EUROPEAN
COMMISSION

Brussels, 9.7.2014
SWD(2014) 221 final

COMMISSION STAFF WORKING DOCUMENT
Accompanying the document

WHITE PAPER

Towards more effective EU merger control

{COM(2014) 449 final}
{SWD(2014) 217 final}
{SWD(2014) 218 final}

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1. INTRODUCTION

1. The present Staff Working Document accompanies the White Paper "Towards more effective EU merger control" ("the White Paper"). It elaborates on the considerations underlying the Commission's analysis of the current functioning of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] (the "Merger Regulation") as well as the proposals for possible amendments of that Regulation put forward in the White Paper.

2. The main areas for the reform of the Merger Regulation have already been discussed in general terms in the Staff Working Document "Towards more effective EU merger control"[2] ("the Consultation Paper") which was published by the Commission on 25 June 2013. The Consultation Paper sought comments from stakeholders primarily on two main issues:

   - whether to apply merger control rules to deal with the anti-competitive effects resulting from certain acquisitions of non-controlling minority shareholdings; and

   - the effectiveness of the system of transferring merger cases from Member States to the Commission both before and after notification.

3. The Commission received around 70 submissions in response to the Consultation Paper. In addition, DG Competition staff has engaged in an intensive dialogue both with Member States – particularly national competition authorities ("NCAs") – and private stakeholders regarding the questions raised in the Consultation Paper. In this Staff Working Document, the Commission takes into account the feedback received during the public consultation for developing these areas further.

4. The first purpose of this Staff Working Document is to look more broadly at the development of the substantive assessment the Commission applies to mergers, as well as how to level the playing field and foster cooperation and convergence between the Commission and NCAs in the field of merger control. Second, it aims to explain how to undertake the main reforms in more detail than the White Paper.[3]

2. CURRENT STATE OF EU MERGER CONTROL AND OUTLOOK

5. With the Council's adoption of Regulation (EEC) No 4064/89[4] (the original Merger Regulation), a comprehensive system of *ex-ante* merger control was introduced into European Union competition law. Under this system, mergers between companies

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[1] OJ L 24, 29.1.2004, p. 1.

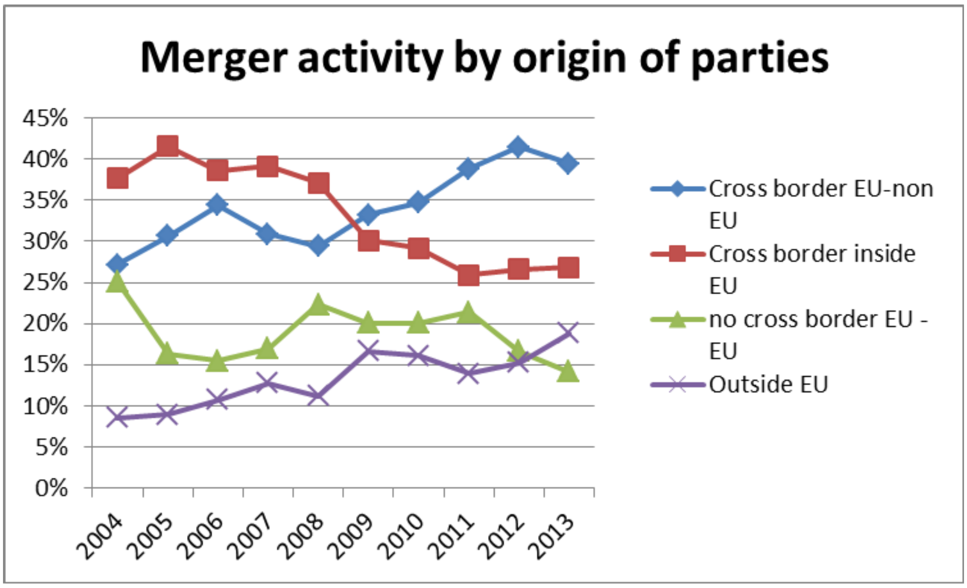
[2] Commission Staff Working Document SWD (2013) 239 final, see http://ec.europa.eu/competition/consultations/2013_merger_control.

[3] The scope chosen for the White Paper is without prejudice to additional evaluations of other important aspects of the EU Merger control by the Commission.

[4] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

meeting certain turnover thresholds must be notified in advance to the Commission, which uses a competition-based test to decide whether they are compatible with the internal market. Since its adoption, merger control has developed into one of the main pillars of EU competition law and its basic features are well proven.

6. EU merger control makes an important contribution to the functioning of the internal market, both by providing a uniform set of rules for corporate restructuring and by ensuring that competition and consumers are not harmed by excessive concentrations of market power. As one might expect in an increasingly globalised economy, EU merger control increasingly focusses on cross-border cases and those which have an impact on the European economy. The following graph shows the significant increase in the percentage of EU merger control cases involving non-EU firms in recent years and the corresponding decrease in cases involving firms from the same Member State, which overall only account for a minor percentage of cases. While the latter cases may also have pan-European importance[5], this trend is consistent with the Commission focussing on mergers that have an EEA-wide or global impact, while the NCAs tend to focus more on mergers within national dimension.



2.1. The 2004 reform

7. The current Merger Regulation is the result of an overhaul of Council Regulation (EEC) No 4064/89 and was preceded by a Commission Green Paper published in 2001.[6]

[5] Even if the origin of the parties is in the same Member State, the parties will need to have broader activities in Europe to fulfil the turnover thresholds of the Merger Regulation. Otherwise, the two thirds rule would apply.

[6] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745 final.

8. The 2004 reform introduced, among other things, the "significant impediment of effective competition" ("SIEC") test as the relevant criterion for assessing mergers (replacing the previous "creation or strengthening of a dominant position" test).

9. The Merger Regulation continued to apply only to concentrations, i.e. those transactions involving acquisitions of control by undertakings over other undertakings or parts of them. However, experience gained since 2004 shows that acquisitions of equity stakes below the level of control, which are not captured by the Merger Regulation, may in some instances lead to structural changes in the market. Section 3 below discusses whether the Merger Regulation should be extended to cover such transactions.

10. The 2004 reform also made it possible to refer cases from Member States to the Commission and vice versa before notification, as well as for several Member States to jointly refer a case to the Commission after notification. The positive impact of these developments as well as some shortcomings is set out in Section 4.

2.2. Substantive assessment

2.2.1. Application of the SIEC test

11. As set out above, the EU merger control system saw its most substantial modification in 2004 when the SIEC test was introduced.[7] While the new test maintained that SIECs most prominently arise through the creation or strengthening of a dominant position, thereby building upon the precedents of the Commission and the case law of the Court, it closed a possible enforcement "gap" by ensuring that mergers resulting in "non-coordinated effects" in oligopolistic situations where the merged entity would not have become dominant were captured by the Merger Regulation.[8]

12. Under the previous Merger Regulation, there was legal uncertainty as to whether the dominance test would capture mergers with potentially anti-competitive non-coordinated effects where the merged entity does not become dominant. In an oligopoly with only a few firms (none of which are individually dominant), and where collusion is unlikely, economic theory suggests that merging firms might be incentivised to increase their prices unilaterally, even if they do not become dominant. The remaining market participants would benefit from the reduction in competitive pressure resulting from the merger and might also increase their prices, leading to an overall price increase in the market. This outcome is particularly likely in differentiated product markets.

13. The new test was designed to address the so-called “gap” cases: mergers which allow firms to unilaterally raise prices but do not create or reinforce a single or collective

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7 Article 2(3) of the Merger Regulation provides that the Commission must assess whether a concentration "would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position". This test replaced the previous substantive test of "creation or strengthening of a dominant position" enshrined in Article 2 of Council Regulation (EEC) No 4064/89, the so-called dominance test.

8 See Recital 25 Merger Regulation.

dominant position. The Commission has examined numerous "gap" cases since 2004. *T-Mobile Austria/tele.ring*[9] was the first and was followed by many others.[10]

14. In order to increase the transparency and predictability of the Commission's merger analysis under the new test, the Commission published a set of Guidelines on the assessment of horizontal mergers ("the Horizontal Merger Guidelines").[11] These Guidelines were complemented by the adoption in 2008 of the Guidelines on the assessment of non-horizontal mergers ("the Non-Horizontal Merger Guidelines").[12] The Non-Horizontal Guidelines defined a structured approach based on the SIEC test relating to concerns of input and customer foreclosure.[13]

15. Guidance is also provided by the EU Courts, as Commission decisions in merger cases are subject to demanding judicial review.[14]

2.2.2. Role of quantitative and qualitative evidence

16. The introduction of the SIEC test highlighted that, beyond the analysis of structural effects of the merger, the Commission also assesses market characteristics (i.e. product substitutability, capacity constraints, elimination of an important competitive

9 COMP/M.3916 – *T-Mobile/Tele.ring*, decision of 26 April 2006

10 For instance COMP/M.4141 – *Linde/BOC*, decision of 6 June 2006; COMP/M.4187 – *Metso/Aker Kvaerner*, decision of 12 December 2006, COMP/M.4844 – *Fortis/ABN Amro*, decision of 3 October 2007; COMP/M.5224 – *EDF/British Energy*, decision of 22 December 2008; COMP/M.6203 – *Western Digital/ Hitachi*, decision of 23 November 2011; COMP/M.6497 – *Hutchinson/ Orange*, decision of 12 December 2012 and COMP/M.6570 – *UPS/TNT Express* decision of 30 January 2013.

11 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5).

12 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6).

13 Both the Horizontal and the Non-Horizontal Guidelines are frequently referred to by the EU Courts as a benchmark for assessing the legality of the Commission's substantial analysis of mergers. The EU Courts have confirmed that the Commission is bound by the guidance documents it has issued, although they remain subject to scrutiny by the Courts for their compliance with the Treaty and the Merger Regulation, see for instance Case T-282/06 *Sun Chemical e.a. v Commission* [2007] ECR II-2149, paragraph 55.

14 The Court may scrutinise both the completeness and accuracy of the evidence relied upon by the Commission and whether that evidence is capable of substantiating the conclusions drawn from it (See in particular Case T-12/03 P *Commission v TetraLaval* [2005] ECR I-987, paragraphs 39 et seq.; Case C-413/06 P *Bertelsmann and Sony v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, paragraphs 47 et seq.; Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, paragraphs 29 et seq.). Nonetheless, nearly all Commission decisions in merger cases taken since 2004 that were appealed have been upheld by the EU Courts and no Commission decision approving or prohibiting a merger was definitively annulled. The only Commission decision in a merger procedure taken after 2004 that was annulled by a final Court judgment did not concern the compatibility of the merger with the internal market but the approval of a proposed purchaser of a business that had to be divested according to a conditional clearance decision (COMP/M.2978 – *Lagardère/Natexis/VUP*, decision of 30 July 2004, annulled in last resort by judgment of the Court of Justice of 6 November 2012 in Joint Cases C-553/10 P and C-554/10 P *Commission and Lagardère v Editions Odile Jacob* [not yet reported in the ECR]). The judgment of the General Court in Case T-464/04 *Independent Music Publishers and Labels Association (Impala) v Commission* [2006] ECR II-2289, which annulled the Commission's unconditional clearance of COMP/M.3333 – *Sony/BMG*, decision of 19 July 2004, was overturned on appeal by the Court of Justice in Case C-413/06 P *Bertelsmann and Sony v Impala* [2008] ECR I-4951, thus the Commission's decision was ultimately upheld.

force, hindrance to competitors' expansion etc.) and whether competitive constraints are eliminated by the merger.

17. On one hand, the Commission has found in certain cases that competition concerns were absent despite the high combined market shares of the parties, due to existing competitive constraints which rendered these mergers unlikely to negatively impact on competition and thus on consumers. In some other cases, however, the Commission identified non-coordinated effects even though the merged company's market share was similar to or even lower than that of its competitors.

18. The Commission has strengthened its economic analysis for complex mergers through a variety of data and empirical techniques. The techniques used depend on data availability and range from descriptive statistics to merger simulation with demand estimation or direct evaluations of competitive constraints.[15] The Commission considers quantitative evidence (namely economic and numerical) to be important in assessing merger cases, but believes that it should always be integrated into the context of the more qualitative evidence on file (such as minutes of interviews with market participants, replies by customers and competitors to requests for information and internal documents of the parties). These two types of evidence are complementary to, rather than substitutes for, each other, as can be seen in the example below:

In case COMP/M.6203 *Western Digital/Hitachi*,[16] the Commission looked at a proposed acquisition in the market for hard disk drives (""HDDs").[17]

The transaction would have reduced the number of competitors active in the HHD industry from 4 to 3 and from 3 to 2 in the market for 3.5-inch hard disk drives. The Commission's assessment of the impact of this transaction relied on two types of data: (i) customer submissions and other qualitative evidence that showed that security of supply was important for HDD customers; (ii) quantitative evidence in the form of commercial data on transactions between the parties and their customers (as well as those of their main competitors), and bidding data showing that most customers multi-source their HDD supplies. By analysing the combined quantitative and qualitative evidence, the Commission concluded that the presence of a third supplier mattered and that removing Hitachi from the market would harm consumers.

2.2.3. Overview of the theories of harm investigated by the Commission

19. Over the last three years, horizontal non-coordinated effects cases have accounted for about 90% of intervention cases in the Commission’s work on merger cases.[18]

[15] There are several recent examples of cases where a range of sophisticated economic analysis was used to assess the existence of SIEC like in: COMP/M.6570 – *UPS/TNT Express*, decision of 30 January 2013; COMP/M.6458 – *Universal Music Group/EMI Music,* decision of 21 September 2012; COMP/M.6471 – *Outokumpu/Inoxum,* decision of 7 November 2012; or COMP/M.6663 – *Ryanair/Aer Lingus,* decision of 27 February 2013.

[16] Commission decision of 23 November 2011.

[17] In this case, the Commission approved the proposed acquisition of Hitachi Global Storage Technology (HGST), a subsidiary of Hitachi of Singapore recently renamed Viviti Technologies, by rival Western Digital of the US. The approval was conditional upon the divestment of essential production assets for 3.5" hard disk drives (HDD), including a production plant, and accompanying measures.

Coordinated effects cases, on the other hand, have been very rare, the last one being *ABF/GBI*[19] from 2008.

20. There have also been relatively few vertical and conglomerate cases, which account for just 7.5% and 2.5% of interventions over the last three years, respectively. Challenging cases with vertical concerns include *TomTom/Tele Atlas* and *Nokia/NAVTEQ*[20]. Although conglomerate cases are much rarer, they may also raise interesting competition issues, as in *Intel/McAfee*[21].

2.2.4. Efficiencies and innovation

21. The Commission's Horizontal Merger Guidelines explain that "it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have".[22] Therefore, in assessing a merger's impact on competition, the Commission makes "an overall competitive assessment" that includes any likely merger-specific efficiencies to the extent that "they are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers."[23] This approach is an integrated one in which possible anti-competitive concerns are weighed against efficiencies.

22. In particular, the Commission will examine the claimed efficiencies with respect to whether (i) the efficiencies are verifiable, (ii) the efficiencies are merger-specific and (iii) the benefits of the efficiencies are likely to be passed on to consumers.[24] The Guidelines specify that the notifying parties must provide, in a timely manner, the information necessary to demonstrate that the claimed efficiencies meet these criteria.

23. Accordingly, assessing efficiencies has been an integral part of merger analysis for the past ten years.

Case COMP/M.6570 - *UPS/TNT Express*[25] is an example of a case where the evaluation of efficiencies was instrumental in the competitive assessment of the proposed merger.[26] The Commission partially recognised the efficiencies claimed by the parties[27] and it was able to quantify the recognised efficiencies and the expected

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18 These are cases where the Commission intervened either by accepting remedies in Phase I or Phase II, or by prohibiting the merger (or where the parties abandoned the merger in Phase II).

19 COMP/M.4980 – *ABF/GBI Business*, decision of 23 September 2008.

20 COMP/M.4942 – *Nokia/NAVTEQ*, decision of 2 July 2008; COMP/M.4854 - *Tom Tom/Tele Atlas*, decision of 14 May 2008.

21 COMP/M.5984 – *Intel/McAfee*, decision of 26 January 2011.

22 Horizontal Merger Guidelines, paragraph 76.

23 Horizontal Merger Guidelines, paragraph 77.

24 Horizontal Merger Guidelines, paragraph 78.

25 Commission decision of 30 January 2013.

26 The case was also considered a "gap" case because it would have likely led to price increases without the creation or strengthening of a dominant position. DHL would have remained a market leader in some countries, but the proposed concentration would have led to the removal of an important competitive player in concentrated markets across Europe.

27 In particular, air network synergies resulting mainly from the fact that the merged entity would need fewer, larger planes for the combined small parcels volume than the individual parties pre-merger.

price rise. By including efficiencies in its overall analysis of the effects of the merger, the Commission was able to exclude anticompetitive effects for a number of countries. The recognised efficiencies were not sufficient to offset the expected negative effects in all countries, however. Since the parties did not offer sufficient remedies for the countries where competition concerns remained, the transaction was prohibited.

24. Innovation is widely recognised as a main driver for competitiveness and growth in the economy. Merger enforcement can foster innovation by protecting competition, which leads to better market outcomes not only in terms of lower prices and increased output but also in terms of better product quality, variety and innovation. In *Intel/MacAfee*, for example, the remedies helped preserve innovation in security software and ensure that competitors were not foreclosed.[28]

2.3. Merger control during the financial and economic crisis

25. The financial and economic crises showed that the EU Merger Regulation provides all the necessary tools to apply effective merger control even in times of economic downturn. While the Commission has taken due account of the market changes resulting from the crisis, it has resisted pressure for a more lenient approach to EU merger control. By preserving competitive market structures during the economic downturn, the Commission set the foundation for a sustainable subsequent upturn.

26. In the particularly sensitive banking sector, for instance, competition concerns in credit card markets were dispelled by a set of remedies on the *BNP Paribas/Fortis* merger.[29] The Commission made its decision well before the deadline and granted a partial derogation from the suspension obligation, thereby making sure that BNP Paribas could give timely and necessary support to the acquired Fortis assets in order to keep them operational. Similarly, in *Fortis/ABN Amro*,[30] the Commission ensured full implementation of the remedies it accepted immediately before the financial crisis in order to preserve competition in the banking market for Small and Medium Enterprises ("SMEs") in the Netherlands after the recovery.

27. When justified, the Commission uses the tools at its disposal to account for the deteriorating situation of the parties during its assessment. In particular, the Commission has done this by thoroughly analysing failing firm arguments[31] and by developing a refined analysis of the framework for the competitive assessment.[32] In this analysis, the Commission undertakes a thorough examination of whether the deterioration of the competitive structure following the merger would have occurred despite the merger.[33] This can be illustrated by the case below:

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28 COMP/M.5984 – *Intel/McAfee*, decision of 26 January 2011.

29 COMP/M.5384 - *BNP Paribas/Fortis*, decision of 3 December 2008.

30 COMP/M.4844 – *Fortis/ABN Amro Assets*, decision of 3 October 2007.

31 COMP/M.6796 - *Aegean/Olympic II,* decision of 9 October 2013; COMP/M.6360 - *Nynas/Harburg,* decision of 2 September 2013.

32 For example COMP/M.6447 - *IAG/bmi*, decision of 30 March 2012.

33 Horizontal Merger Guidelines, paragraph 89. For a further explanation on the criteria to be fulfilled for the, see Horizontal Merger Guidelines, paragraph 90.

In case COMP/M.6360 - *Nynas/Harburg*[34], the Commission cleared the proposed acquisition by Sweden's Nynas AB of certain Shell Deutschland Oil GmbH refinery assets located in Hamburg/Harburg (Germany). The Commission's analysis showed that, in the absence of the notified transaction, the Harburg refinery assets would most likely exit the market, which would have been much worse for the competitive structure of the relevant markets than the reasonably foreseeable effects of the concentration. The case is a good illustration of how the Commission compares the competitive conditions that prevail without the concentration with the conditions that would result from the concentration.

2.4. Remedies

28. If the Commission identifies competition concerns when examining a notified merger, the parties may offer commitments in order to remedy those concerns. If the Commission finds that the commitments address the competition concerns and are sufficient to ensure the merger's compatibility with the internal market, it shall authorise the transaction subject to those commitments. Such authorisation renders the commitments binding on the parties.[35]

29. Commitments are crucial instruments of merger control, since the large majority of cases that raise competition concerns are cleared with commitments rather than prohibited. Indeed, only 24 transactions have been prohibited since 1990. The overall percentage of mergers where the Commission intervened in order to maintain effective competition in the single market[36] has been stable at around 5% to 8% of all notified mergers over the last years. While this ratio may fluctuate depending on the nature of the transactions notified to the Commission, it stability also indicates the maturity of the system.

30. The Commission further revised its practice regarding remedies with its 2008 Remedies Notice.[37] The revised Remedies Notice[38] explains that a divestiture commitment is the best way to eliminate competition concerns and is also the "benchmark" against which the suitability of other proposed remedies should be assessed. The new Notice aims at a more standardised approach towards remedies and focuses more closely on their effectiveness. In particular, it clarifies and strengthens:

- the requirements for the scope of the divestiture,
- the requirements for suitable purchasers,

[34] Commission decision of 2 September 2013.
[35] See Article 6(2) and Article 8(2) of the Merger Regulation.
[36] These cases include mergers cleared in Phase I or in Phase II with commitments, prohibitions as well as mergers abandoned after the opening of an in-depth investigation.
[37] Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1).
[38] See Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001, p. 3), which updated and refined an earlier Notice from 2001.

– the hold-separate obligations of the parties pending the divestiture, the conditions for so-called carve-out divestitures (where the divestment business does not constitute an existing stand-alone business), and the supervisory role of the monitoring trustee.

Case COMP/M.5658 - *Unilever/Sara Lee*[39] illustrates the Commission's approach to structural/non-structural remedies. In order to alleviate the Commission's concerns, the merging parties offered several non-structural remedies that the Commission did not consider to be effective, including re-branding in certain Member States. Finally, the commitment to divest Sara Lee's Sanex brand and related business in Europe was accepted as this offered a clear and workable remedy, sufficient to restore competition in all markets where the Commission had concerns.

31. Complex remedies involve risks that need to be anticipated in advance. Untimely remedies may render an authorisation impossible, especially when the purchaser's identity is critical and "fix-it-first" solutions are necessary.[40] However, recent cases also show that the Commission is flexible in discussing complex remedies such as up-front buyers or specific purchaser requirements if they are workable and supported by sufficient safeguards.[41]

2.5. Outlook: Fostering the level playing field, cooperation and convergence

32. The Merger Regulation has truly succeeded at levelling the playing field and providing one-stop-shop scrutiny for mergers with an EU dimension. However, Member States also play important roles in merger control enforcement in the European Union. Between 2001 and 2007, the combined NCAs dealt with nearly 4,000 merger cases per year on average. A truly functional system for scrutinizing mergers throughout the EU requires efficient work-sharing, cooperation, and convergence between the Commission and the 27 Member State exercising merger control.[42]

33. Diverging merger rules and practices create administrative burdens on businesses and may also impact the internal market. In the consultation carried out in preparation for a 2009 report from the Commission to the Council on the operation of the Merger Regulation ("the 2009 Report"),[43] and in subsequent debates, stakeholders expressed concerns regarding the administrative burden and risk of diverging decisions of competition authorities across Europe. Stakeholders stated

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39 Commission decision of 17 November 2010.

40 See e.g. case COMP/M.6570 - *UPS/TNT*, Commission decision of 30 January 2013: the parties proposed the divestiture of local subsidiaries in 15 origin countries, including the temporary access to UPS' air network. The viability of such a remedy critically depended on the identity of the buyer as it would need to connect the divested assets to a functioning existing network which the parties were not able to propose within the timeframe of the Commission's proceedings.

41 Recent examples of cases with complex carve-out remedies include COMP/M.6576 – *Munksjsö/Ahlstrom,* decision of 24 May 2013; COMP/M.6690 – *Syniverse/Mach,* decision of 29 May 2013; COMP/M.6857 – *Crane/MEI,* decision of 19 July 2013.

42 All Member States with the exception of Luxembourg.

43 Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, 18 June 2009, COM (2009) 281 final, accompanied by Staff Working Paper SEC (2009) 808 final/2 ("2009 Staff Working Paper").

that they would welcome more convergence in this respect. The administrative burden is particularly apparent in cases with cross-border effects, as these sometimes require clearance from several NCAs. In such cases, diverging rules may lead to higher cost for businesses and, in exceptional cases, inconsistent outcomes.

34. Although NCAs ordinarily apply Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") in conjunction with their national laws, the EU Merger Regulation has been a model for many national merger control regimes. For this reason, there is basic legislative convergence across jurisdictions, particularly regarding the substantive test for assessing transactions.[44]

35. In addition, some convergence has been achieved on substantive and jurisdictional issues through increased cooperation between NCAs and the Commission. In 2010, a working group of the Commission and the NCAs ("Merger Working Group") was established to foster cooperation and convergence among the NCAs of the 27 Member States (with merger control regimes) within the current institutional and legal framework. In 2011, the group adopted a set of Best Practices for merger cooperation between NCAs.[45] There is, in general, close practical cooperation between the Commission and NCAs, as well as between the NCAs themselves.

36. Despite the convergence achieved to date, the harmonisation is incomplete. Among the notable points of divergence are national laws that allow a government to overrule an NCA's negative competition-based merger decision (applying national merger control law) on the basis of other public-interest considerations. Although such interventions are generally rare, such regimes exist in France, Germany, Italy, Spain and the United Kingdom, for example.

37. While most NCAs now apply the SIEC or a similar test in their substantive assessments, the ways in which such tests are further developed in guidance documents (such as the Commission's Horizontal and Non-Horizontal Guidelines) and the ways in which they are applied and interpreted by competition authorities (and ultimately reviewing courts) are equally important. Divergence in this respect may impact the substantive assessment and cause inconsistent outcomes. The same is true with respect to remedies, as Member States do not always follow the same approach.

38. The Member States' rules and practices regarding procedure, such as time frames for review and stand-still rules, may also differ, leading to uncertainty and imposing additional costs on companies.

39. Therefore, the White Paper concludes that greater convergence between the Commission and NCAs, and among the NCAs, is important to create a truly level playing field and avoid inconsistent outcomes[46], even short of an initiative of

44 For instance, in 2013 Germany replaced the previous dominance test with the SIEC test thereby following the example of the re-cast Merger Regulation adopted in 2004, see Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 29.6.2013 (BGBl. I, 1738).

45 EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November 2011.

46 See Recital 14 of the EUMR that emphasizes cooperation and deals with referral and competence.

legislative harmonisation, as recently also called for by several NCAs. On one hand, the Commission and Member States should continue to align their respective practices by increasing cooperation and sharing experience, using all available tools and forums such as the Merger Working Group. On the other, NCAs should intensify their cooperation on individual cases.

40. NCAs can avoid inconsistent outcomes in any event by referring cases to the Commission. Stakeholders, including NCAs, have therefore proposed that parties should be able to request a referral if only two Member States have jurisdiction. In any event, if NCAs believe that the Commission is best situated to avoid divergent outcomes, they can refer cases to the Commission under Article 22. The reform proposals on Article 22, set out in the White Paper and explained further in Section 4.2.2 below, suggest setting up a system based on an early information notice. Such a system should facilitate practical cooperation amongst the NCAs in cross-border and multi-jurisdictional cases, even if no referral ultimately takes place. By the same token, the proposal set out in Section 5.1.3 would make practical cooperation easier, which would improve the exchange of case-related information between the Commission and NCAs.

41. Beyond such voluntary "soft convergence", Professor Monti's report "A New Strategy for the Single Market" (2010)[47] referred to the possibility of extending the use of the substantive EU merger control rules. He concluded that there is an interest in moving towards a greater convergence for the substantive assessment of mergers and the review process at national level. He also concluded that the objective of ensuring a level playing field would require NCAs to apply the substantive EU merger control rules at the national level too when mergers have cross-border effects. More recently, a report by the French NCA raised similar proposals.[48]

42. A move towards a system similar to the current enforcement framework of Articles 101 and 102 TFEU could be appropriate for transactions in the Single Market with cross-border effects, which are increasing in number. It could further reduce the risk that NCAs dealing with the same case will reach conflicting outcomes and could simplify the administrative burden for parties in multi-jurisdictional filings. However, such a move to a system where both the Commission and the NCAs apply the same EU substantive law ("EU merger control area") would require a more ambitious modification of the current merger control system within the European Union.

47 Mario Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society*, Report to the President of the European Commission José Manuel Barroso, 9 May 2010.

48 Autorité de la concurrence, Rapport au Ministre de l'Économie et des Finances. Pour un contrôle plus simple, cohérent et stratégique en Europe, 16 December 2013.

3. ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS

3.1. Why does the Commission want to subject acquisitions of non-controlling minority shareholdings to merger control rules?

43. Effective and efficient competition policy requires appropriate and well-designed methods of tackling all sources of harm to competition and thus to consumers. The following subsections address the problems concerning non-controlling minority shareholdings.

44. As is stands, the Merger Regulation only applies to "concentrations", which are defined as acquisitions of control by one or more person(s) or undertaking(s) over one or more other undertakings or parts of undertakings. For example, a firm acquiring a majority stake in another firm and two firms creating a joint venture both qualify as concentrations. If certain thresholds are complied with, such concentrations must be notified to the Commission in advance and may only be implemented once the Commission has cleared them.

45. When the acquisition of a minority shareholding is unrelated to acquisition of control, the Commission cannot investigate or intervene against it. Only a merger party's pre-existing minority shareholdings in a competitor or a company active in an upstream or downstream market can be taken into account by the Commission in the context of a notified merger concerning a separate acquisition of control. If the minority shareholding is acquired after the Commission examines the acquisition of control, however, the Commission has no competence under the Merger Regulation to address possible competition concerns, even though they may be the same.

46. The experiences of the Commission, the Member States, and third countries, as well as economic research[49] all show that in some instances, the acquisition of a non-controlling minority shareholding, such as one firm acquiring a 20% shareholding in a competitor, can harm competition and thus consumers (see below for some examples). Such minority shareholdings can lead to a SIEC which cannot be adequately addressed under the Merger Regulation in its current form.

47. In the European Union, Austria, Germany and the United Kingdom currently have national merger control rules that give them the competence to review acquisitions of non-controlling minority shareholdings.[50] In all three Member States, the NCAs have intervened against acquisitions of minority shareholdings that raised competition concerns. Likewise, many jurisdictions outside the EU, such as Canada, the United States, and Japan, examine structural links under merger control rules. In addition, in both the public consultation and recent media reports, further recent acquisitions of minority shareholdings have emerged where the shareholding was acquired in a competitor or a vertically related company.[51]

49 See Annex I of the Consultation Paper for an overview of the economic literature,

50 See Annex II of the Consultation Paper.

51 See for example the minority stakes recently acquired by Telefónica in Telecom Italia, by Air France in Alitalia, by Intel in ASML, a manufacturer of lithography systems for the semiconductor industry, by Marine Harvest in Grieg Seafood or by VW in Suzuki. Regarding minority shareholdings in vertical relationships examples include the 10% minority shareholdings of Nestlé in Givaudan (which was

3.1.1. *Theories of harm*

48. Several types of competition concerns can arise when a minority shareholding is acquired. These concerns are based on similar theories of harm to those relevant for acquisitions of control and, in general, require that the transaction significantly increase market power.[52]

49. The economic effects of minority shareholdings on competition in the market depend on the size of the minority shareholding, the resulting financial interests, and the corporate rights conferred by them. Whereas financial interests refer to the acquiring firm's entitlement to a share of the target firm's profits, corporate rights refer to the ability to influence the acquired firm's commercial decisions.

50. Acquiring a minority shareholding in a competitor may lead to non-coordinated anti-competitive effects because such a shareholding may increase the acquirer's incentive and ability to unilaterally raise prices or restrict output. Intuitively, if firms have financial stakes in their competitors' profits, they may decide to 'internalise' the positive effects of their own output reductions or price increases on their competitors' profits. This may occur when the minority shareholding is "passive", meaning its holder has no influence on the target firm's decisions.

51. These potential anti-competitive effects may also materialize when a minority shareholding is "active", meaning its holder may have influence over the target firm's decisions. This can occur when the acquirer gains influence over the outcome of special resolutions in shareholders' meetings, which are needed to approve certain strategies related to significant investments, product lines, geographical scope, raising capital, engaging in mergers and acquisitions, and advertising, among others. In this respect, economic theory predicts that the acquiring firm may influence the target firm to increase its prices because the acquiring firm fully benefits from the positive externalities of the competitor's price increase but bears only part of the costs, depending on the level of its financial ownership rights. If the target company is ultimately forced to stop competing with the acquirer, the situation would be akin to a full merger but without any of the cost-saving efficiencies that a merger can generate.

52. The Commission and the Member States have found that competition concerns are more likely to be serious when a minority shareholding grants some degree of influence over the target firm's decisions, as in the case studies described below.

53. *Siemens/VA Tech* demonstrated both the "financial incentive" theory of harm and risk created when an undertaking holds influence and voting rights in a competitor. In that case, the Commission concluded that information and voting rights granted to Siemens through the prior acquisition of a minority shareholding in SMS Demag would lead to reduced competition in the metal plant-building market, where VA Tech was active, because Siemens would have received privileged access to information about SMS Demag's participation in plant building tenders.

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recently sold) or the 15% shareholding of BMW in SGL Carbon (in addition to the 29% shareholding of the Quandt/Klatten family which controls car manufacturer BMW).

52 See para. 8 of the Horizontal Merger Guidelines and para. 10 of the Non-horizontal Merger Guidelines.

Case M.3653 - *Siemens/VA Tech*[53] involved the acquisition of Austrian engineering group VA Tech by Siemens. There was a horizontal overlap between SMS Demag, a company in which Siemens held a 28% (non-controlling) minority shareholding, and one of VA Tech's subsidiaries. Certain information, consultation and voting rights were granted to Siemens by SMS Demag's shareholders' agreement. The Commission found that the merger would reduce competition in the metal plant-building market due to a combination of financial incentives and information rights stemming from Siemens' 28% share in SMS Demag.

In order to resolve the Commission's concerns, Siemens proposed, and the Commission accepted, a number of commitments that ensured Siemens would dispose of the minority shareholding and not use its position in SMS Demag to obtain any strategic information regarding the latter's business policy until the sale was finalised.

54. Competition concerns may also arise when the financial interests of the acquiring company in the target company are limited but the acquirer can use its minority shareholding position to limit the competitive strategies available to the target firm, thereby weakening it as a competitive force.

55. Competition concerns regarding the ability of minority shareholders to influence the competitive strategies of target companies were at the core of several recent European and UK minority shareholding cases, of which the Ryanair/Aer Lingus cases may be the best known example.

Ryanair had already acquired a significant minority shareholding in the share capital of its competitor, Aer Lingus, when it notified the Commission of its proposal to acquire control in 2006. The Commission prohibited the acquisition due to serious concerns that it would hurt competition by creating or strengthening Ryanair's dominant position on a number of routes, but Ryanair maintained a minority shareholding of 29.4% in Aer Lingus.[54] A second attempt by Ryanair to acquire control over Aer Lingus was also blocked by the Commission in February 2013.[55]

The Merger Regulation did not allow the Commission to order Ryanair to divest the shareholding it already held in Aer Lingus, as the General Court confirmed.[56] However, Aer Lingus argued Ryanair's minority shareholding would have significant negative effects on competition between the two carriers, as Ryanair would use the minority shareholding to weaken Aer Lingus's ability to compete.

The United Kingdom's Competition Commission examined Ryanair's minority shareholding in Aer Lingus on the basis of the UK merger control rules, which allow for a review of such minority interests. In its findings issued on 28 August 2013,[57]

53 Commission decision of 13 July 2005.

54 COMP/M.4439 – *Ryanair/Aer Lingus I*, decision of 27 June 2007.

55 COMP/M.6663 – *Ryanair/Aer Lingus III*, decision of 27 February 2013.

56 Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.

57 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/130828_ryanair_final_report.pdf - Ryanair appealed the decision but the Competition Appeal Tribunal rejected the appeal on 7 March 2014.

the UK Competition Commission stated that the shareholding gives Ryanair the ability to influence the commercial policy and strategy of Aer Lingus, its main competitor on flight routes between the United Kingdom and Ireland. In particular, it was likely to impede or prevent Aer Lingus from being acquired by, or combining with, another airline. The UK Competition Commission was also concerned that Ryanair's minority shareholding was likely to affect Aer Lingus's commercial policy and strategy by allowing Ryanair to block special resolutions, restricting Aer Lingus's ability to issue shares and raise capital, and to limit Aer Lingus's ability to effectively manage its portfolio of Heathrow slots. Ryanair was required to reduce its 29.8% stake in Aer Lingus down to 5% and was obligated not to seek or accept board representation or acquire further shares.

56. In the *Ryanair/Aer Lingus* case, the UK Competition Authorities had no jurisdiction to assess cross-border effects of the transaction resulting from overlaps between the parties for flights between Dublin and European destinations other than those in the UK. The European Commission could have assessed those if the Merger Regulation had covered acquisitions of non-controlling minority stakes. Since this is not the case, those effects remained unscrutinised. This illustrates that there are cases with dimensions beyond a single Member State for which the Commission would be better situated to investigate the impacts on competition.

57. Competition concerns stemming from a minority shareholder's ability to influence the target company's competitive strategies were also the focus of the *Toshiba/Westinghouse* case. That case also demonstrates that competition concerns arising from a minority shareholding can be alleviated not only by a full divestiture, but also by non-structural remedies regarding voting rights and access to information.

Case M.4153 - *Toshiba/Westinghouse*[58] concerned the acquisition of Westinghouse, active in the nuclear sector, by Toshiba. Toshiba already held a pre-existing minority shareholding in Global Nuclear Fuels ("GNF"), a joint venture active in the market for nuclear fuel assemblies. Accordingly, the notified transaction would have led to an overlap between Westinghouse's activities and Toshiba's non-controlling shareholding in the joint venture.

Toshiba held 24.5% of the voting rights in GNF, which was one of the two most important competitors to Westinghouse (alongside French company Areva) in both the EEA and world-wide markets for the design and manufacture of nuclear fuel assemblies. In addition, Toshiba had a number of veto rights that it could use to prevent GNF from expansions into fields in which they would compete with Toshiba/Westinghouse, as well as certain information rights and representation in various boards of GNF and its subsidiaries.

The Commission found that the transaction could lead to a possible elimination of competition. In particular, the Commission found that Toshiba could use its veto rights in GNF and its subsidiaries to prevent GNF from expanding into fields in which they would compete with Toshiba/Westinghouse. Furthermore, through its

58 Commission decision of 19 September 2006.

information rights and its representation on various Boards of GNF and its subsidiaries, Toshiba would have the opportunity to obtain sensitive confidential information which would help Toshiba make GNF's expansion more difficult.

The concern was addressed through remedies in the joint venture. In particular, Toshiba had to relinquish all board and management representation in GNF, its veto rights under the joint venture agreement, and all rights to obtain any confidential information. Toshiba was not prevented from receiving strictly limited information, however.

58. Horizontal minority shareholdings may also lead to coordinated anti-competitive effects by increasing market participants' ability and incentives to tacitly or explicitly collude in order to achieve supra-competitive profits. The acquisition of a minority shareholding in a competitor may facilitate such effects by offering the acquiring firm a privileged into the competitor's commercial activities. It may also make the threat of future retaliation more credible and severe should a minority shareholder deviate from the collusive behaviour, as the acquiring firm may use its rights in an obstructive or hostile way to limit the competitive strategies of the "target" company. Both effects will impact market participants' ability and incentives to coordinate.[59] Concerns about potential coordinated effects were at the heart of *VEBA/VIAG*.

Case M.1673 - *VEBA/VIAG*[60] concerned the merger between German energy operators VEBA and VIAG, which was examined by the Commission in parallel to the merger between RWE and VEW (assessed by the German Bundeskartellamt). Both mergers together would have resulted in a dominant duopoly on the German wholesale electricity market. In this context, the Commission also examined the complex web of interconnected (controlling and non-controlling) minority shareholdings that VEBA/VIAG and RWE/VEW held in regional and local electricity suppliers.

These various controlling and non-controlling shareholdings between the duopoly and virtually all other wholesale supply companies could, in combination with high market shares, increase the duopoly's market power and lead to coordinated behaviour. To remedy the situation, the parties committed to divest several of their controlling and non-controlling minority shareholdings, among other things.

59. Finally, non-horizontal transactions may raise competition concerns related to input foreclosure. Minority shareholdings may make input foreclosure more likely because the acquiring company only internalises a part, rather than all, of the target firm's profits. In some cases, the risk of foreclosure created by a minority shareholding is actually higher the risk from a fully-integrated firm.

60. Input foreclosure was a concern in *IPIC/MAN Ferrostaal*.[61]

The acquisition of MAN Ferrostaal (a subsidiary of MAN) by International Petroleum Investment Company ("IPIC") was approved by the Commission in 2009

[59] Annex I of the Consultation Paper.

[60] COMP/M.1673 - *VEBA/VIAG,* decision of 13 June 2000.

[61] COMP/M.5406 - *IPIC/MAN Ferrostaal AG*, decision of 13 March 2009.

subject to certain conditions. The Commission found that the transaction would give rise to a foreclosure risk regarding the only existing non-proprietary technology for melamine production in the world. In fact, IPIC's subsidiary AMI was, together with DSM, the major producer of melamine, whereas MAN Ferrostaal had a 30% minority shareholding in Eurotecnica, the supplier of the input technology. Although a minority shareholding, this 30% participation gave MAN Ferrostaal material influence over Eurotecnica's melamine licensing and engineering businesses, since the shareholders' agreement foresaw a number of decisions to be taken by super-majority. Furthermore, the shareholder agreement gave all shareholders extensive information rights. The Commission found that these conditions were likely to have a substantial deterrent effect on the licensing practice for current and future customers of Eurotecnica, given that the voluminous information exchanged between a prospective client and Eurotecnica might end up in the hands of these clients' competitors, namely AMI.

In addition, a foreclosure strategy towards DSM or potential new entrants for the production of melamine, a billion euro European market, could be expected. The Commission also found that, due to the high concentration of the melamine market (two main producers with symmetrical market shares – AMI and DSM) and its transparent nature (published contract prices, well-known costs), there was increased risk of coordination between the two market leaders, AMI and DSM.

To remedy the situation, MAN Ferrostaal committed to divest its entire minority shareholding in Eurotecnica.

3.1.2. Articles 101 and 102 may not be suitable to deal effectively with anti-competitive minority shareholdings

61. In the public consultation, a number of stakeholders, such as businesses, business associations, and law firms, questioned whether the limited number of problematic transactions justifies broadly extending the Merger Regulation's scope. Some stakeholders suggested that the rules on restrictive agreements and abuse of a dominant position, set out in Articles 101 and 102 TFEU, respectively, were adequate substitutes because they could capture many of the problematic transactions.

62. However, the Commission's ability to use Article 101 and Article 102 TFEU to intervene against anti-competitive minority shareholdings may be limited. Regarding Article 101, it is not clear whether acquiring a minority shareholding would constitute an "agreement" having the object or effect of restricting competition within the meaning of Article 101 TFEU in all cases. Particularly regarding acquisitions of a series of shares via the stock exchange, the application of Article 101 TFEU might present a number of conceptual difficulties such as whether there is an agreement. If there is, the Commission would still have to determine whether such an agreement would have the object or effect of restricting competition and, if so, which purchase agreement specifically does so. The same is probably true for the articles of association of a company, the purpose of which is generally to determine the corporate governance of the company and the relationship between it and its shareholders. Regarding Article 102 TFEU, this provision requires that the

undertaking acquiring a minority shareholding already hold a dominant position and that the acquisition would constitute an abuse of that dominant position. The circumstances under which the Commission can intervene against competitive harm arising from acquisitions of minority shareholdings are therefore quite narrow.[62]

63. As explained above, the so-called "theories of harm" relevant for a competition assessment of minority shareholdings are similar to those arising from acquisitions of control (i.e. horizontal, non-coordinated, and vertical effects) because they target structural changes in the market. Therefore, the SIEC test laid down in the Merger Regulation appears much more appropriate than the tests laid down in Article 101 or 102 TFEU.

64. Second, while some respondents to the public consultation claim that Articles 101 and 102 TFEU should be applied, they also emphasise the importance of legal certainty for companies making investments. The procedures laid down in Council Regulation (EC) No. 1/2003[63] for enforcing Articles 101 and 102 TFEU essentially require companies to self-assess whether they comply with the competition rules and give the Commission and NCAs the power to intervene ex-post against any anti-competitive conduct without any time limitation. Such a procedure appears to provide less legal certainty for undertakings and therefore is less appropriate for examining the effect of lasting acquisitions of minority shareholdings than the procedural framework of the Merger Regulation. Under the latter, the Commission must make a decision within a short, legally binding deadline.

65. In sum, the Commission sees the need to extend the Merger Regulation to the acquisition of non-controlling minority shareholdings and that it is appropriate to apply the substantive test of the Merger Regulation. While it is expected that only a limited number of cases would be investigated, past cases have shown that this initiative would be a relevant enforcement activity.

3.2. Design options for controlling the acquisition of minority shareholdings

66. When designing the system for the control of minority shareholdings, it is useful to establish the parameters for a system of controlling minority shareholdings at EU level. This will help in answering two fundamental questions: (1) which cases should fall under the Commission's competence and (2) which procedure is best suited to meet the Commission’s aims.

3.2.1. Principles for a system for the control of minority shareholdings at an EU level

67. A system for controlling minority shareholdings at the EU level should strike the right balance between the following three principles.

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[62] Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691, in particular paragraph 104, and Case 6/72 *Continental Can v Commission* [1973] ECR 216.

[63] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the treaty (OJ L 1, 4.1.2003, p. 1) as amended.

68. First and foremost, considering the overall aim of preventing harm to consumers and the theories of harm discussed above, the system should capture the potentially problematic cases.

69. Secondly, it should avoid unnecessary and disproportionate administrative burdens, primarily for companies, but also for the Commission and NCAs. In the public consultation, stakeholders were concerned that the Commission would propose a far-reaching system with a high administrative burden on business even though few transactions would be problematic. Stakeholders often pointed out that most minority shareholdings are perfectly innocuous, such as those acquired for investment purposes or during recapitalisation or restructuring of ailing companies by financial institutions. Indiscriminately subjecting such shareholdings to mandatory review under merger control rules might go beyond what is needed to prevent anti-competitive transactions.

70. While these first two principles are important for a system of controlling minority shareholdings in any jurisdiction, a third principle is important for a system for the control of minority shareholdings at the EU level. Namely, the system should fit with the existing merger control systems at EU and national level.

71. The NCAs maintained that any system for controlling minority shareholdings at the EU level should be consistent with national systems. This is important given that the Member States that currently control the acquisition of minority shareholdings would lose the competence to review transactions above the turnover thresholds of the Merger Regulation.[64] Some NCAs were also concerned that a high level of protection of competition would only be achieved if the Commission is at least informed about the fact that a transaction is envisaged and takes a clear position on whether it will investigate that transaction. This would allow Member States to request a referral in case the Commission were to decide not to investigate a case.

72. A system for controlling minority shareholdings should also fit smoothly into the existing legal and procedural framework of the Merger Regulation in order to avoid unnecessarily complicating EU merger control. It can accomplish this without necessarily extending the notification system.

3.2.2. Possible alternatives

73. Regarding the possible design of the procedure, the Consultation Paper put forward three procedural options for the control of minority shareholdings. These three options were (i) a notification system; (ii) a self-assessment system; and (iii) a transparency system (as a hybrid option)[65]:

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64 Regarding the delineation of competences between the Member States and the Commission, it would be envisaged that the turnover thresholds of the Merger Regulation would also apply to the acquisitions of minority shareholdings and that likewise the referral system would apply for minority shareholdings in order to allow for a "fine tuning" of case allocation to the "more appropriate authority" where this is not achieved via the turnover thresholds.

65 The Consultation Paper did not define what would constitute a relevant "minority shareholding" (the Consultation Paper used the term "structural link"), but rather put it to the stakeholders to state which

- Under the notification system, the current system of ex-ante merger control would be extended to acquisitions of non-controlling minority shareholdings under certain conditions. All acquisitions of shareholdings above a given "safe harbour" would have to be notified in advance and could only be implemented after the Commission had issued a clearance decision. The same procedural deadlines as for concentrations would also apply to minority shareholdings.

- Under the self-assessment system, the parties would not be obliged to notify the acquisition of a minority shareholding in advance and could proceed without prior approval of the Commission. The Commission would have to rely on its own market intelligence or complaints to become aware of transactions that may raise competition issues and would then be free to select the potentially problematic cases (except for acquisitions below a "safe harbour") and investigate them.

- Under the transparency system, the parties would be required to submit an information notice informing the Commission about certain types of transactions. Submitting an information notice would allow the Commission to decide whether the transaction warrants an investigation and allow Member States to consider whether to make a request for a referral.

74. The cases that fall within the Commission's competence should be closely linked to the theories of harm discussed above. Based on these theories, only transactions between competitors or vertically related companies are potentially anti-competitive. Amongst those, only transactions that result in the acquisition of some sort of influence over the competitive behaviour of the "target" company or which create an incentive for the acquiring company to adapt its competitive behaviour (for example, in view of the knowledge gained about the target company through the minority shareholding) should be captured. Further details and criteria regarding the identification of potentially anti-competitive transactions are discussed below.

75. The scope of the Commission's jurisdiction relates directly to what procedure is appropriate and adequate. For example, if the Commission has jurisdiction over all acquisitions of minority shareholdings above a certain threshold, a pre-merger notification system would create a heavy burden on businesses because unproblematic mergers would also be covered. Giving the Commission jurisdiction over all acquisitions of minority shareholdings above a certain threshold might therefore be more appropriate under a self-assessment system, where the Commission is free to investigate transactions on its own initiative. On the other hand, the administrative burden imposed by a notification or transparency system would be much lower if the Commission's jurisdiction were limited to only potentially problematic transactions. The relationship between the design of the procedural system and the scope of jurisdiction arose frequently in responses to the public consultation.

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minority shareholdings should be controlled. Many replies pointed in the direction of a targeted system which would cover only transactions between competitors or vertically related companies.

3.2.3. *The preferred system: Targeted transparency system*

76. Taking into account the three principles articulated above and the considerations regarding scope of jurisdiction and procedure, the Commission proposes targeting the new system at only certain types of minority shareholdings. From the outset, the Commission's competence under the Merger Regulation would be limited certain potentially anti-competitive transactions, which would limit the number of cases to be assessed under the new system.

77. The Commission must therefore define the group of potentially anti-competitive acquisitions of minority shareholdings to be captured. In view of the theories of harm discussed in section 3.1.1, only transactions between competitors or vertically related companies seem to raise competition concerns. Furthermore, a certain minimum level of shareholding and/or certain rights attaching to that shareholding, which grant the acquirer some influence over the target or access to information, should be required.

78. In view of the theories of harm discussed above, the Commission proposes that only transactions with the following criteria fall within the Commission's jurisdiction and require an information notice. These transactions would presumptively create a "competitively significant link":

- The transaction concerns the acquisition of a minority shareholding in a competitor or vertically related company ("competitively significant link").

- The minority shareholding creates a significant link between the two companies. Such a link would be presumed if the post-transaction minority shareholding is above a certain threshold (e.g. around 20%), as such shareholdings generally confer certain corporate rights and change financial incentives. Alternatively, if the minority shareholding is between 5% and 20%, then certain rights would need to attach to the shareholding in order for the link to be considered competitively significant. Such rights might include the right to nominate a member of the board, exert influence, or obtain access to the target's competitively sensitive information.

79. Transactions involving acquisitions of minority shareholdings below 5% would not be covered by the new competence, but might still be captured by the Member States' merger control regimes or, in case they are part of wider cooperation agreements, by Article 101 TFEU. For pre-existing minority shareholdings analysed in the context of a concentration, full divesture may still be necessary to ensure a remedy's effectiveness if the Commission finds that the minority shareholding affects the incentives to compete.

80. Considering the three principles set out in Section 3.2.1, the targeted transparency system is the preferred option for the following reasons:

81. First, under the targeted transparency system, potentially harmful transactions would likely come to the attention of the Commission and Member States while innocuous transactions, such as those entered into for investment purposes only, would not. The

targeted transparency system therefore limits cases to those that are strictly necessary to prevent harm to consumers.

82. Second, the targeted transparency system limits the administrative burden by weeding out the unproblematic cases and limiting the amount of information to be submitted to the Commission at the initial stage. Contrary to the targeted notification system, the parties would not have to submit a notification in each and every case. Only if the Commission were to decide to investigate a case would the parties have to submit full notifications, and only then would the Commission have to issue a decision following its investigation. The targeted transparency system is therefore administratively lighter for both companies and the Commission.

83. Finally, the targeted transparency system would fit with the existing systems for controlling minority shareholdings on a national level. The notice would inform the Member States of relevant transactions and would allow them to request a referral. The Commission would take into account the reduced level of information available to Member States when assessing whether the criteria for a referral, pursuant to Article 9, are met. Under the transparency system, a 15 working-day waiting period should also be considered. Such a waiting period would align with the deadline under Article 9 for a Member State referral request following a full notification. Such a system would ensure that the Member States with notification systems and stand-still obligations do not face transactions that have already been implemented before they start their investigations. Under a self-assessment system, the Member States would not be informed of transactions and, unless a transaction were voluntarily notified before implementation, the member states could not possibly request a referral before the transaction is implemented.

84. The Commission therefore believes that an amendment to the Merger Regulation to cover acquisitions of non-controlling minority shareholdings should be based on a "targeted transparency system", as outlined in this section. The system should also permit voluntary notifications, which many stakeholders advocated for during the public consultation in order to obtain legal certainty. In such cases, the Commission would investigate the case and issue a decision.

85. The Commission estimates that roughly 20-30 minority shareholding cases per year will meet the above criteria of the targeted transparency system as well as the turnover thresholds of the Merger Regulation. This number corresponds to roughly 7-10% of the merger cases currently examined by the Commission each year.[66]

3.2.4. Details and options within the targeted transparency system

86. The following section sets out details and possible policy choices within the targeted transparency system regarding jurisdiction, procedure, and substantive assessment.

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66 These figures were based on an extrapolation from the Zephyr database (a database containing information on the total number, the value and the corresponding participation percentages of ownership transactions in listed companies registered in 27 EU Member States) and an estimation of the yearly number of minority shareholding transactions with EU dimension which were investigated by the Member States (i.e. those which have a system for the control of minority shareholdings. However, the estimate presuppose that acquisitions of non-controlling minority shareholding are similarly frequent across different Member States. See Impact Assessment Report for more detail.

3.2.4.1. Jurisdiction

a) Criteria for transactions creating a "competitively significant link"

87. Based on the theories of harm discussed above, the Commission suggests the following criteria for determining whether a transaction creates a "competitively significant link" and therefore should fall under the Commission's jurisdiction:

88. First, the minority shareholding must be acquired in a competitor or in a directly vertically-related company. For the purpose of establishing the Commission's competence, the concept of "competitor" would not require a detailed antitrust analysis of the relevant markets. Rather, it would take into account whether the companies are active in the same sector and the same geographic area and, based on the self-assessment of the parties, whether the acquirer has a competitive relationship to the target.[67]

89. Second, the link would be considered significant if: (1) the acquired minority shareholding is above a certain thresholds (e.g. around 20% of the total shares capital); or (2) the minority shareholding is above 5%, but below the 20% threshold, provided that additional rights are present.

90. The following considerations apply to the threshold levels. First, national corporate law often foresees that shareholding conferring certain levels of voting rights enable the shareholders to block special resolutions. This right allows the shareholder to influence the target company's strategy.[68] The percentage level of voting rights that enables the shareholder to block special resolutions differs between Member States and depends on the corporate form, but is frequently set at 25%.[69] A shareholding at around this level very often results in blocking and other corporate rights, so a 25% shareholding should be the upper limit for a threshold. (The threshold could also be reached on the basis of a "de-facto" blocking minority due to low attendance rates at the annual shareholder meetings, as described below.)

91. Second, higher shareholdings more strongly shift financial incentives, so the rights attached to such shareholdings may be less important in assessing whether a minority shareholding is potentially anti-competitive. In fact, according to economic theory financial incentives that may affect the incentives for firms to compete can be

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67 This approach would also capture an acquisition of a minority shareholding by one company which itself does not compete with the target, but which already holds a minority stake (or more) in one or more other firm(s) competing with the target. The main possible theory of harm applicable in such a case would be one of coordination, where, for instance, the holding company sits on the board of several competitors and has access to confidential information which it can share with the other competitors. Although the likelihood that such a case would result in competition concerns may be less than in the case of a direct link between acquirer and target, such transactions would still fall under the Commission's competence. One would also need to consider the turnover calculation and the definition of undertakings concerned for such cases.

68 The two Member States which rely so far on a similar test, namely "material influence" in the UK, "wettbewerblich erheblicher Einfluss" (competitively significant influence) in Germany, both take into account whether the shareholding gives rise to equivalent rights to those granted to a minority shareholder of 25% in determining the "significance" of the shareholding.

69 See for instance in Belgium, Germany and the United Kingdom a 25% threshold applies to publicly listed companies, while in other Member States, such as France and Italy, it is 33.33%.

considered significant at a threshold significantly lower than 25%.[70] On this basis, the Commission should consider approximately 20% as an appropriate starting point for analysing financial incentives.[71]

92. If the minority shareholding is above 5% but below 20%, additional elements would have to be present in order for a minority shareholding to qualify as a competitively significant link. For example, a shareholding could qualify if it results in a "de-facto" blocking minority[72] due to the low attendance level at shareholder meetings or because the shareholder agreement grants additional rights. Other elements would typically include (i) a seat on the board (or the agreement or likelihood to be elected to the board) and (ii) information rights giving access to commercially sensitive information. When establishing the "additional elements", typically rights stemming from the shareholding itself, corporate law, or the shareholder agreement are important for determining whether the shareholdings create competitively significant links.

93. Meanwhile, experience shows that competitive harm is very unlikely for shareholdings of 5% or less. On the other hand, shareholdings above 5% that are linked to special rights such as board seats make competitive harm possible because the shareholding goes beyond mere financial participation for investment purposes. Note, for instance, that the U.S. exempts acquisitions of voting securities of 10% or less from the filing obligation if the acquisition is made "*solely for the purpose of investment*"[73]. The exemption does not apply if the acquirer is a competitor or can nominate a candidate for the board of directors, for example. With this in mind, a safe harbour of 5% seems appropriate, especially as further conditions would exist up to the 20% threshold (e.g. additional rights, acquisition of a stake in a competitor or vertically related company).

94. Other agreements, such as cooperation agreements, R&D agreements, joint production agreements, joint purchasing agreement, long-term exclusive supply agreements, off-take agreements, sometimes coincide with the acquisition of a minority shareholding. Where a minority shareholding is only acquired in support of broader cooperation, the Commission suggests excluding these agreements from the assessment if a transaction creates a competitively significant link and falls within the Commission's jurisdiction. However, in line with current practice for concentrations, these agreements could be assessed in the competitive assessment of

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70 See responses to the Consultation Paper from economic consultancies and academics.

71 Alternatively, a 15% threshold could be envisaged. For instance, the United Kingdom has set a threshold of 15% above which it may examine any case (see OFT, "Mergers - Jurisdiction and procedural guidance", para. 3.20). This might also serve as a clear-cut threshold above which a shareholding would be considered a "competitively significant link".

72 The UK case BSkyB/ITV (2007) provides a good example of a de-facto blocking minority shareholding as a stake of 17.9% was found sufficient for a material link on the basis that it allowed BskyB to influence strategic decision making of ITV. The case was cleared subject to a divestiture of the shareholding down to 7.5%.

73 See Section (c)(9) of the Hart-Scott-Rodino Act (15 U.S.C. § 18a). An acquisition is made "*solely for the purpose of investment*" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer. See 16 CFR 801.1(i)(1) and 16 CFR 802.9 available at: http://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations.

the transaction (see also below in the context of Article 101 TFEU, para. 115 et seq.). Distinguishing between the rights linked to the shareholding itself and commercial agreements should increase legal certainty in determining whether or not a minority shareholding results in a competitively significant link.

b) Legislative implementation

95. With respect to the practical implementation, there are several possible ways to transpose this targeted approach into legislation.

96. The text of the Merger Regulation could define the Commission’s competence to cover only acquisitions of minority shareholdings which create a "competitively significant link". The criteria of a "competitively significant link" (namely that the competence covers only minority shareholdings in competitors and vertically related companies and that the transaction results in a cumulative minority shareholding of around 20% and above, or a minority shareholding between 5% and 20% if additional rights are present) would either be set forth in the articles of the Merger Regulation, the recitals, and/or a guidance document.

97. Another option to implement the Commission’s proposals is to state, in the regulation itself, that the Commission is competent for acquisitions of minority shareholdings above 5% if further criteria, to be specified by the Commission in an implementing regulation, are fulfilled. Spelling the criteria out in an implementing regulation would give the Commission the ability to fine-tune the criteria, in consultation with the Member States, after gaining some experiences and without requiring a full amendment of the Merger Regulation.

c) Amendment of the banking clause, Article 3(5)(a) of the Merger Regulation

98. Extending the scope of the Merger Regulation to non-controlling minority shareholdings might also require adapting the banking clause (Article 3(5)(a)). Article 3(5)(a) currently allows financial institutions to acquire a controlling shareholding in other companies under certain circumstances without having to notify the transaction.[74]

99. In the public consultation, some stakeholders voiced concerns that the suggested reform should not endanger restructuring transactions. For example, in case of debt-for-equity swaps, business decisions might have to be made very quickly and any waiting period or stand-still obligation would delay and harm such transactions.

100. The Commission can avoid this by adapting Article 3(5) of the Merger Regulation to specify that restructuring transactions, carried out by financial institutions in the normal course of business and for a limited period of time, would not create competitively significant links.

[74] Broadly speaking, a concentration is not deemed to arise if the acquiring financial institution does not exercise the voting rights with a view of determining the competitive behaviour of the target firm and if the securities are disposed within one year following the acquisition.

101. Application of such an amended banking clause would likely be limited, as the targeted approach only captures transactions between competitors or vertically related companies in the first place. However, the amendment would offer the concerned parties reassurance.

3.2.4.2. Procedural aspects

102. The targeted transparency notice could broadly look like the following:

- The parties self-assess whether, in their view, the transaction creates a competitively significant link according to the criteria described above.

- If it does, they submit an information notice to the Commission. Alternatively, if the parties want legal certainty, they can also voluntarily notify the transaction to the Commission under the normal procedure.

- If the parties submit an information notice, the Commission decides on the basis of the notice whether the case merits a Phase I investigation. The Commission would publish a notice of the transaction in order to allow complainants to come forward and would also inform the Member States of the notice to allow them to consider a referral request.

- If the Commission decides that the case merits an investigation, it would request a full notification from the parties. This would initiate the Phase I procedure as applicable for concentrations. If the Commission does not request a notification, the parties can close the transaction either immediately or after a short waiting period (discussed further below) and the Commission will not issue a decision on the case.

103. Some aspects of the procedure are discussed in more detail below.

a) Scope of the information notice

104. The information notice should contain information about the parties, the turnover of the undertakings concerned, a description of the transaction, the level of shareholding before and after the transaction and any rights attached to the minority shareholding if it is below 20%. In addition, the notice would have to contain some essential market information about the parties and their main competitors or internal documents that allow for an initial competitive assessment.[75] While the Commission is aware that reviewing documents and delineating and identifying antitrust markets can be cumbersome for companies, this information appears to be necessary for the Commission to decide if a transaction warrants further investigation. It is also

[75] One possibility would be to require market share information only for the markets where the combined market shares are 20% or above, similar to what is required under the German Act against Restraints of Competition, see §39 (3) Nr. 2 GWG. Another possibility would be to require the submission of internal documents similar to the HSR 4(c) documents in the U.S., covering any studies, analyses, etc. which were prepared "*for the purpose of evaluating or analysing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets*".

necessary to allow the Member States to determine whether to request a referral of the case.

b) Waiting period

105. In order to make the targeted transparency system fully compatible with the Member States' merger control systems, the Commission should consider imposing a waiting period once an information notice has been submitted during which the parties would not be able to close the transaction. The Member States could request the referral of a case within this period. Such a waiting period could last 15 working days, for example. Given the current deadlines for Member States to request a referral, the same period of 15 working days seems appropriate for the acquisition of minority shareholdings. The Commission could request a notification from the parties during this period if the case appears *prima facie* problematic, in which case the normal procedure would start and the stand-still obligation would apply in order to ensure the effectiveness of a later decision. If the Commission did not request a notification within the 15 working days following the receipt of the information notice and no referral request occurs, the parties would be free to close the transaction.

106. As with concentrations, the parties would be able to request a derogation from the waiting period/stand-still obligation under Article 7(3) of the Merger Regulation.

107. Introduction of a waiting period might also require adapting the wording of Article 7(2) of the Merger Regulation for the acquisition of minority shareholdings. Namely, the wording should be changed to allow acquisitions of shares via a stock exchange without observing the three week waiting period. Such an acquisition would not constitute an early implementation if, during the three week waiting period, the voting rights are not exercised. Such an application of Article 7(2) of the Merger Regulation would take into account a concern expressed by stakeholders in the public consultation that reforms should not harm the liquidity of the stock markets.

c) Prescription period

108. In order to allow the business community to come forward with complaints, the Commission should also be free to take up a case within a limited period of time after the transaction has been implemented. Such a period would also reduce the risk of the Commission starting precautionary investigations during the initial waiting period so as not to be blocked from investigating a transaction in case complainants come forward later on.

109. The responses to the public consultation regarding an appropriate prescription period ranged from periods of 10 working days to 5 years.[76] Many respondents referred to the limitation period of 4 months under the UK system as an appropriate period, while several other respondents suggested 6 to 12 and up to 24 months. In view of the responses, the Commission suggests a limitation period of four or six months which runs upon submission of the information notice.

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[76] Responses to Question 9 of the Consultation Paper.

110. If the Commission decides to open an investigation during this period and the transaction is already (partially) implemented, the Commission suggests validating all steps already taken. However, the regular stand-still obligation would apply for any further implementing measures and the Commission would have the power to issue interim measures, such as a hold separate order[77], to ensure the effectiveness of a decision under Articles 6 and 8 of the Merger Regulation.

d) "Staggered" acquisitions

111. In "staggered" transactions (i.e. transactions where an initial minority stake is acquired and increased in subsequent, independent transactions) the question arises whether an information notice would have to be submitted every time that a stake is increased and/or the underlying rights change. One possibility is to require submission of an information notice only the first time a competitively significant link is established (when the acquirer acquirers a 20% minority stake or a stake between 5% and 20% plus the additional rights specified above). Subsequent increases would not trigger a new information notices unless they result in acquisitions of control, which would trigger notifications under the existing rules.

112. On the other hand, the Commission can conceive of a system in which each increase in a minority stake and change in the underlying rights triggers a new information notice. Alternatively, in cases where the acquirer has previously informed the Commission of a "5% + rights" acquisition, the Commission could consider requiring subsequent information once the acquirer passes the 20% threshold, as such an increase could change of the type or level of influence held over the target.

113. The second and third options present a "safer", more conservative framework, as each change would be newly assessed, but they could also result in significant additional administrative burden on companies. Given that the Commission would only be competent if the minority shareholding represents a competitively significant link anyway, it suggests the first option.

3.2.4.3. Substantive Assessment

a) Substantive test

114. The Commission suggests also applying the substantive test for assessing concentrations to acquisitions of minority shareholdings. The test requires determining whether a transaction would lead to a significant impediment of effective competition in the internal market or a substantive part of it (the "SIEC" test). Under the SIEC test, the theories of harms could be tailored to the specific circumstances of each minority shareholding case. Examples of the possible theories of harm are set out under Section 3.1.1.

b) Relationship between Article 101 TFEU and the assessment under the Merger Regulation

[77] The "hold separate" obligation would require a ring-fencing of the assets, the obligation to nominate a hold separate manager, etc., similar to what is standard practice for divestiture commitments during the divestiture periods or the conditions and obligations under Article 7(3) of the Merger Regulation.

115. For the substantive assessment of minority shareholding acquisitions, a clearance decision under the Merger Regulation needs to clarify the extent to which it covers any further agreements between the acquirer and the target at the same time the minority stake is acquired, but which go beyond the acquisition of minority shareholding. Such agreements might, for example, concern further cooperation between the parties.

116. The Commission suggests that, in line with the current practice, such agreements remain subject to assessment under Articles 101 and 102 TFEU unless they constitute ancillary restraints. Ancillary restraints are directly related to and necessary for the implementation of the transaction.[78] Any merger assessments would therefore be limited to competition issues specific to the structural link created by the acquisition of the minority stake. They would not prejudice any future antitrust investigations. All additional agreements between the parties would remain subject to Articles 101 and 102 TFEU. This means that only agreements which are deemed to be "ancillary restraints" are covered by the clearance decision.

117. In addition, in line with the Commission's practice under the Merger Regulation, the Commission can take those agreements into account when assessing the transaction under merger control rules. The Commission has to assess the current market conditions and their likely development in the future and, for example, any long-term contracts form part of this market reality.[79]

118. As with ancillary restraints, it is for the parties to assess, with the help of the Commission's relevant guidance notice[80], whether any agreement fulfils the relevant criteria, unless they explicitly request that the Commission do so because of novel or unresolved questions giving rise to genuine uncertainty.[81]

c) Acquisition of non-controlling minority shareholdings and joint ventures

119. As the Consultation Paper already suggested, acquisitions of minority stakes in joint ventures, which perform on a lasting basis all the functions of an autonomous economic entity (so-called "full function" joint venture, Article 3(4) of the Merger Regulation), should be covered by the new competence.

120. Under the revised Merger Regulation, joint ventures which are not jointly controlled but rather have several shareholders with minority stakes who make decisions through changing majorities would also fall under the new competence as long as the joint venture is full-function in nature.

121. Procedurally, the acquisitions of minority shareholdings by several companies in a joint venture would constitute a single transaction if the share purchase agreements

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78 Article 6 (1) (b) subparagraph 2 and Article 8 (2) subparagraph 3 of the Merger Regulation and Commission Notice on restrictions directly related and necessary to concentrations (OJ C 56, 5.2.2005, p.24).

79 See for instance COMP/M.6541 - *Glencore/Xstrata*, decision of 22 November 2012, para. 26.

80 Commission Notice on restrictions directly related and necessary to concentrations (OJ C 56, 5.3.2005, p. 24).

81 See Recital 21 of the Merger Regulation.

are conditional upon each other or if they are concluded at the same time.[82] Where a joint venture is newly established and two of the shareholders acquire joint control (triggering a notification) while a third shareholder acquires a minority stake without control (triggering only an information notice), the third shareholder should also join the notification if the operation constitutes a single transaction. This ensures that the transaction assessment is not artificially divided.

d) Creeping transactions and relevant framework of analysis

122. In cases where minority shareholdings are slowly built up ("creeping transaction"), the relevant framework for assessing the acquisition would use the *status quo ante* (i.e. the status before the transaction triggering the notice) as the benchmark. This is in line with the current stance of the Merger Regulation for concentrations.

3.3. Conclusion on minority shareholdings

123. A targeted transparency system, as set out in this section, seems well suited to capture potentially problematic transactions and thus prevent consumer harm, which can result from acquisitions of minority shareholding and which the Commission is not adequately equipped to address under the current Merger Regulation. In addition, a system like the one suggested above would not disproportionately burden business, as only a limited number of cases would require the filing of an information notice to the Commission. The introduction of an information notice instead of a full notification further reduces the burden on businesses to collect the necessary information.

124. Although the design of such a system for controlling minority shareholdings poses a number of challenges regarding the proper procedure, jurisdictional scope, and substantive assessment, none of these challenges seems insurmountable. Implementing such a system needs some fine-tuning to ensure a smooth integration into the existing procedures for merger control at the EU level, but also at the Member State level.

4. CASE REFERRALS

4.1. Objectives and guiding principles for case referrals

125. More effective and efficient EU merger control implies a reduction in the administrative burden for existing procedures and simplification of existing procedures, particularly for case referrals between Member States and the Commission.

126. The Merger Regulation uses a bright-line test based on certain turnover thresholds to distinguish concentrations with an EU dimension from those subject to national merger scrutiny. The turnover thresholds include the so-called "two-thirds rule",

[82] However, this would not necessarily mean that the turnover would be calculated in the same way as it is currently calculated for joint ventures. For jurisdictional purposes, it might be more appropriate to calculate the turnover for each acquirer separately.

leaving cases to Member States' jurisdiction where all the undertakings concerned achieve two thirds of their turnover in a single Member State. The jurisdictional thresholds are also complemented by a case referral system that allows re-allocation of individual cases when the bright-line test fails as a proxy for the European or cross-border dimension of a merger.

127. The 2004 reform of the Merger Regulation allowed Member States to refer cases to the Commission and vice versa before notification. It also allowed several Member States to jointly refer a case to the Commission after notification. The 2009 Report highlighted that, although the rules on jurisdiction and referrals laid down in the Merger Regulation worked well overall, there remained room for improvement.[83] It found that the pre-notification and post-notification referral mechanisms had considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU by improving the allocation of cases between the Commission and Member States according to the principles of "one-stop-shop" and the "more appropriate authority".

128. However, the Report also found that a significant number of cross-border cases remain subject to reviews in three or more Member States (in 2007, 100 cases resulted in more than 360 investigations by NCAs). In addition, available data suggested that around 6% of the cases notified in at least three Member States gave rise to competition concerns. The 2009 report identified the procedural burden associated with a referral as a possible reason for the lack of referrals, as companies and their advisors criticised the referral procedures as cumbersome and time-consuming.[84] In some cases, companies may have opted against referring cases to the Commission in order to avoid its jurisdiction, even if the Commission would have been the "more appropriate authority". This practice is known as "forum shopping". Against this background, the 2009 Report found room to expand "one-stop-shop" review and suggested that additional concentrations could be reviewed by the Commission under the principle of the "more appropriate authority".

129. In light of the stakeholder comments and the Commission's and Member States' experiences, there appears to be further room to streamline the case referral system in order to strengthen the principles of one-stop-shop and the "more appropriate authority". There is also room to simplify the referral procedures both before and after notification, especially from Member States to the Commission (Articles 4(5) and 22 of the Merger Regulation).

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83 Regarding the two-thirds rule, the 2009 Report noted that the 126 cases notified at the national level in application of this rule during the period of 2001 to 2009 was relatively low compared to the overall case load of more than 26,000 at Member State level and that it had mostly been applied in relation to large Member States. The Report found that the two-thirds rule had in most cases appropriately distinguished between mergers that in terms of cross-border effects had a Union relevance and those that did not. However, the Report found that there were nevertheless a small number of cases with potential cross-border effects that fell under NCA competence due to the two-thirds rule. On the other hand, the figures analysed in the 2009 Staff Working Paper also show that as firms become geographically more diversified, the relevance of the two-thirds rule is decreasing. It is likely that that trend has continued since 2009.

84 For instance, paragraph 19 of the 2009 Report.

130. The following proposals do not foresee any fundamental changes to the current referral system, but are mostly aimed at relieving the procedural burden associated with referrals as identified by the Commission, the Member States, and companies and their advisors. The proposals should render the procedure less cumbersome and time-consuming.

131. In line with the Consultation Paper and the comments received in response to the public consultation, the Commission proposes:

- simplifying the procedure for pre-notification referral of cases from Member States to the Commission pursuant to Article 4(5) of the Merger Regulation, particularly by abolishing the need for merging parties to file a reasoned submission for referral before filing a notification. This will generate savings both in terms of time and costs;

- improving the effectiveness of the procedure for post-notification referral of cases from Member States to the Commission, pursuant to Article 22 of the Merger Regulation, and strengthening the "one-stop-shop" principle by ensuring that the Commission is positioned to examine the effects of the merger on competition for the whole territory of the EEA following a referral.

4.2. The proposed measures and policy choices in the area of case referrals

4.2.1. Pre-notification referral to the Commission: Article 4(5) of the Merger Regulation

4.2.1.1. Introduction

1. Since the introduction of Article 4(5) in 2004, a total of 269 requests for pre-notification referral to the Commission were made; roughly 26 a year on average.[85] This represents around 8% of all cases notified to the Commission and several of these were significant cases which posed competition problems or allowed the Commission to look into nascent markets.[86] Out of these 269 cases, only 6 were vetoed by a Member State and therefore not referred to the Commission.

2. Article 4(5) of the Merger Regulation allows the merging parties to request, before notifying a transaction to the competent NCAs, the referral of a merger to the Commission if it does not meet the thresholds of the Merger Regulation and has to be notified in at least three Member States. Under the current system, parties must submit a "reasoned submission" ("Form RS"). The competent Member States have 15 working days to oppose the referral (in which case the review remains with the Member States). If no competent Member State opposes the request, the Commission

[85] Figures include cases until May 2014. Source: http://ec.europa.eu/competition/mergers/statistics.pdf

[86] For instance COMP/M.4854 - *Tom Tom/Tele Atlas*, decision of 15 May 2008; COMP/M.4731 - *Google/Double Click*, decision of 11 March 2008; COMP/M.5669 - *Cisco/Tandberg*, decision of 29 March 2010; COMP/M.6690 - *Syniverse/Mach*, decision of 29 May 2013; COMP/M.6576 – *Munksjö/Ahlstrom*, decision of 24 May 2013 or COMP/M.6857 – *Crane/MEI,* decision of 19 July 2013.

obtains jurisdiction for the entire EEA and the parties must submit a notification to the Commission ("Form CO" or "Short Form CO").

3. While the system is, in general, popular with stakeholders, the requirement for two separate submissions ("Form RS" and "Form CO") and the 15 working day consultation period is burdensome and time-consuming. Some undertakings may have therefore opted against using the Article 4(5) referral procedure in some cases in the past. This view has been confirmed almost unanimously by the replies of stakeholders to the Staff Working Document.

4.2.1.2. Proposed amendments

135. The proposal, as expressed by the Commission in its Staff Working Document, has received strong support from all public and private stakeholders in the public consultation.

136. The proposal suggests abolishing the requirement that the parties file a Form RS to the Commission while retaining the basic principles of the system. Given the low number of vetoes in the past years, experience shows that there is no need for a Form RS, which allows the Member States to exercise a veto before the notification to the Commission.[87]

137. The parties could therefore notify directly to the Commission, at which point the Commission would immediately forward the notification to the Member States so that Member States competent to examine the transaction under national law[88] can oppose the referral. As under the current system, Member States would have a period of 15 working days to oppose the referral. Unless a competent Member State opposes the referral, the Commission would obtain jurisdiction. If at least one competent Member State opposes the referral, the Commission would renounce jurisdiction and Member States would retain their original competence.

138. In the event of such a veto, the Commission would adopt a decision renouncing its competence. It would not have any discretion in this regard. As before, the parties would then have to determine which Member States they have to notify.

139. A chart explaining the proposed changes is attached as Annex 1 - Chart 1.

4.2.1.3. Some further possible improvement(s)

140. The public consultation and the various discussions with the Member States have stressed the need for an early information exchange between the Member States and the Commission. This ensures that the Member States are informed about a case at an

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87 Some stakeholders, including NCAs, have questioned whether parties should be able to request a referral if only two Member States have jurisdiction. The advantage of such a proposal is that parties could ensure a uniform decision is taken for such cases with cross-border effects. On the other hand, the one-stop-shop principle is less important if only two competent Member States are involved. In any event, Member States can request an Article 22 referral for such cases with cross-border effects.

88 It should be made clear that, in the context of case referrals, a competent Member State includes those Member States where the parties may notify, but there is no obligation to do so given the voluntary nature of the regime (e.g. the United Kingdom).

early stage. They may not even need the full 15 working days to decide whether to oppose the referral. If Member States were able to exercise their veto early on, this could reduce the time and resources spent by the Commission on a case which might ultimately be reviewed by a Member State. In case of a veto, the Member States should be able to access and use the information gathered by the Commission in its investigation, as it might have engaged in a significant investigation by the time of the veto.

141. The aim of an early information exchange is not to reintroduce the Form RS in pre-notification. However, parties should be encouraged to contact the relevant NCAs as soon as they are in contact with the Commission, even at a preliminary stage. To accomplish this, some amendments of Article 19 of the Merger Regulation might be necessary.[89]

4.2.2. Post-notification referral to the Commission: Article 22 of the Merger Regulation

4.2.2.1. Introduction

142. Article 22 of the Merger Regulation allows one or more Member States to request referral of a case to the Commission after it has been notified to the competent NCAs, provided the concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request.

4. While 30 referral requests have been made since 1990, 23 of these 30 have taken place since 2004.[90] As can be seen from Annex II, most of the cases concerned either EEA-wide markets or multiple affected national markets. On this basis, the Commission was considered to be the "more appropriate authority" to handle these investigations.

5. In line with the general principles for case allocation among the Commission and Member States, Article 22 currently allows NCAs to refer those cases to the Commission when the Commission is the "more appropriate authority". Cases that raise serious competition concerns in supra-national markets or with possible cross-border remedies are most appropriate for the Commission's jurisdiction.[91] Article 22 may also concern transactions which are reviewable in only two Member States, like the case *Aegean/Olympic II*.[92] It seems to be the right tool for dealing with such

89 See paragraph 0.

90 Figures include cases until May 2014. Source: http://ec.europa.eu/competition/mergers/statistics.pdf.

91 See Commission Notice on case referral in respect of concentrations (OJ C 56, 5.3.2005, p. 2) ("Notice on Case Referral"), paragraph 45. According to the Notice, a case displays such cross-border effects in particular if it gives rise to serious competition concerns in markets which are wider than national in geographic scope or in a series of national or narrower than national markets in a number of Member States in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable.

92 Case COMP/M.6796 – *Aegean/Olympic II,* decision of 9 October 2013.

cases, as NCAs should be able to assess on the basis of a notification whether to refer a case to the Commission.[93]

6. However, under the current system, if the Commission accepts referrals under Article 22, it will only obtain jurisdiction for the territory of the Member State(s) that have requested the referral or explicitly joined another Member State's request. This means that, even though such cases have cross-border effects, the Commission cannot examine the effects of the merger for the entire EEA. The current system is therefore not based on the "one-stop-shop" principle that generally governs case allocation under the Merger Regulation. This shortcoming can lead to a patchwork of competences, where the Commission investigates the effects of a transaction for some Member States while some NCAs investigate the effects of a transaction in their respective territories. The system also undermines the principle of legal certainty.

7. NCAs and the majority of replies to the Staff Working Document support the view that the current Article 22 referral system is suboptimal because it does not give the Commission competence for the entire EEA and may lead to parallel investigations contrary to the "one-stop-shop" principle. Some stakeholders also mentioned that Article 22 referrals are especially unpredictable, and thus burdensome, for notifying parties because a Member State that lacks competence to review a transaction under its national law may join a referral request.

147. The following examples demonstrate that the referral system needs to move towards "one-stop-shop" scrutiny and ensure that the "more appropriate authority" receives the case.

In case COMP/M.5675 - *Syngenta/Monsanto*,[94] Spain referred the case to the Commission and was joined by Hungary. The Commission examined the European-wide upstream market for sunflower hybrid licences and the closely related national markets for hybrid distribution in Spain and Hungary. However, since France had not joined the referral request, the Commission could not look into the French distribution market, which might have raised equally serious competition concerns.

COMP/M.5828 - *Procter & Gamble/Sara Lee*[95] was similar. Although the transaction was notifiable in ten Member States (Bulgaria, Italy, Austria, Poland, Portugal, the Slovak Republic, Spain, Hungary, Cyprus and Germany), Proctor & Gamble decided against pre-notification referral pursuant to Article 4(5) of the Merger Regulation and had notified the concentration to the Bundeskartellamt, as well as to other NCAs. Following Germany's Article 22(1) referral request, which

93 Such category of cases also involves few cases in which the NCAs involved reached diverging conclusions, for instance the transactions *Eurotunnel/SeaFrance*, *Akzo Nobel/Metlac* or *Flughafen Wien/Bratislava Airport*.

94 Commission decision of 17 November 2010.

95 Commission decision of 17 June 2010.

seven other Member States[96] later joined, the Commission accepted the requests of Belgium, Germany, Portugal, Spain and the United Kingdom.[97]

4.2.2.2. Proposed amendments

148. In line with the proposal set out in the Consultation Paper, which has received very positive feedback in the public consultation, the Commission proposes amending the post-notification referral procedure under Article 22 as follows:

- One or more Member State(s), competent under their national law to review a merger, would be able to request a referral to the Commission within 15 working days.

- Unlike the current system, only Member States that are originally competent could request referrals.

- If a referral is requested, any other competent Member State can oppose the referral. The Member State would not have to justify its veto, in view of the fact that it has jurisdiction to examine the merger.

- If no competent Member State vetoes the referral, the Commission has discretion to accept or decline the referral. One reason for the Commission to decline the referral would be that the merger has no European scope (i.e. it affects purely national markets and has no cross-border effects), in line with the Notice on Case Referral.

- The Commission's decision to accept a referral would give it jurisdiction for the entire EEA and it would therefore become unnecessary for Member States to join the request.

- If any competent Member State opposes the referral, all Member States would retain their jurisdiction.

149. A chart explaining the proposed mechanism is attached as Annex 1 - Chart 2.

4.2.2.3. Proposed procedural measures to improve cooperation amongst NCAs and with the Commission in cross-border or multi-jurisdictional cases

150. The above proposal presents two challenges. The first concerns a timing issue which could arise if the referral request is made after another Member State has already cleared the transaction in its territory. In that case the Commission would no longer be able to take EEA-wide jurisdiction.

151. The second challenge concerns the information deficit of the other Member States. First, they might not have enough information to ascertain whether they are competent and therefore have the right to oppose the referral. Second, if they are

[96] The United Kingdom, Belgium, Portugal, Spain, Slovakia, Hungary and Poland.

[97] The Commission dismissed the request of Hungary as it did not meet the requirements laid down in Article 22(3). Slovakia and Poland withdrew their request.

competent, they still might not have sufficient information to make an informed choice about whether or not to veto the referral. This is because they may not yet have received a notification (the second information problem is not new and exists similarly under Article 22 as it stands currently).

152. Although it might not be possible to remedy both issues completely, the Commission proposes the procedural solutions below to avoid the problem of prior clearance decisions by other Member States, and at least mitigate the information problem.

153. The Commission suggests installing a mandatory early information system for multi-jurisdictional or cross-border cases or cases which concern markets which are *prima facie* wider than national. This system would replace the current ECA notice used by NCAs to inform each other and the Commission of transactions notified to NCAs.[98] The Member State would send the notice to the Commission as soon as possible after receiving the notification or otherwise learning of the transaction. The Commission would then forward the notice to the other Member States. For Member States which have pre-notification contacts with the parties, the notice could be circulated at an earlier stage.

154. The notice would be circulated when a NCA has to assess a transaction that is multi-jurisdictional and/or potentially concerns markets which are *prima facie* wider than national. In this notice, the NCA would indicate whether it is considering making a referral request because, on a preliminary basis, the Commission seems to be the "more appropriate authority". In that case, the notice would trigger the suspension of the national deadlines of all Member States which are also investigating the case so that the suspension would occur earlier than under current rules. Alternatively, if the Commission itself believes that it might be the "more appropriate authority", it would invite the Member State to request a referral under Article 22(5). Such an invitation would suspend all national deadlines.

155. The suspension would start on the day the Member States receive the notice. It would end at the latest 15 working days after the Member State which sent the notice receives a formal notification. At that point, the Member State has to decide whether or not to request a referral (as it is already currently foreseen in Article 22). If the Member State decides not to request a referral, the suspension triggered by the notice or an invitation would end and the NCAs would remain competent to decide on the case. Alternatively, if it or any other competent Member States decides to request a referral, the normal suspension of Article 22(2)(2) of the Merger Regulation would apply.

156. Such a procedural solution should reduce the risk of an NCA making a referral request to the Commission after another NCA issues a decision clearing the transaction. However, in the unlikely event that a Member State adopts a clearance decision before a referral request occurs, the clearance decision would remain in force and the case would be referred by the remaining Member States only. This would be an exception to the Commission's competence to review transactions for the entire EEA following an Article 22 referral.

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98 http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

157. The circulation of such a notice would also ensure that the Member States and the Commission are informed of all multi-jurisdictional transactions, as well as cases with potential trans-border effects. This would facilitate cooperation and coordination between all the agencies involved in the review process and would foster convergence among them.

158. The content of the notice should address the information problem. The notices should include information about the likely scope of the geographic markets concerned, particularly if they are supranational, and list other competent Member States. In order to do this, the NCAs could request information from the parties about the other Member States in which the transaction is notifiable. To the fullest extent possible, the notice would contain information on markets that cover the territory of other competent Member States. Alternatively, if one Member State cannot request information on behalf of others, the Commission remains competent to request market information like market share estimates from the notifying parties to share with competent Member States. This power allows those Member States to assess possible referral requests. In practice, the parties will have to prepare notifications for the other competent Member States, so such a request would not create an undue burden.

159. Even if a referral to the Commission does not take place, the notice would facilitate cooperation between Member States in cross-border and multi-jurisdictional cases, since they would be informed about such cases early on.

4.3. Other referrals

160. Further streamlining referrals from the Commission to the Member States may require amending the Article 4(4) pre-notification referral procedures and the Article 9 post-notification referral procedures set forth in the Merger Regulations.

4.3.1. Pre-notification referral to one or more Member States (Article 4(4)): clarify the substantive threshold for referrals

161. In total, 94 requests for pre-notification referrals to NCAs were made since the introduction of Article 4(4) in 2004. The number of requests has risen for the past two years so that, as a percentage of total notifications, Article 4(4) requests are around 4%, up from 1-2% in 2007-2008.[99]

162. Under Article 4(4) of the Merger Regulation, the merging parties may request referral of all or part of the case to a competent NCA before notifying a transaction falling under the Merger Regulation to the Commission. Parties have to submit a "reasoned submission" ("Form RS"), which requires the information necessary for the Commission and Member States to assess whether or not to accept the referral. If the Member State to which the case is referred does not oppose the referral within 15 working days and the Commission finds that "the concentration may significantly affect competition" in a distinct market within that Member State, the Commission may refer all or part of the case to the Member State in question. It has 25 working days from receipt of the reasoned submission to make its referral decision.

[99] Figures include cases until May 2014. Source: http://ec.europa.eu/competition/mergers/statistics.pdf.

163. Similar to its proposal regarding Article 4(5), the Commission seeks to determine whether it can streamline the Article 4(4) referral procedure by abolishing the "Form RS" filing to the Commission and allowing direct notification to the concerned Member State.

164. Unlike under Article 4(5), however, where the Commission becomes competent to assess the merger for the entire EEA on the basis of the notification, under Article 4(4), a case is ultimately only dealt with by one Member State (except in partial referral cases) once it is being referred. The "Form RS" is the only basis for the Commission and the other Member States to assess whether potential competition issues exist in other Member States which should be addressed at the EU level. Consequently, it does not appear possible to reform Article 4(4) referrals like their Article 4(5) counterparts or to abolish the Form RS. Neither the Commission nor the other Member States would receive sufficient information about transactions that may affect the EEA and their own territories, respectively.

165. According to Article 4(4) of the Merger Regulation, prior to the notification of a concentration, the parties may request that the transaction be reviewed at the Member State level when concentration "*may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.*" Some stakeholders expressed concern during the public consultations for the 2009 Report and the Consultation Paper that, in order to justify the Article 4(4) referral request, the parties would have to make self-incriminatory statements regarding the appearance of competition concerns.[100]

166. Unlike Article 4(5) of the Merger Regulation, Article 4(4) imposes a substantive test for transactions to qualify for a referral. Although Recital 16 clarifies that, in order to request a referral, parties need not demonstrate a likely adverse effect on competition, the current language of Article 4(4) may indeed give such an impression. The language may have deterred some notifying parties from requesting referrals to a Member State in appropriate cases.

167. Therefore, the Commission should consider amending the substantive test in Article 4(4) so parties do not have to claim that the transaction may lead to a "*significant effect in a market*" in order for a case to qualify for a referral. Showing that the concentration is likely to primarily impact a distinct market in the Member State in question would suffice. Article 4(4) might be used more frequently by parties in the future if it no longer involves a perceived "element of self-incrimination".

168. In any event, the Commission would maintain discretion about referring a case to Member State.

[100] 2009 Staff Working Paper, paragraph 96.

4.3.2. *Post-notification referral to one or more Member States (Article 9): modify the deadline to reject a referral request*

169. Member States have made more than 100 requests under Article 9 of the Merger Regulation since 1990 and more than 40 since 2004.[101] As the 2009 Report stated, Article 9 remains a useful tool for ensuring that cases are assessed by the "more appropriate authority".[102]

170. Upon the request of a Member State, Article 9 of the Merger Regulation allows the Commission to refer a concentration with a Union dimension to a Member State to investigate under applicable national competition rules.

171. The referral mechanism under Article 9 is generally believed to function effectively and is a useful tool underpinned by the principle of the "more appropriate authority".[103]

172. Still, there may be room for further flexibility regarding the Commission's deadline for rejecting referral requests in the case of Phase II proceedings.

173. Currently, the Commission has 65 working days from the date of notification to make a referral or adopt a statement of objections (which constitutes "*the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned*" as required by Article 9(5)). If, despite receiving "*a reminder from the Member State concerned*", the Commission does not take any of those steps, the case is deemed to have been referred to that Member State. The 65 working days deadline can be problematic for the Commission as normally the Commission will still be in the course of investigating at that time and it may typically still have to decide on whether to take the case forward and to adopt a statement of objections.

174. Therefore, the Commission is considering amending the Merger Regulation to ensure a proper functioning of the deadlines. It suggests tolling the 65 working days deadline from the start of the Phase II proceedings[104] to ensure that its investigation is well advanced at the time when it has to decide upon a referral. Also, this amendment would bring that deadline in line with the deadline for remedies in Phase II.[105]

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[101] Figures include cases until May 2014. Source: http://ec.europa.eu/competition/mergers/statistics.pdf.

[102] 2009 Report, paragraph 21, and 2009 Staff Working Paper, paragraph 154.

[103] Section 4.2 of the 2009 Report.

[104] Article 6(1)(c) of the Merger Regulation.

[105] In Phase II investigation, commitments must be submitted no later than 65 working days from the day on which the Phase II investigation was opened (Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (OJ L 133 30.04.2004, p. 1) amended by Commission Regulation EC No 1033/2008 of 20 October 2008 (OJ L 279, 22.10.2008, p. 3) and by Commission Regulation (EU) No 1269/2013 of 5 December 2013 (OJ L 336, 14.12.2013, p. 1)

5. Miscellaneous

175. Reforming the Merger Regulation would also address some smaller, more technical points where experience has shown that improvement is possible ("housekeeping"). In particular, reforms can be used to simplify procedures. The following section addresses these housekeeping issues.

5.1. Procedural simplification

5.1.1. Introduction

176. The Commission has always sought to minimise the administrative burden on notifying parties and third parties resulting from merger control proceedings. In December 2013, it adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself. This package targeted simple mergers which do not raise competition concerns from the outset and are treated under the so-called "simplified procedure", as well as more complex ones. The Simplification Package[106] substantially re-drafted and streamlined the forms required for notifying mergers or making pre-notification referral requests (Form CO, Short Form CO and Form RS). It reduced information requirements for both simplified and non-simplified cases wherever possible.

177. With the new Notice on a simplified procedure and the revised Short Form CO, the thresholds for applying the simplified procedure for non-problematic cases were raised to 20% for mergers with horizontal overlaps (i.e. involving companies active in the same market) and 30% for mergers with vertical relationships (i.e. where one merging company is active in a market upstream or downstream from a market where the other merging company is active).

178. In addition, the Commission allowed for simplified treatment of cases with horizontal overlap and combined market shares between 20% and 50% if the increase in market share is very small.[107] The Simplification Package was also a concrete step towards the goals of the Commission's Regulatory Fitness and Performance ("REFIT") programme, which sought to make rules and procedures less burdensome for business. At the same time, it enabled the Commission to focus its resources on those mergers that are most likely to raise competition concerns.

179. Further streamlining and simplification of EU merger procedures, beyond the achievements of the 2013 Simplification Package, require amending the Merger Regulation itself. These amendments are outlined below.

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106 Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 336, 14.12.2013, p. 1) and Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6).

107 As indicated by an increase ("delta") of the so-called Herfindahl-Hirschman Index ("HHI") of less than 150.

5.1.2. Extra-EEA Joint Ventures

180. The Commission suggests amending Article 1 of the Merger Regulation so that a full-function joint-venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission's competence, even if the turnover thresholds are met.

5.1.3. Exchange of confidential information between Commission and Member States

181. Articles 19(1) and (2) of the Merger Regulation provide for exchange of certain case-related information between NCAs and the Commission. The Commission should consider refining this provision to ensure that when Member States refer cases to the Commission and vice versa, under Article 22 and Article 9 respectively, the authority that continues the investigation can use the information already obtained by the authority that referred the case. In addition, it should also clarify that the Commission’s ability to exchange case-related information with NCAs includes information obtained by the Commission during the pre-notification stage.

5.1.4. Further simplification by extending the transparency system to certain types of simplified merger cases

182. To further simplify the Merger Regulation’s procedures, the Commission should consider exempting certain categories of mergers from the prior notification requirement. The exemption would include certain categories of cases currently falling under the simplified procedure, such as cases leading to no "reportable markets" due to the absence of any horizontal or vertical relationship between the parties. The Merger Regulation could confer this power upon the Commission, and the Commission could define the exemption’s scope in the Implementing Regulation.

183. If the Commission did issue such an exemption, a possible replacement procedure would include extending the targeted transparency system, explained above in the minority shareholdings section, to cover the exempt transactions. Thus, the Commission would be informed by an information notice and would be free to investigate a case. If it decided not to, the transaction could be implemented after three weeks without the need for a clearance decision.

5.2. Other issues

5.2.1. Notification of share transactions outside the stock market (Article 4(1))

184. Article 4(1) of the Merger Regulation specifies the timeframe within which a merger notification may be submitted. The 2004 re-cast introduced some flexibility insofar as merging parties may now also notify a transaction before a binding sale and purchase agreement is concluded or a public takeover bid is launched, provided they demonstrate a "good faith intention" to do so.

185. The Commission should also consider modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for notifying mergers that are executed through share acquisitions on a stock exchange without a public takeover bid. On one hand, the current rules do not allow for notification of such transactions

before the acquisition of control on the basis of good faith intention. On the other, they do not allow for an exercise of the voting rights once control has been acquired. For such cases, it may be useful to adapt the criterion of "good faith intention" in order to allow the parties to notify before the level of shareholding required to exercise (de facto) control is acquired. The acquiring party can demonstrate a clear commitment to carry out the acquisition by preparing everything necessary (internally and externally) to proceed immediately.

5.2.2. Clarification of methodology for turnover calculation of joint ventures

186. Article 5(4) of the Merger Regulation should be amended to explicitly articulate the methodology for the calculating a joint venture's relevant turnover. The methodology is currently laid out in the Commission Consolidated Jurisdictional Notice.[108] This amendment would not entail any substantive change. It would merely clarify how the law is currently applied.

5.2.3. Time limits

187. Merger review by the Commission is subject to strict, legally binding time limits.[109] While these time-limits attempt to balance the parties' interest in a quick decision with the general interest in a thorough investigation, the time-limits in Phase II can sometimes be challenging. They are especially challenging in cases involving complex economic data analysis or large numbers of internal documents.

188. The additional flexibility introduced by the 2004 review has therefore proven to be indispensable, particularly where the Commission has carried out a complex quantitative analysis.[110] The Commission has granted deadline extensions under Article 10(3) of the Merger Regulation in over 50% of Phase II cases over the past ten years. These extensions can either come by request of the notifying parties or by agreement between the Commission and the notifying parties. In some cases, the available time is barely enough for a thorough quantitative analysis, even with an extended deadline, largely due to the time needed to collect data from the parties and possibly third parties. The Commission should therefore consider introducing greater flexibility by increasing the maximum number of working days by which the Phase II deadline may be extended under Article 10(3)(2) from 20 to 30, for example.

189. At the same time, the Commission should clarify that Article 10(3)(1)'s automatic 15 working day extension for Phase II deadlines be triggered in all cases where

[108] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1), section 5.2.

[109] In principle, the Commission has 25 working days during the initial Phase I investigation to decide whether the transaction may be cleared because it does not raise any serious doubts as to its compatibility with the internal market, or whether an in-depth Phase II investigation should be initiated. In Phase II proceedings, it must normally take a final decision within 90 working days (Article 10(1) of the Merger Regulation. If the parties offer commitments, the deadlines are extended to 35 working days (in Phase I) or 105 working days (in Phase II, unless the commitments are offered before 55 working days and not substantially modified thereafter). Furthermore, the Phase II deadline may be extended either on request of the notifying parties or in agreement between the Commission and the notifying parties by up to a maximum of 20 additional working days (Article 10(3) of the Merger Regulation).

[110] Section 0.

commitments are offered following a statement of objections. It should also clarify that the exception to the automatic extension for commitments that are offered before 55 working days only applies if commitments offered are sufficient to remove the concerns identified without the need for a statement of objections.

5.2.4. *Unwinding of concentrations with regard to minority shareholdings (Article 8(4))*

190. The Commission should consider 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).

191. In case COMP/M.4439 *Ryanair/Aer Lingus* I in 2007[111], Ryanair's acquisition of a non-controlling minority shareholding in Aer Lingus and Ryanair's subsequent proposal to acquire control of Aer Lingus by acquiring additional shares were treated as a single concentration for purposes of EU merger control.[112] Despite declaring the proposed concentration incompatible with the internal market, however, the Commission could not order divestiture of Ryanair's prior non-controlling minority shareholding in Aer Lingus pursuant to Article 8(4) of the Merger Regulation. The modified Article 8(4) would address such a scenario by clarifying that when a partially implemented concentration is prohibited, the Commission may order full divestiture of the acquired stake, even if it would not confer control.

192. Such an amendment would logically extend the current version of Article 8(4) to cases in which transactions have been partially implemented. However, it would also align with the proposed reform extending merger control to certain acquisitions of non-controlling minority shareholdings.[113] If, following the complete dissolution of a prohibited concentration under Article 8(4), the acquirer were acquired a minority stake in the target company, the acquisition would need to be assessed under the new proposed regime for non-controlling minority shareholdings.

193. In this context, the question arises whether the divestment of a minority shareholding which forms part a single concentration should be limited to what is permissible under the rules of minority shareholdings. In other words, given that the acquirer would be free to acquire a minority stake after having to dispose of its shareholding, should the divestment then be limited to the shareholding above this threshold?

194. In order to follow the same logic inherent in the current Article 8(4) and to avoid a potentially complex assessment, it would seem preferable to re-establish the status quo ante and allow the Commission to enforce the full divestiture of the minority shareholding insofar as it forms part of the single transaction assessed.

5.2.5. *Staggered transactions under Article 5(2)(2) of the Merger Regulation*

195. Article 5(2)(2) of the Merger Regulation establishes that, for the purpose of the turnover calculation of the undertakings concerned, one or more transactions which

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111 COMP/M.4439 – Ryanair/Aer Lingus, decision of 20 February 2007.

112 Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.

113 See section 0.

take place within a two-year period between the same persons or undertakings are treated as a single concentration.

196. The purpose of this provision is to prevent staggered transactions that circumvent EU merger control by artificially dividing the transactions. For such cases Article 5(2)(2) foresees treating and assessing the transactions as a single concentration. While the Commission generally assesses the transaction as a whole, this practice raises questions in cases where the first transaction was notified and cleared by a NCA.

197. The Commission should therefore consider how to tailor the scope of Article 5(2)(2) to only capture cases of "real" circumvention.

5.2.6. Qualification of "parking transactions"

198. According to Article 3(1) of the Merger Regulation, a concentration is defined as an operation bringing about a lasting change in the control of the undertakings concerned. In certain instances, however, an undertaking is "parked" with an interim buyer (such as a bank) on the basis of an agreement that the target will at a later stage be sold on to an ultimate acquirer. The interim acquirer thus acquires the shares or assets on behalf of the ultimate acquirer, who may also bear the financial risk, in order to facilitate the ultimate acquisition by the latter. The Commission has stated in the Consolidated Jurisdictional Notice that it considers such "parking transactions" the first step of a single concentration leading to the ultimate buyer's lasting acquisition of control.[114] In the Merger Regulation, the Commission should clarify that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.[115]

5.2.7. Effective sanctions against use of confidential information obtained during merger proceedings

199. Article 17(1) of the Merger Regulation provides that information acquired in merger proceedings may only be used for the purposes of the relevant investigation. However, when private parties and their legal and economic advisors obtain commercially relevant information about other private parties from the Commission (such as when the notifying parties access the file or third parties take part in oral hearings in order to be informed of the proceeding's subject matter), the Commission currently lacks an effective mechanism for enforcing the limited use obligation. Therefore, the Commission should consider 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.

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114 Consolidated Jurisdictional Notice, see footnote 103, paragraph 35.

115 The Court of Justice has explicitly stated in Case C-551/10 P Editions Odile Jacob v Commission, judgment of 6 November 2012 (not yet reported in the ECR), that the question of qualification of the "parking transaction" was not relevant for deciding the case at hand.

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

200. According to Articles 6(3)(a) and 8(6)(a) of the Merger Regulation, the Commission may revoke a decision clearing a merger if that decision was obtained by deceit or is based on incorrect information for which one of the parties is responsible. However, the Merger Regulation does not explicitly confer an analogous revocation power for falsely-obtained Article 4(4) referrals to Member States. The Commission should 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.

6. CONCLUSIONS AND NEXT STEPS

201. The review carried out in this Staff Working Document shows that EU merger control has worked very well over the ten years since the 2004 Merger Regulation reform. Overall, the re-cast Merger Regulation provides a good framework for effectively protecting competition, and thus consumers, from anti-competitive effects of mergers and acquisitions in the internal market while allowing the vast majority of transactions that do not raise competition concerns to proceed after a short review process. EU merger review procedures are transparent, respect the procedural rights of the parties involved, and are subject to effective judicial review by the EU Courts.

202. The 2004 reforms helped preserve the Merger Regulation as an effective and modern instrument of competition policy. In particular, the introduction of the SIEC test has allowed the Commission to refine and improve its substantive assessment of mergers. The assessment addresses all possible sources of competitive harm, including likely non-coordinated effects of transactions where the merged entity would not acquire a dominant position. The improvements to the case referral system have also ensured that most cases reach the "more appropriate authority".

203. However, the Staff Working Document's review also reveals certain areas for further improving EU merger control:

- First, there appears to be an enforcement gap in EU competition law regarding potential anti-competitive effects from acquisitions of non-controlling minority shareholdings. The gap would be best addressed under the Merger Regulation.

- Second, the case referral system could be further streamlined to simplify administrative procedures and advance the principles of "one-stop-shop" review and the "more appropriate authority".

- Third, a number of more technical changes appear to be useful in light of the experience gained since the 2004 reform. These mostly relate to further procedural simplification.

204. In light of the comments received to the White Paper, the Commission will decide which further legislative action to take in order to address these issues.

It is standard practice for DG Competition to publish submissions received in response to a public consultation. However, it is possible to request that submissions, or parts thereof, remain confidential. Should this be the case, please indicate clearly on the front page of your submission that it should not be made public and also send a non-confidential version of your submission to DG Competition for publication.

The Commission invites comments on the White Paper and the Staff Working Document. The Commission would in particular invite comments on the following questions:

1. Minority shareholdings:

a) Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission's competence or not be subject to the 15 days waiting period.

b) Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?

c) Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?

d) Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.

e) Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?

2. Referrals - Article 22:

a) Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?

b) Would such a system reduce the risk of diverging decisions by the Member States?

3. Please comment on the suggestions listed in Section 5 "Miscellaneous" including the more detailed and technical suggestions in the accompanying Staff Working Document.

Comments may be sent by Friday 3 October 2014, either by e-mail to:

comp-merger-registry@ec.europa.eu

or by post to:

European Commission
Directorate-General for Competition, Unit A-2
White Paper "Towards more effective EU merger control"
B-1049 Brussel/Bruxelles.

ANNEX I: FLOWCHARTS OF THE REFERRAL PROCEDURES

Chart 1: Pre-notification referral requests by parties (Article 4(5))

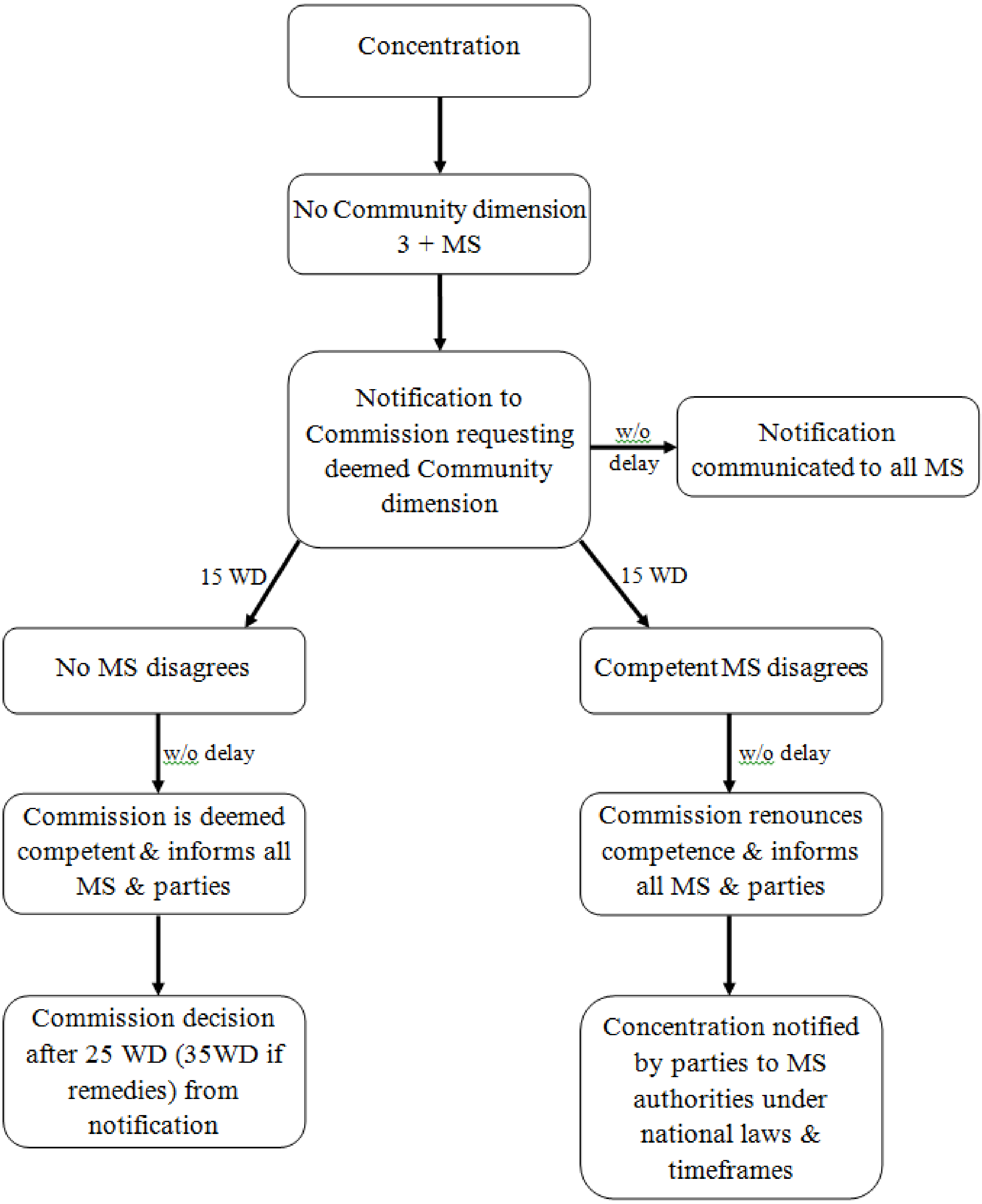
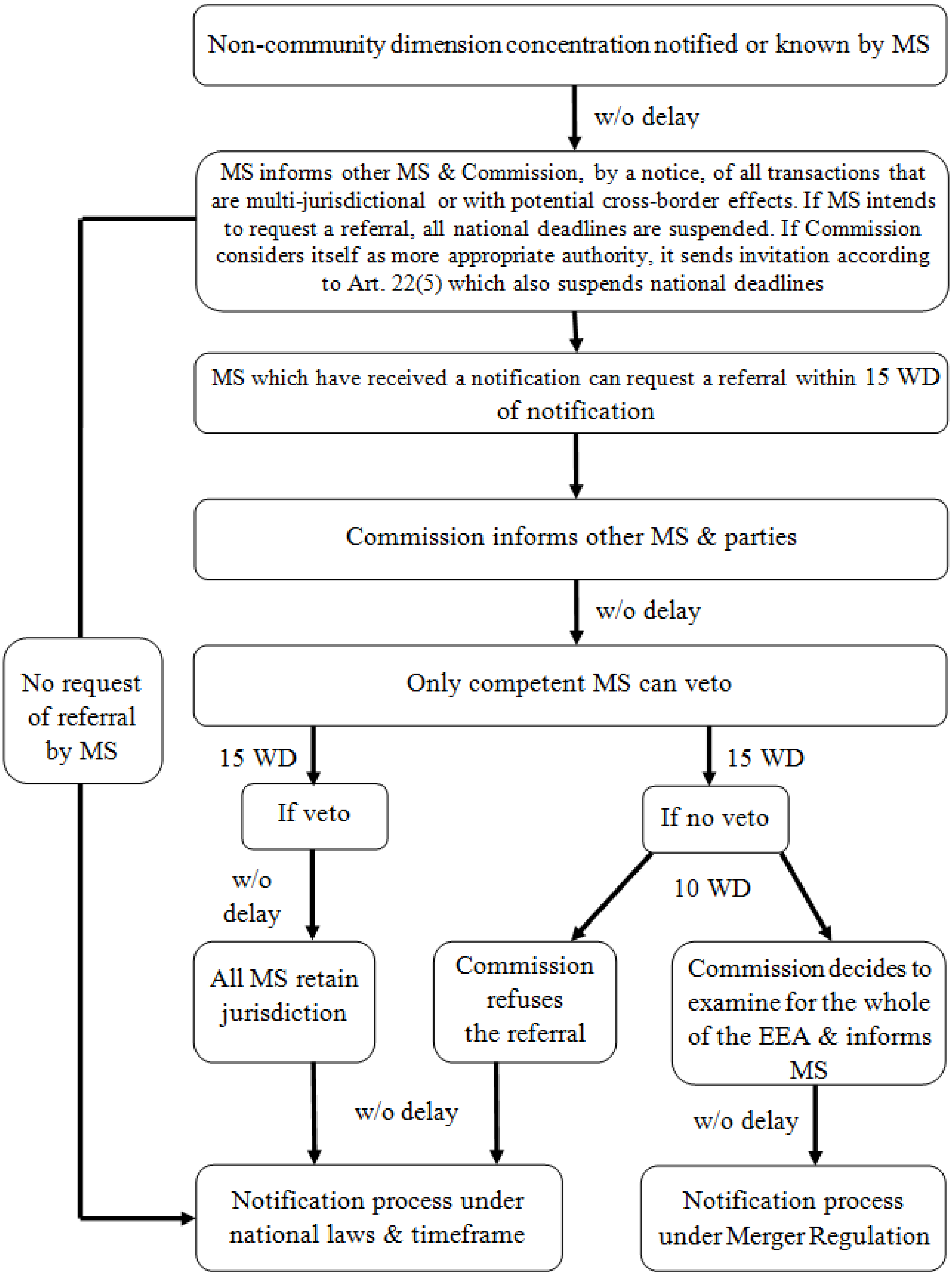


Chart 2: Referral request by a Member State to the Commission (Article 22)



Annex II: Overview of transactions for which an Article 22 referral has been accepted since 2004

Case	Country	Decision date and type of decision	Geographic scope of affected market	Competition concerns
M.4980 - *ABF / GBI BUSINESS*	Spain, joined by France, Portugal and NL (NL later withdrew its referral request)	13/12/2007 Full referral	National markets for compressed yeast; EEA-wide (if not worldwide) market for dry yeast	Competition concerns for national markets for compressed yeast in Spain and Portugal
M.5020 - *LESAFFRE / GBI UK*	UK	04/02/2008 Full referral	National market for fresh yeast (liquid and compressed) in UK; EEA-wide/worldwide market for dry yeast	National market for liquid and compressed yeast in the UK
M.5109 -*DANISCO / ABITEC*	Germany, joined by UK	17/04/2008 Full referral	At least EEA-wide market for synthetic emulsifiers	No competition concerns
M.5153 -*ARSENAL / DSP*	Spain, joined by Germany	16/05/2008 Full referral	Various EEA-wide chemical markets	Competition concerns for EEA-wide markets for various chemicals
M.5675 - *SYNGENTA / MONSANTO'S SUNFLOWER SEED BUSINESS*	Spain, joined by Hungary	12/11/2009 Full referral	EEA-wide upstream markets for seed treatment, downstream national markets for commercialization of sunflower seed	Competition concerns for national and EEA-wide markets
M.5828 - *PROCTER & GAMBLE / SARA LEE*	Germany, joined by Belgium, Spain, Portugal, UK, Slovakia and Poland (Slovakia and Poland later withdrew their request)	31/03/2010 Full referral	National markets for air fresheners in Belgium, Spain, Germany, Portugal, UK	No competition concerns
	Hungary joined, but referral refused	31/03/2010 Refusal of referral request by Hungary	National market	Not applicable
M.5969 - *SCJ / SARA LEE*	Spain, joined by Belgium, France, Czech Republic, Greece and Italy	07/09/2010 Full referral	Not assessed since notifying parties withdrew notification	
	Hungarian request to join after expiry of deadline	No decision, as Hungary withdrew its request	Not assessed since notifying parties withdrew notification	

M.6106- *CATERPILLAR/ MWM*	Germany, joined by Slovakia and Austria	26/01/2011 Full referral	Left open whether EEA-wide or worldwide market for generator sets	No competition concerns
M.6191 - *BIRLA / COLUMBIAN CHEMICALS*	Germany, joined by Spain, France, UK	02/03/2011 Full referral	At least EEA-wide carbon black market	No competition concerns
M.6773 - *CANON / IRIS*	Belgium, joined by Austria, France, Ireland, Italy, Portugal, Sweden	26/11/2012 Full referral	Markets for portable document scanners and office automation equipment: left open whether national or EEA-wide; EEA-wide market for capture software	No competition concerns
M.6502 - LONDON STOCK EXCHANGE GROUP / LCH CLEARNET GROUP	Portugal, joined by France and Spain	04/07/2012 Refusal of referral, as the UK as the centre of the transaction had not requested a referral	The merger concerns the trading market, compensation of equity, fixed interest securities and derivative instruments and must be notified in three countries: Spain, Portugal and UK.	Not applicable
M.6796 - AEGEAN / OLYMPIC II	Greece, Cyprus	13/12/2012 Full referral	National market for passenger air transport services in Greece	No competition concerns
M.7054 - CEMEX / HOLCIM	Spain	18/10/2013	Case ongoing	Case ongoing