

Evaluation of procedural and jurisdictional aspects of EU Merger Control

I. Questionnaire

I.1. Simplification

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

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

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

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

i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);

ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);

iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);

iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)

v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). The Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure.

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

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

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

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

(1 = "did not create much added value"; 7 = "created much added value"):

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

Please explain.

Further simplification of the treatment of certain categories of non-problematic cases

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

- YES
- NO
- OTHER

Please explain

The simplified procedure tends to be used to serve purposes other than the one for which it was designed (which was to speed up and ease the notification of merger projects deemed to have no or little impact on competition). Indeed, it seems to be used by the Commission as a laboratory to study competition issues raised by a said sector. As a result, the simplified procedure, even for those types of non-problematic cases, is heavier and more complex for companies than it should be. The Commission Notice on simplified procedure should be adapted to prevent such abuses, as regards the content and number of transmitted data, and the duration period of the procedure. Although it is useful, the simplified procedure remains burdensome and costly for companies. It does not prevent from pre-notification.

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

- YES
 NO
 OTHER

Please explain

[See comments to the answer in 2 \(i\)](#)

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);

- YES
 NO
 OTHER

Please explain

[See comments to the answer in 2 \(i\)](#)

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

- YES
 NO
 OTHER

Please explain

[See comments to the answer in 2 \(i\)](#)

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

- YES
 NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

No (as far as we know in the working Group of AFEC)

(ii) Post notification:

YES

NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

No (as far as we know in the working Group of AFEC)

4. Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure?

YES

NO

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

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

YES

NO

OTHER

Please explain

Not to our knowledge

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

- YES
- NO
- OTHER

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- Transactions falling under point 5a of the Notice:

- YES
- NO

See answer to question 2(i)

Please explain.

- Transactions falling under point 5b of the Notice:

- YES
- NO

Please explain.

See answer to question 2(i)

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

- YES
- NO

Please explain.

See answer to question 2(i)

- Transactions falling under point 5d of the Notice:

YES

NO

See answer to question 2(i)

Please explain.

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

Costs have not been reduced. See answer to question 2(i)

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

YES

NO

OTHER

If you replied yes or other, do you consider that there is scope for further simplification by, in particular:

- 8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

YES

NO

Such exemptions would indeed further simplify the functioning of the Merger Regulation, provided that the exemption is complete: it should also exclude reviews by national competition authorities and rule out reviews under unrelated provisions of EU competition law (especially Articles 101 and 102 of TFEU). Furthermore, the criteria to be fulfilled to benefit from the exemption should be clear and simple, and similar procedures should apply at EU and national levels.

The categories of cases for such exemptions may be listed as follows:

- Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);
- Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);
- Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

Please explain.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

YES

NO

Please explain.

Introducing lighter information requirements, notably by replacing the notification form by an initial short information notice, would indeed further simplify the functioning of the Merger Regulation regarding certain categories of cases listed in question 2, should they not benefit from the exemption mentioned on question 8.1. We do prefer the exemption, except in the case of mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice), where lighter information requirements might suit best.

Introducing lighter information requirements would bring about further simplification only if the following conditions are met:

- the Commission's decision whether or not to examine the case is subject to a deadline that is reasonably short,
- the "initial short information notice" brings about truly lighter information requirements,
- if the Commission does not examine the case, it should mean that the case is granted on an "implicit authorization" basis,
- such procedure is articulated with the referrals procedures, to ensure global consistency.

8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

YES

NO

Please explain.

We don't think so because legal certainty would not be guaranteed in this case.

8.4 Other

YES

NO

Please explain.

If neither option 8.1. nor option 8.2. are implemented, AFEC believes that the Commission should commit to reduce the length of the procedures (especially at pre-notification stage).

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction

which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

Further simplification of the treatment of extra-EEA joint ventures

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

- YES
- NO
- OTHER

Please explain

AFEC believes that extra-EEA joint ventures (which in AFEC views should also include the acquisition of joint control over pre-existing extra-EEA companies) with no effect on competition on markets within the EEA does not contribute to the protection of competition and consumers in Europe.

Accordingly, AFEC considers the application of the mandatory notification requirement in such cases to be disproportionate.

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

- YES
- NO
- OTHER

Please explain

AFEC welcomes the principle of a one stop shop review, which avoids review by one or more national competition authorities. AFEC however believes that the creation of extra-EEA joint ventures should not be subject to any notification requirements, neither at European level nor at national level.

11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

- YES
- NO
- OTHER

Please explain

AFEC believes that extra-EEA joint ventures with no appreciable impact on competition in the EEA should not require any merger control review (either at European or national level), and therefore considers the costs incurred by companies to be disproportionate

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

AFEC notes that extra-EEA joint ventures were already subject to the simplified procedure prior to the 2013 Simplification Package. This being said, the Simplification Package may have contributed to the reduction of costs, in particular by clarifying that mere overlaps between the JV parents do not give rise to "reportable markets". However, AFEC considers that the reduction of cost was not substantial.

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

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

There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

YES

NO

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

As mentioned above in response to Q10 and 11, AFEC believe that extra-EEA joint ventures should not be subject to any notification requirements in Europe, neither at European level nor at member states level.

To remove the burden to notify extra-EEA JVs, AFEC believes that these transactions should be exempted from (i) the notification requirement and (ii) the standstill obligation under the EUMR.

However, AFEC considers that they should not be excluded and should still be caught by the EUMR as a transaction with an EU dimension (assuming the thresholds are met) so that national filings in the EEA are excluded.

Finally AFEC considers that NCAs should follow a similar approach, when EU thresholds are NOT met.

(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

YES

NO

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

See AFEC's response to Q13(i)

(iii) Other.

Please explain.

I.2. Jurisdictional thresholds

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

Article 1 of the Merger Regulation

Scope

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

2. A concentration has a Union dimension where:

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

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

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

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

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

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

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

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

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

4. [...]

5. [...]

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

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

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

14. In your experience, have you encountered competitively significant transactions **in the digital economy in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

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

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

The Commission mentions the acquisition of WhatsApp by Facebook. Even if Article 1 of the Merger Regulation did not catch this merger, the current EU Merger Regulation is efficient as this transaction was ultimately referred to the Commission. Therefore, Facebook/WhatsApp is an example of the fact that the current system works and is effective. It should also be noted that the Commission concluded that this transaction would raise no competition concerns. In addition, Articles 101 and 102 TFUE allows the Commission and the national competition authority to intervene and remedy competitive distortions in digital markets (see, for example, hotel booking portals cases).

15. In your experience, have you encountered competitively significant transactions **in the pharmaceutical industry in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

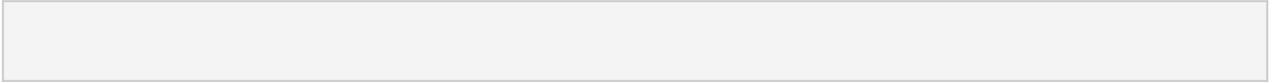
- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.



- **If no or other**, please explain your answer.

The EU Commission only mentions one example, which deals with pharmaceutical products in development (Pharmacyclis by AbbVie). AFEC has not encountered any other examples of this kind.

AFEC believes that implementing a specific merger control for pharmaceutical products in development would be inefficient at such an early stage of development.

The currently applicable antitrust law (Articles 101 and 102 TFUE) is the most appropriate tool to deal ex-post with anticompetitive practices arising in the pharmaceutical sector.

16. In your experience, have you encountered competitively significant transactions **in other industries than the digital and pharmaceutical sectors in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?

- YES
- NO

OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

AFEC considers that the current EU thresholds are efficient. Its scope should not be expanded to additional transactions, which would otherwise, in most cases, have been reviewed by the national competition authorities.

17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?

- YES
- NO
- OTHER

Please explain.

Paragraph 79 of the 2009 Staff Working Paper accompanying the Communication from the Commission to the Council Report on the functioning of Regulation No 139/2004 states that: *"In conclusion, it appears that the threshold criteria in Article 1(2) and 1(3), seen in conjunction with the various referral mechanisms, operate in a satisfactory way in allocating jurisdiction. In fact, based on the Commission's own experience and the views expressed by NCAs and stakeholders there appears to be a consensus that the right cases are generally being reviewed at the Community level."*

AFEC believes that this statement is still relevant as the current case referral system is effective (see for example in the digital sector, the following mergers: Amadeus/Navitaire, Facebook/WhatsApp, Equinix/Telecity, Google/DoubleClick, Nokia/Navteq and TomTom/Tele Atlas).

In addition, the EU Commission will have the possibility to examine, through the referral system, additional transactions since Germany is about to introduce a new deal size threshold into its national merger control regime.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
- NO
- OTHER

- **If yes**, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

- **If no or other**, please explain.

Although the Commission has identified two cases falling outside the scope of the EU Merger Regulation, the Commission did ultimately have the ability to intervene in one case. Therefore, AFEC does not consider that there are several convincing cases for extending the scope of the EU merger regulation.

In addition, to the extent that such mergers could raise antitrust concerns, the Commission and the national competition authority could always apply Article 102 and 101 TFUE.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
 NO
 OTHER

Please explain.

Extending EU merger control should take into account a realistic assessment of the number of additional relevant filings that such an extension will generate, and the corresponding burden for the business community. In this respect, AFEC considers that the number of cases that would actually cause concerns is likely to be very small.

In addition, such a complementary jurisdictional threshold will not be useful as the relevant transaction are in most cases reviewed by national competition authorities and the referral system is efficient.

Finally, the extension of the merger control would not allow achieving the simplification target. It would produce the opposite effect and difficult questions of interpretation relating to the exact amount of purchase price would arise.

AFEC believes that the European Commission should abandon the proposal relating to the "deal size threshold".

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would

be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

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

Please explain your response and provide examples where appropriate.

22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

- YES
- NO
- OTHER

- Please state if any of the following criteria would be appropriate to ensure the desired efficiency [multiple answers are possible]:

- A minimum level of aggregate worldwide turnover of all undertakings concerned.
- A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.
- A maximum level of the worldwide turnover of the target business, in cases where the latter does not meet the Union-wide turnover thresholds (with the aim of only covering highly valued transactions where the target has a strong potential for instance to drive future sales but not cases where the target already generates significant turnover but outside of the EEA).
- The requirement that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple. (Example: transaction value = EUR 1 billion, worldwide turnover of the target = EUR 100 million, ratio/ multiple = 10. The aim of this requirement would be to identify transactions where the valuation of the target company exceeds its annual revenues by several multiples, which could signal high market potential of the target.)
- Other.

Please explain your answer.

I.3. Referrals

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

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

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

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

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

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;

2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely

- an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
- and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and

3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

- YES
 NO
 OTHER

Please explain.

24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating merger cases to the more appropriate competition authority and/or reducing burden on businesses?

- YES
- NO
- OTHER

Please explain.

As regards Article 4 (5), the abolition of the Form RS would be a welcome change which AFEC has already called for. It will simplify and accelerate the assessment of pre-notification referrals and reduce costs for companies. AFEC also agrees with the proposed change in the wording of Article 4(4).

As regards article 22, entrusting the Commission with jurisdiction over the entire EEA in the case of a referral is consistent with the one stop shop principle. However, this would result in significantly increasing the administrative burden of companies as they would have to provide information on all relevant markets EEA-wide, not just on markets situated in the Member State(s) which initially have jurisdiction on the case. Moreover, the additional information to be provided would virtually concern the situation in Members States where the notification thresholds are not met, hence in areas where competition concerns could be excluded. The proposed amendment of Article 22 is therefore detrimental to undertakings and imposes on them an unnecessary burden.

25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

- YES
- NO
- OTHER

Please explain.

The possibility to use Article 22 should be expressly reserved to national competition authorities having jurisdiction over a case, the local turnover thresholds being met.

As regards article 4(5), the Commission may consider to shorten the 15 days period granted to Member States in order to decide to oppose or not to the referral. Likewise, in view of accelerating the assessment of the referral by Member States, they could be consulted in the pre-notification phase provided that the notifying party agrees so. If such a pre-notification referral discussion takes place, the 15 days period granted to Member States could be eliminated.

I.4. Technical aspects

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

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).
- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.
- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

AFEC disagrees with the above proposals as regards parking transactions. The principles currently contained in Paragraph 35 of the jurisdictional notice should not be inserted in the Merger Regulation. On the contrary, Paragraph 35 should be amended to better reflect the case-law and in particular the Odile Jacob case. The judgment of the General Court in this matter (T-279/04) is very clear on the fact that a parking transaction may not be treated as the first stage of a concentration if it does not result in the financial institution acquiring sole or joint control over the target company. It is not consistent with the concept of control within the meaning of the EU Merger Regulation to contend, as the Commission does in Paragraph 35 cited above, that a parking transaction is always the first stage of a concentration, i.e. even in cases where no control is acquired by the financial institution.

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

- YES
- NO
- OTHER

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defence and to propose and discuss commitments.

There are case in which the finalisation of remedies would require extra time which is not provided for by the current procedural rules. Adding flexibility could allow to address these cases. However, merger control must remain framed in terms of its timing and time limits must remain the rule.

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

- YES
- NO
- OTHER

Please explain.