 5(d) simplified cases: moves from joint to sole control

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| 5.(d) a party is to acquire sole control of an undertaking over which it already has joint control. |
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- 2.8 Point 5(d) simplified cases have been subject to the simplified procedure rules since 1994. The previous reform in 2013 therefore did relatively little to reduce the administrative burden on parties to such transactions. Experience shows that transactions which result in the move from joint to sole control only rarely give rise to any effects within the EEA. Such cases would, therefore, be obvious candidates for a further reduction in administrative burden through inclusion in the proposed new “super-simplified” regime.

Practical operation of a new “super-simplified” procedure

- 2.9 The ECLF considers that the burden on undertakings in those cases which are least likely to have any effects in the EEA can be meaningfully reduced through the use of a new “super-simplified” notification regime. Eligible cases would (in the ordinary course) only need to be notified to the Commission under a simple information notice with basic information on the parties and confirmation that the relevant criteria are satisfied.⁴ The key aspects of such a mechanism would be:

- (A) Where a transaction meets the EUMR thresholds but falls within one or more of points 5(a), (b) and (d), the notifying parties would complete a simple information

⁴ The onus would be on the notifying parties to satisfy themselves that the criteria are satisfied, such that the Commission would be able to impose fines under Article 14(1) or (2) EUMR, and/or revoke a clearance decision, if parties intentionally or negligently use the procedure for a case that does not meet the criteria.

notice and formally submit this to the Commission. The Commission would, as a general rule, then promptly inform the NCAs and publish a notice in the Official Journal as soon as practicable (and in any event within 10 working days).⁵

- (B) In the alternative, it would remain open to the Commission, within 10 working days of the information notice, to request that the notifying parties submit a Form CO (either a Short Form or even a full Form CO)⁶. Given the nature of the cases which could benefit from this “super-simplified” process, the Commission should only request such a Form CO notification in “exceptional circumstances”. The inclusion of this hurdle should suffice to address the risk that the Commission may routinely require filings out of an abundance of caution.
- (C) Third parties would have a short period (of no more than 10 working days from publication in the Official Journal) to make any representations to the Commission, with this essentially being an opportunity to raise concerns that the transaction does not meet the eligibility criteria for “super-simplified” treatment. Given that these cases are by their nature very unlikely to raise significant competition concerns, the ECLF would not envisage significant third party or NCA input in such cases. Accordingly, it would be possible for the Commission to proceed to adopt a short pro forma clearance decision relatively quickly after expiry of this period (failing which the concentration would be automatically cleared 25 working days after submission of the information notice.) The Commission would be able to ask questions of the notifying parties to the extent it required additional information.
- (D) Finally, notifying parties would remain free to pursue the current Short Form or full Form CO procedure from the outset should they consider it appropriate. This may be the case if, for example, there are special circumstances that mean that market participants may have concerns about a change from joint to sole control (given the role of the existing JV partner) or there are uncertainties regarding market definition which may affect whether the case is properly to be viewed as a pure conglomerate merger. In other words, these would generally be cases where the parties should recognise that there is a likelihood of the Commission finding that there are “exceptional circumstances” such that it may be more efficient to proceed straight to preparing a draft notification. There would continue to be the possibility for parties to engage in pre-notification contacts with the Commission to ascertain whether or not the case is a candidate for super-simplified treatment.

2.10 The mechanism described above has the advantage of removing the administrative burden of a Form CO notification from those cases which are least likely to have any anti-

⁵ This information notice would be in lieu of the “case allocation request” that notifying parties are currently expected to submit ahead of a draft notification. It should be relatively straightforward for such cases to be screened and processed by a “screening unit” without needing to appoint a sector-specific case team.

⁶ In such circumstances, the case would be allocated to a case team with which the notifying parties could engage in pre-notification discussions.

competitive effects in the EEA, whilst ensuring an appropriate allocation of jurisdiction between the Commission and the NCAs.⁷

B. Observations on other simplified procedure cases

Point 5(c) and point 6 cases: cases with prima facie minimal impact on competition

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| 5.(c) | 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: <ul style="list-style-type: none">(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%. |
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| 6. | The Commission may also apply the simplified procedure 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: <ul style="list-style-type: none">(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. |
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2.11 The ECLF recognises that by increasing the thresholds to 30% and introducing the HHI threshold in 2013, the Commission has permitted a greater number of concentrations to benefit from the Short Form simplified notification procedure. However, whilst this commitment in principle to administrative ease was welcome, the ECLF identifies below two areas where this objective has been somewhat undermined. These issues cast some doubt over the total quantum of administrative and cost savings for these types of cases:

- (A) First, the 2013 reforms introduced additional information requirements prescribed by the revised Short Form CO. These additional requirements are: (i) the need

⁷ The alternative of removing these simple cases entirely from the jurisdiction of the EUMR would have the unwelcome effect of possibly triggering multiple national filings which would undermine the efficiencies. It would also create complexity with the operation of Article 5(4).

to provide internal documents; and (ii) the need to consider “plausible markets”. The latter “new” Short Form CO requirement in particular can materially increase the information required (typically disproportionately to any value to the Commission in assessing the case).

- (B) Second, there have been increased administrative burdens during the pre-notification process. It is the experience of ECLF members that parties are sometimes required (in the face of a cautious case team) to “prove the negative”: i.e. that there is no possible, hypothetical, “plausible” market (or sub-segment of the market) where the parties’ shares may be over the relevant thresholds. Whilst this can have the advantage of flushing out any issues and avoiding a finding of incompleteness in the event of a sophisticated complainant identifying high shares in niche segments, the pre-notification process can also see the parties being subjected to burdensome information requests. These often require the parties to provide as much information as would have been required for a full Form CO, including extensive contact details. Indeed, ECLF members have experienced cases where the decision as to whether the parties will be permitted to file a Short Form CO or required to “flip” to a full Form CO has been deferred to the very last moment, meaning that the parties experience no meaningful reduction in the administrative burden associated with a Short Form CO (even if a Short Form CO is ultimately filed). The evident risk of a burdensome pre-notification and/or the difficult task of proving a negative are pushing parties towards conservatively filing a full Form CO for point 5(c) or point 6 cases from the outset which, arguably, is undermining the 2013 reforms.

C. More general remarks

- 2.12 This ballooning of pre-notification periods and increasingly burdensome information requests are not limited to simplified procedure cases, but are also present in normal procedure cases (even those which are unconditionally cleared at Phase 1). A particular area of concern is the increasing over-reliance on internal documents by the Commission. Whilst internal documents clearly have a useful role to play, it should be kept in mind that they will often be comparatively unsophisticated (when compared with the analysis required for a merger control assessment) and will often be prepared by sales or managing executives to portray as strong a picture as possible of the relevant business unit – i.e. they will include a lot of sales “puff”.
- 2.13 One means of reform – which could address what some observers are beginning to view as an abuse of the pre-notification process – would be to have prescribed pre-notification periods either formally or informally in a revised best practice guidance as some commentators have suggested.⁸ On balance, however, the ECLF would not be in favour of strict deadlines as this (even if contained in informal guidance) simply bolts on an additional review period and risks limiting what can be useful flexibility. Rather, the ECLF would advocate “softer” means of reducing the time spent in pre-notification and the associated information burden. One means of achieving this could be to capture the time spent (and number of questions asked and/or number of draft Form COs submitted) in

⁸ See <http://kluwercompetitionlawblog.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>.

pre-notification in the Commission's official statistics or in the published decisions. Whilst the ECLF understand that the pre-notification process is a two-way street, with the efficiency of the parties' responses also playing a part, such publication would help to shine a spotlight on what is an increasing concern for undertakings – but without committing the Commission or the parties to prescribed formal or informal timelines. On a related point, the ECLF notes that the Best Practice Guidelines are nearly 13 years old; they pre-date the recent Merger Regulation (Regulation 139/2004) which replaced the original Merger Regulation (Regulation 4064/89). The ECLF would welcome an assessment of the scope for updating and revising the Best Practice Guidelines to ensure their continued relevance and applicability.

- 2.14 An additional way that the burden of the Short Form CO process can be reduced is if the Commission were to prepare guidance, based on nearly three years of experience, on what waivers should be available in which circumstances. Currently the ECLF considers that the availability and scope of waivers can vary significantly from case team to case team. This could be included as part of a broader updating of the Best Practice Guidelines.

Part 3: Jurisdictional Thresholds (Questions 14-22)

- 3.1 The ECLF considers that any amendments to the existing EUMR thresholds should be carefully considered and only developed on the basis of empirical evidence of need and in a way that does not impose unwarranted additional burdens on business. Jurisdictional thresholds are, by their very nature, a balance between effectiveness (i.e. capturing potentially problematic transactions) and simplicity (i.e. being easy to apply in practice). This balance therefore involves an element of compromise. Accordingly, the overwhelming majority of deals which are captured by the current thresholds are non-problematic. Similarly, it may be possible that a potentially problematic deal falls under the thresholds; however, the Commission has yet to provide convincing evidence of such an enforcement gap. Moving the dial towards effectiveness will do so at the expense of simplicity. Given the risk associated with increased complexity (detailed further below) the case for reform needs to be compelling and a thorough impact assessment conducted.

A. Reasons not to introduce an additional value-based test

- 3.2 Therefore, the ECLF would urge restraint in the development of additional (value-based) thresholds for at least the following reasons:

- (A) **Lack of evidenced need:** There is currently a lack of real empirical evidence of a need to extend the thresholds.⁹ There is no robust evidence of cases which are “falling through the cracks” of EU merger control and resulting in reductions in consumer welfare in the EEA. The Commission risks placing the cart before the horse in developing and consulting on possible solutions before it has conducted a thorough empirical study into the need to increase the jurisdictional reach of the EUMR. To this end, the ECLF considers that the current round of consultation should act as a launch pad for further investigation rather than as an opportunity to influence the shape of any reform. As with the consultation on extending the Commission’s competence to examine minority interests, the case for reform seems to be built on a handful of high profile cases. The case of *Facebook/WhatsApp* was unconditionally cleared at Phase I and therefore is not an example of a problematic deal in the tech sector which almost escaped the Commission’s jurisdiction. Moreover, rather than pointing to the need for reform, *Facebook/WhatsApp* appears to show that the current system is in fact working effectively as the case was referred under Article 4(5) to the Commission. Before instigating reform, the Commission should see whether it can identify a meaningful body of substantively problematic deals which have escaped review under the merger control rules.
- (B) **Lack of suitable substantive tools:** The basis on which to extend jurisdiction to cover acquisitions of assets which are not currently generating significant turnover is (presumably) that the acquired assets could be a potential competitor to a business of the acquirer; or that the acquired assets are some form of

⁹ In this respect it is important that the Commission adheres to the Better Regulation Agenda which includes, amongst other principles, the principle that “evidence always informs policy and law-making”. See https://ec.europa.eu/priorities/democratic-change/better-regulation_en.

essential input into a (presumably future) business activity of the acquirer.¹⁰ Whilst any form of substantive merger control assessment requires a forward-looking assessment, where the target has not generated any (or limited) revenues and has no (or limited) market share, the tools available to a regulator to conduct an evidence-based assessment within a reasonably short timescale are very limited. The analysis is necessarily reduced to the Commission's or complainants' subjective views as to how (what are often) highly innovative markets with disruptive technologies may develop in the near- to-mid-term. There are numerous examples of "the next big thing" in tech markets falling by the wayside, including MySpace and Vine.¹¹ The contentious nature of this assessment might simply produce many more appeals.

- (C) ***Difficulties in determining and allocating value:*** The EUMR's current notification thresholds have the benefit of being (a) clear and understandable, (b) based on objectively quantifiable criteria and (c) based on information that is readily accessible to the merging parties; accordingly, they are fully compliant with the ICN's recommended practices for merger notification procedures.¹² This risks being undermined by the adoption of a value-based threshold. The concept of deal value is complex and can change materially over short periods. The total value of deals with a share consideration element can vary rapidly in response to micro- and/or macro-economic criteria. At what point should the deal value be set for the purposes of assessing merger control notification requirements? Many transactions have complex post-closing adjustments such that the final value of a deal will not be known until post-closing. Deal valuations based on NPV, EBITDA multiples or other metrics are notoriously subjective. Geographic allocation of deal value (if required) is also very difficult. Does deal value follow where the target has its assets, where it has its current sales (which may be very low and not reflective of where future sales will occur), or is it a more subjective exercise (for example, where the acquirer has identified a significant (but untested) market opportunity in different geographic markets)? Are the current high deal valuations, in particular in the tech industry, a red herring resulting from cheap money and buoyant share prices? Will similar deals in five years' time be commanding the same levels of deal value and, therefore, attract the same veneer of significance? Finally, whether a transaction is particularly high value will depend on the sector involved. There is a risk that introducing value-based thresholds will disproportionately regulate certain sectors over others.
- (D) ***Full coordination with NCAs:*** Whilst some jurisdictions (notably the US) have deal value thresholds, and there are proposals to introduce them in others (notably Germany), in all of these jurisdictions triggering the merger control thresholds does not deprive another jurisdiction of competence to review the

¹⁰ As the assets are generating limited turnover, it ought to be possible to infer that they are not a key input to existing competitors of the acquirer.

¹¹ See "The Rise and Fall of MySpace", <https://www.ft.com/content/fd9ffd9c-dee5-11de-adff-00144feab49a>; and "Twitter prunes Vine and cuts workforce by 9%" <https://www.ft.com/content/d4f32c86-9c3c-11e6-a6e4-8b8e77dd083a>.

¹² See <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>, Part II "Notification Thresholds".

case. The EUMR thresholds currently set a fairly clean boundary between the jurisdiction of the Commission and that of the NCAs. Any development of a value-based threshold will encroach on this accepted delineation. It is important therefore that any new thresholds are developed in coordination with the Member States to ensure that pan-EU merger control operates seamlessly between NCAs and the Commission. The Commission should continue to encourage close cooperation between the NCAs and within the ECN in order to drive forward convergence across the EEA and discourage outlier positions in terms of jurisdictional thresholds, substantive assessment and/or filing requirements.

- (E) ***Chilling effect on innovation/investment:*** In the tech and pharma fields (themselves difficult to define clearly) the incentive for developing, or for venture capital to fund, new and innovative products can be the prospect of a large pay-off. The Commission should tread lightly and develop a robust impact assessment where there is at least a risk that market players will be deterred from developing, funding or acquiring the next Instagram, Uber or WhatsApp through increased regulatory costs. This is particularly important given Europe's comparatively poor record at developing innovative tech companies. Similarly, in the pharma sector there are very significant sunk costs involved with R&D which need to be recovered before the seller will be profiting from the sale. Again, the Commission should fully assess the impact of reform where there is a risk of deterring new drug development.

B. Pre-requisites for any value-based test that may be introduced

3.3 If, however, the Commission concludes that it is appropriate to move to a value-based merger control threshold, it will be important to maintain a balance between the various competing factors of: (i) not overreaching into the jurisdiction of the NCAs, (ii) ensuring that "missed" cases are caught, (iii) not over-burdening businesses, and (iv) avoiding possible chilling effects. Accordingly, the ECLF would propose the following:

- (A) The existing turnover thresholds should, in the short-term, be kept;¹³ however, empirical investigation should be undertaken to determine the number and character of cases which currently trigger the "alternative" Article 1(3) turnover threshold. If an additional value-based test is introduced then the overall thresholds ought to be simplified. It is the ECLF's hypothesis that the alternative threshold will not be capturing many problematic cases and could be removed.
- (B) Any new value-based threshold should be set at a suitably high level which takes account of the interplay with the NCAs' jurisdictions.
- (C) Any new value-based threshold should have a meaningful nexus to the EEA.¹⁴ This could be achieved through foreign-to-foreign exemptions (as is the case in

¹³ Depending on the eventual shape (if any) of the UK's departure from the EU, consideration will need to be given to the treatment of UK turnover and/or whether the principal EUMR turnover thresholds ought to be revised downwards.

¹⁴ The ICN's recommended practices for merger notification practices emphasise the importance of ensuring that merger control regimes (a) only catch transactions that have an appropriate nexus with the jurisdiction concerned, (b) incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification, and (c)

the United States), through a requirement that a certain level of deal value is attributable to the EEA, or through the incorporation of turnover criteria into the value-based threshold. The ECLF would favour the latter and proposes the following criteria in addition to the deal value threshold:

- (i) The existing worldwide combined EUMR turnover threshold under Article 1(2) should apply to the parties (€5 billion);
 - (ii) The existing EU-wide turnover threshold under Article 1(2) should apply to at least one of the parties (€250 million);
 - (iii) The “maximum level of worldwide turnover of the target business” should be rejected as it risks unnecessarily increasing confusion/complexity. Moreover, if the underlying rationale for increasing the Commission’s jurisdiction is that a target has the potential to be brought to market in the EEA and (at some point in the future) may affect competition in the EEA, it should not be relevant whether the target currently generates significant revenues in other jurisdictions or not. The rationale applies equally whether the target generates no revenues globally or has already been brought to market in other parts of the world; and
 - (iv) The ratio of value-to-turnover should be rejected. It is not in accordance with deal valuation in practice. Further, such an approach could hamper M&A activity as potential purchasers use the possible multiple as a ceiling during negotiations to limit consideration to levels which may be unacceptable to the seller.
- (D) Importantly, transactions which trigger the new value-based test but do not trigger the existing turnover threshold(s) should benefit from the revised “super simplified” procedure outlined at paragraphs 2.9 - 2.10 above. (As the operation of such a procedure is explained already at Part 2 above, we do not repeat it here.) To achieve this, it would be necessary to identify a new category of simplified procedure cases, i.e. those which only qualify for review by the Commission by virtue of meeting the new value-based test.

determine a transaction’s nexus to the jurisdiction based on activity within that jurisdiction as measured by reference to the activities of at least the parties to the transaction in the territory and/or by reference to the activities of the acquired business in the territory: *ibid.*, Part I “Nexus to Reviewing Jurisdiction”.

Part 4: Referrals (Questions 23-25)

- 4.1 With the exception of Article 22, the ECLF considers that the referral mechanisms generally work well and reduce the overall administrative burden on the parties. The mechanisms ensure that the most appropriate authority has jurisdiction over the case in a broadly efficient manner. The Article 4(4) and 4(5) referrals are particularly beneficial to business as they remove the uncertainty and additional delay associated with an Article 9 or 22 referral. That said, there remains room for reform: the ECLF would advocate reforming Article 4(5) so that it can be used when only one Member State's threshold is triggered; and the Form RS mechanism (whether for Article 4(4) or 4(5)) is burdensome and duplicates much of the work needed for a Form CO or national filing. The Article 22 mechanism is antiquated and should be removed. The ECLF notes that Article 22 can sometimes be used as a means for the EC to "pull-up" cases to the Commission; however, this role could in large part be taken-up by a revised Article 4(5).

A. Article 4(4): pre-notification referrals to one or more Member States

- 4.2 The ECLF supports the proposal to abolish the requirement in Article 4(4) to demonstrate that a proposed concentration "*may significantly affect competition in a market within a Member State*" and to replace this with a requirement to demonstrate that a proposed concentration is likely primarily to impact a distinct market in the particular Member State(s) at which the request for referral is directed. Indeed, it ought to be possible to develop more neutral language such as "has its centre of gravity" in one Member State.
- 4.3 The current test acts as a deterrent to requesting referrals back to an NCA as it effectively puts the parties in a position where they have to "claim" or "represent" that the case raises substantive competition issues in order to make a referral request. Amending the language in the way proposed should encourage parties to make referrals in appropriate cases and introduce greater flexibility into the ECN structures, so that they can be used more efficiently and effectively in line with principles of subsidiarity.
- 4.4 The Commission has proposed the removal of the Form RS for Article 4(5) referrals. The ECLF supports that proposal (as discussed below). Particularly if the NCAs could take more steps towards harmonisation of their merger control procedures, there may also be scope to go further and propose that the Form RS process could likewise be removed for Article 4(4) referrals, i.e. a process whereby the notifying party has the option to prepare a draft notification (which includes a discussion of the reason for referral) and lodges this with the NCA. It would then fall to the NCA to inform the Commission and the other NCAs (through enhanced ECN procedures), with the Commission then having a period to object. Provided the notifying party has been well advised, this ought to reduce the current burdens of the Article 4(4) referral procedures.

B. Article 4(5): pre-notification referrals to the Commission

- 4.5 The ECLF also wishes to raise the possibility of reforming Article 4(5) so that it could be utilised when the thresholds of only one Member State are met. This is for the following reasons:

- (A) As explained further below, Article 22 is antiquated and should be removed. However, the ECLF notes that (notwithstanding its original purpose) there are some cases where Article 22 has been usefully used to “pull up” cases to the Commission which are in reality better suited for review at the EU, rather than Member State, level. One example of such a case is *Aegean/Olympic II* which was referred to the Commission by the NCAs of Greece and Cyprus. If a reformed Article 4(5) had been available, this case could have been referred earlier using this mechanism.
- (B) In the event that the UK were ultimately to leave the European Union, the ability to utilise Article 4(5) in its current form could be reduced. Currently the UK (together with Germany, Austria, Portugal and Spain) is a Member State whose merger control threshold (by virtue of the “share of supply” test) is frequently triggered.

- 4.6 The competent Member State would retain the right to object to any referral; and for cases which clearly have a nexus to that Member State, would be expected to be successful. Accordingly, where only one Member State is competent, only those cases which are more appropriately dealt with at the EU level would be expected to be successfully referred. This would be those cases which clearly have a significant cross-border element (such as a tech or pharma deal) or where there were broader political or policy considerations at play (as in *Olympic/Aegean II*). A sensible allocation between NCAs and the EC would continue but an appropriate mechanism to “pull up” cases which are better suited to be dealt with at EU level would remain following the removal of the inappropriate and outdated Article 22.¹⁵
- 4.7 The ECLF agrees that the current two-stage process (submission of a Form RS followed by a Form CO) is unnecessarily onerous and time-consuming; furthermore, in some cases it deters parties from making requests for a referral to the Commission where it would be appropriate to do so. The ECLF therefore welcomes in principle the proposal to abolish the requirement of a Form RS, so that parties would instead notify transactions directly to the Commission using a Form CO (or possibly a simple information notice of the type proposed in Part 2 of this response); this would be forwarded to the NCAs which would (if competent) have a limited period in which to object to the request.
- 4.8 This approach does raise the risk, however, that the notifying parties may expend time and effort preparing a Form CO and engaging with the Commission, only to be required to make national filings if a Member State exercises its veto. Although Member States have rarely exercised their veto in the past, this could change if the number of requests increases as a result of the abolition of the Form RS or the proposed amendment to Article 4(5).

¹⁵ The ECLF recognises that the Article 4(5) pre-notification referral procedures only operate where the notifying party wishes to benefit from the “one-stop shop” and that there may be circumstances where they do not wish to do so, such that Article 22 is currently the only mechanism that the authorities may be able to deploy to take jurisdiction over such cases. An alternative might therefore be to have an explicit right for the Commission to “pull up” appropriate cases, particularly if the concern relates to the authorities’ ability to impose appropriate remedial action.

- 4.9 In order to mitigate this risk of delays, we would suggest shortening the period during which Member States can exercise their veto from 15 working days to 10 working days. It would also be helpful if the members of the ECN could work together, perhaps by agreeing a set of general principles, so that the right of veto is only exercised in appropriate cases (such as where the centre of gravity is in the opposing Member State and the transaction appears to give rise to material competition issues). Similarly, this burden would also be reduced if the ECN continues to work towards substantive and procedural harmonisation, including as to notification forms.
- 4.10 In addition to the burden of the current two-step process, there may be a number of reasons why parties decide currently to make three or more national filings rather than seek an Article 4(5) reference. In some cases there may be good reasons to make multiple national filings rather than notifying the Commission, such as where the geographic scope of the relevant markets is national and/or the NCA is already familiar with the market. The fact that multiple national filings are made for some transactions should not therefore be seen as necessarily problematic. However, there may be cases that would be good candidates for a reference, but where the parties are deterred from making a request because the Commission would review the effects of the transaction across the entire EEA, substantially increasing the burden on the merging parties in terms of data requirements when compared to filing in three or more Member States. Furthermore, the ECLF considers that parties may be further deterred by the Commission's approach to identifying and assessing each and every "plausible" (no matter how hypothetical) market and what the ECLF considers is an increasingly burdensome approach to pre-notification (even in no-issues cases), as well as an over reliance on internal documents. Indeed, the Commission's approach is so increasingly out-of-step with the significantly more pragmatic assessment of straightforward cases in jurisdictions such as Germany and Austria (Member States which are frequently triggered due to their low thresholds) that the likely conduct of the Commission itself often points in favour of not filing with the Commission.¹⁶
- 4.11 We would therefore recommend that, unless there is a clear cross-border dimension, the Commission's review be limited to examining the effects of a transaction in the territories of those Member States that the parties have identified as having jurisdiction, or whose NCA has confirmed it has jurisdiction, to review the transaction under national law. We would also propose that the approach to pre-notification be reconsidered along the lines of the reforms outlined above. This would encourage more Article 4(5) referrals.
- 4.12 As an alternative, the Commission could consider adjusting the data requirements for Article 4(5) cases so that notifying parties are not required to provide data on a national basis (for example on sales volumes and market shares) for Member States in which the national authorities do not have jurisdiction under national law, unless the data is specifically requested by the Commission. Requests should be limited to cases where the data is necessary to assess cross-border competition issues.

¹⁶ For example, the ECLF is aware of a recent case which involved EEA-wide or global markets but which was filed in five Member States rather than with the Commission due to concerns regarding the arguably overzealous investigative practices of the Commission.

C. Article 22: post-notification referrals to the Commission

- 4.13 Article 22 was introduced at a time when a number of Member States did not have national merger control regimes (hence its description as the “Dutch clause”). Its main purpose was therefore to enable those Member States to refer potentially anti-competitive mergers to the Commission for review.
- 4.14 In circumstances where all Member States have a national merger control regime, with the sole exception of Luxembourg (which will establish a merger control regime soon and, in any event, has never made an Article 22 referral request or joined a request), it is clear to the ECLF that the original rationale for allowing Member States to refer mergers under Article 22 no longer applies. The ECLF would therefore encourage the Commission and Member States to reflect on whether it is necessary to retain Article 22, in particular given the potential uncertainty, delay and regulatory burden it can impose on business.
- 4.15 In the ECLF's experience, Article 22 has often been the cause of sub-optimal outcomes, including:
- (i) Case M.5969 *Sara Lee / SC Johnson* is a clear example of the problems that Article 22 referrals of cases by NCAs to the European Commission can cause. In 2010, Spain referred to the European Commission the transaction consisting in the acquisition of the Sara Lee household insecticide business by SC Johnson. The deal did not qualify for the EU's one-stop shop review because the parties did not meet the EUMR turnover thresholds. The transaction only had to be notified in Spain and Portugal, so could not benefit from the Article 4(5) procedures (in its then and current form). During the initial review process, the Spanish competition authority asked the parties for disaggregated market share data in all EU countries. Based on that information, it decided to refer the case to the European Commission pursuant to Article 22(1). That request was joined by several NCAs (namely Belgium, Czech Republic, France, Italy and Greece), jurisdictions where the transaction did not reach national notification thresholds. The relevant geographic markets were at most national (and, in the case of France, included markets in Départements d'Outre-Mer – even though the parties' turnovers fell below the special French lower merger control thresholds for the DOMs). Portugal decided not to join the referral request. As a consequence, the review of the European Commission and that of the Portuguese Competition Authority were carried out in parallel. In Portugal, the transaction was cleared with remedies. This partial referral and EUMR Phase 2 process caused a delay of approximately a year in the estimated timeline of the transaction and the parties could not benefit from the EU's one-stop shop review since Portugal did not refer the case to the European Commission. Moreover, the European Commission raised concerns about the effects of the transaction in jurisdictions in which the transaction did not meet national merger control thresholds, such that it proved impossible for the parties to agree acceptable remedies. Accordingly, the transaction had to be abandoned (such that the

Commission stopped the Phase 2 procedure). The parties subsequently agreed a different deal (likewise constituting a concentration below the EUMR thresholds) that resolved the competition concerns in Spain (and Portugal), without any Article 22 requests being made.

- (ii) In Case M.7054 *Cemex / Holcim Assets*, the Commission accepted a referral under Article 22 by the Spanish Competition Authority, despite the very limited impact of the transaction on intra-EU trade and the fact that the Czech Competition Authority (which was also competent to assess the transaction under national law) refused to join the request by the Spanish authority. The Czech Competition Authority reviewed and cleared the transaction under Czech law.

4.16 The ECLF notes, however, that the mechanism does continue to provide a useful function in allowing the Commission to “pull-up” cases. In a situation where Article 4(5) is not available, Article 22 can be used to allow the Commission to obtain jurisdiction over a case which it is better placed to deal with, or for which there are political or policy reasons for it to have jurisdiction. An example of the latter is *Aegean/Olympic II*. However, this is not the use for which Article 22 was intended or designed. The ECLF considers that an amendment to Article 4(5), as described above, would allow for the advantages of Article 22 without the significant disadvantages. An alternative would be for the Commission to have the right in exceptional circumstances to “pull-up” cases where it is requested to do so by an NCA which has competence to review the case under its national merger control rules, notably in circumstances where the NCA lacks enforcement powers to impose remedies outside its jurisdiction in order to address substantive competitive concerns in its jurisdiction.

4.17 To the extent, however, that Article 22 is retained, the ECLF has a number of comments regarding the Commission’s proposals:

- (A) The ECLF agrees that where one Member State has exercised its right to oppose a referral, the Commission should renounce jurisdiction. This will avoid a patchwork approach where the Commission reviews part of a transaction alongside review by one or more NCAs – see, for example *Cemex / Holcim Assets* described above;
- (B) The ECLF also agrees that only those Member States with competence under their national law to review the transaction should be able to request or veto a referral. The current system where any Member State can request or join a referral causes significant uncertainty for, and imposes additional burdens on, merging parties;
- (C) The ECLF disagrees, however, that where the Commission accepts a referral request it should have jurisdiction to investigate substantive issues in other Member States. The Commission should not be able to examine the impact of the transaction in the territories of Member States that are not competent to review the transaction under national law and have not joined in the request for referral, unless this is necessary to assess the effect of the transaction in the

Member States that are competent (for example where the relevant geographic markets are EEA-wide).¹⁷

- 4.18 From a procedural perspective, the Commission should ensure that Article 22 referral requests are made as early as possible and that case allocation is decided as quickly as possible once a referral request is made, given the uncertainty that Article 22 requests create for notifying parties after time and expense has been dedicated to making one or more national filings.
- 4.19 In principle, the ECLF supports the Commission's objective to reduce late referrals by NCAs under Article 22. However, the ECLF is concerned that the mechanism proposed may cause significant delays and uncertainty for merging parties. For example, the ECLF is concerned that the lower threshold for triggering a suspension of national deadlines (i.e. that an NCA is "considering" making a referral request because on a "preliminary basis" the Commission seems to be the more appropriate authority) will result in national deadlines being suspended more frequently in circumstances where the case ultimately ends up being reviewed by NCAs and not the Commission. The ECLF is also concerned that the period during which national deadlines can be suspended may be significantly longer than is currently the case, again in circumstances where the case may ultimately end up being reviewed at the national level. Under the current approach, national deadlines can be suspended for a maximum period of 25 working days from the date on which an NCA makes a referral request (i.e. for an initial 15 working day period during which other Member States must decide whether to join the request and a further 10 working day period during which the Commission must decide whether to accept the request). By contrast, under the proposed approach, national deadlines could be suspended for up to 40 working days. This would include:
- (i) an initial 15 working day period following notification that an NCA is considering making a referral and during which competent Member States would have to decide whether to request a referral;
 - (ii) a further 15 working day period during which competent Member States would have to decide whether to oppose the request; and
 - (iii) a final 10 working day period during which the Commission would have to decide whether to accept the request.
- 4.20 The ECLF agrees that it is undesirable for NCAs to make late referral requests. However, this risk should be more manageable in circumstances where only those Member States with competence under their national law to review a transaction are able to request or veto a referral. That being the case, we consider that the current procedure is preferable to the approach proposed in the White Paper.

¹⁷ The ECLF accepts, however, that it may be appropriate for the Commission to accept commitments that require implementation in other Member States, in order to remedy substantive competition concerns in the referring Member State(s).

D. Article 9: post-notification referrals to one or more Member States

- 4.21 The ECLF disagrees with the Commission's proposal that the 65 working day deadline should run from the start of Phase 2 proceedings, instead of the date of notification. The current timetable for making an Article 9 referral already causes merging parties significant uncertainty and it is unnecessary to give the Commission more time in which to reach a decision on whether to refer the case or to adopt a statement of objections.

Part 5: Other Technical Aspects (Questions 26-29)

5.1 The ECLF supports the following six reforms proposed by the Commission:

- (A) To amend Article 4(1) to provide more flexibility for notifying concentrations that are executed through share acquisitions on a stock exchange without a public takeover bid, so as to allow parties to notify before the level of shareholding required to exercise de facto control is acquired.
- (B) To amend Article 5(4) to clarify the methodology for turnover calculation of joint ventures. The Commission's proposal is limited to transposing the CCJN guidance into the Merger Regulation and that *"this amendment would not entail any substantive change."* The ECLF notes that some uncertainty remains regarding the methodology for the calculation of turnover for joint ventures and with the attribution of market shares to and from such joint ventures. Accordingly, further clarification in this area would be welcome.
- (C) To amend Article 5(2), which treats transactions occurring between the same undertakings and within a two-year period as a single concentration, so that only cases of "real" circumvention, where parties have deliberately sought to stagger transactions to avoid merger control scrutiny, are captured.
- (D) To clarify that "parking transactions" (also known as "warehousing" arrangements) should be assessed as part of the acquisition of control by the ultimate acquirer.
- (E) To amend 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. The ECLF notes that, whilst caution and restraint should be applied when further extending DG Competition's already considerable quasi-criminal sanctioning powers, provided this extension is limited and "appropriate" it will protect merger party and third party participants in merger control processes and should be welcomed.
- (F) To amend 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. Provided the threshold for revoking a decision is aligned with the threshold for revoking a clearance decision, the ECLF supports this reform.

5.2 As regards the Commission's other two proposals:

- (A) On balance, the ECLF would caution against the Commission's proposal to increase the maximum number of working days by which the Phase 2 deadline may be extended under Article 10(3) from, for example, 20 to 30 working days. Although we recognise that such an extension would be granted either at the request of the parties or through agreement between the parties and the Commission, in practice there is a significant risk that extensions of 30 days will

become routine. The maximum period for a Phase 2 review is already sufficiently long to enable the Commission to carry out a full review. That said, the ECLF does believe that some additional flexibility could be built into Phase 2 potentially through an agreement to stop the clock for a period. Currently, the use of extensive RFIs by decision in order to stop the clock is an unsatisfactory outcome where what is required is some additional time on a discrete issue.¹⁸

- (B) The ECLF disagrees with the proposal to modify 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.
- (i) In the Staff Working Paper a partial justification was that "*such an amendment would...align with the proposed reform extending merger control to certain acquisitions of non-controlling minority shareholdings*"; as this broader legislative aim does not appear (rightly) to have been taken forward this no longer justifies the proposed amendment to Article 8(4).
 - (ii) The proposed amendment would usher in jurisdiction over minority shareholdings "by the back door". The Commission has jurisdiction over concentrations giving (de facto) control. This places an important limit on the Commission's jurisdiction. The Commission should only assess the concentration which (if approved) will result in a change in control on a lasting basis. If a potential offeror has, over time, built up a stake in the target which did not constitute a change of control on a lasting basis the Commission has no jurisdiction over these transactions and has no basis to unwind them or require divestment of them. Where the Commission has concerns with a later concentration, the Commission's justified course of action is to prohibit the transaction which would result in a change of control on a lasting basis (i.e., the takeover offer) or to allow the transaction subject to remedies.
 - (iii) The proposed amendment to Article 8(4) would conflict with the proposed amendment to Article 5(2).

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¹⁸ See, for example, the procedure in Case M.7265 *Zimmer / Biomet*.