

Consultation concerning the evaluation of procedural and jurisdictional aspects of EU Merger Control

JOINT AFEP & CERCLE DE L'INDUSTRIE POSITION PAPER

Context

The European Commission is undertaking an evaluation of procedural and jurisdictional aspects of EU merger control that may lead to a review of the EU Merger Regulation (No 139/2004). The Commission evaluation will be built upon its own analysis, stakeholder interviews and the present consultation. The consultation builds upon the 2014 White Paper "Towards More Effective EU Merger Control" and prior consultations and seeks to evaluate the following procedural and jurisdictional aspects of EU merger control in more detail:

- **Simplification:** the treatment of certain categories of cases that do not generally raise competitive concerns;
- **Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation**, in the context of certain recent acquisitions of companies with no substantial turnover but that can potentially have a considerable market impact (for instance in the digital or the pharmaceuticals sectors);
- **Functioning of the case referral mechanisms** set out in Articles 4(5) and 22 of the Merger Regulation;
- **Certain technical aspects** of the procedural and investigative framework for the assessment of mergers.

AFEP and Cercle de l'Industrie provide joint comments on all of those issues in the following sections: Simplification (I), Jurisdictional thresholds (III), Referrals (III) and Technical aspects (IV).

Summary of our position

French companies would like to highlight two key elements that are addressed in more detail in the present document:

- first of all, in our opinion, introducing a transaction value threshold as a complementary jurisdictional criterion in the Merger Regulation is neither relevant (due to the difficulty to appreciate the right price) nor needed, and would raise huge concerns; therefore it should be ruled out;
- the simplified procedure is too burdensome and complex for companies, as it tends to be used to serve purposes other than the ones 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). The Commission Notice on simplified procedure should therefore be adapted (content and duration period of this procedure).

I. Simplification

1. Even if the simplified procedure for non-problematic cases falling under point 5 or 6 of the Notice is **useful**, it remains **burdensome for companies**, and **pre-notification is still necessary**. **Actually, the simplified procedure does not serve its initial purpose** (i.e. speed up and ease the notification of merger projects deemed to have no or little impact on competition), but **is used for other purposes** (notably to settle competition issues that should be addressed at a later stage of the procedure). As a result, the simplified procedure, even for those types of non-problematic cases, is **still too burdensome and complex for**

companies. The Commission Notice on simplified procedure should therefore be adapted (content and duration period of this procedure).

2. It is not clear whether the one-stop shop review at EU level for concentrations falling under the simplified procedure has reduced costs of notification (in terms of workload and resources spent) for companies. Indeed, the length of the procedure (from pre-notification to decision), which should be reasonably short and predictable, is key for companies. It varies for any given case, whether it be under the one-stop shop at EU level with simplified procedure or at national level with national procedures, depending on parameters such as the sector, the company and its frequency of notification, etc. For these reasons, companies believe that the optional nature of the one-stop shop review for concentrations falling under the simplified procedure is very useful and should be maintained, to enable companies to select the best option for any given case.
3. There is scope for further simplification of the treatment of certain categories of non-problematic cases, by exempting certain of those categories from the obligation of prior notification to the Commission and from the standstill obligation, provided that such exemption is **complete**. That means it should 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. Moreover, similar procedures should apply at EU and national levels.**

The categories of cases best suited for such exemptions are the following:

- 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);
- Joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures").

4. **Should the above mentioned cases not benefit from such exemption, introducing lighter information requirements, notably by replacing the notification form by an initial short information notice**, would be a second best and indeed further simplify the functioning of the Merger Regulation, provided that 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 indicate within the timeframe its intention to examine the case, it should mean that the case is granted an implicit authorisation,
 - such procedure is articulated with the referrals procedures, to ensure global consistency.

As an exception, companies would favor introducing lighter information requirements over exemption for 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).

Transparency Register identification number:
953933297-85

Transparency register identification number:
60974102057-03

5. On the contrary, introducing a **self-assessment system**, as defined by the Commission (under which 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), **would not bring further simplification and is not suitable as legal certainty would not be guaranteed in this case whereas it is a priority for interested parties.**
6. In any case, if the Commission does not introduce exemptions or lighter information requirements, it should commit to **reducing the length of the procedures** (especially at pre-notification stage).

II. Jurisdictional thresholds

7. **There is no evidence that there is a real enforcement gap** with regards to transactions falling under the turnover-based jurisdictional thresholds but having a strong impact and the internal market. The few problematic cases that have been identified (such as the WhatsApp/Facebook case) can be addressed by the Commission and by NCAs through the lower turnover thresholds at national level.
8. Therefore, **the introduction, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) is neither relevant nor needed.** The current system, based on the turnover of the undertakings concerned, is **simple and unbiased**, and therefore provides **legal certainty**. Should merger control be based on alternative criteria, it would create a blurry and uncertain situation, which is not suitable for companies.
9. **From our perspective, the value of the transaction is not a good criterion to trigger merger control: this option should be ruled out.** A company that has a bad balance sheet might have a strong market power. In addition, prices may vary over time. In addition, should transaction value be introduced as a new criterion to trigger merger control at EU level, the NCAs might be tempted to introduce lower transaction value thresholds at national level to trigger national merger control. This would create a completely unmanageable situation. Moreover, the significance of the transaction value is industry- specific. For example, depending on the CAPEX required for an industrial activity, a transaction price may be significant in one industry but minor in another.
10. In any case, before taking any steps towards the introduction of complementary jurisdictional thresholds (including thresholds based on transaction value), the Commission should undertake a **thorough impact assessment**. In accordance with the Commission's better regulation initiative, any reform should **preserve legal certainty and be as simple as possible**.

III. Referrals

11. The current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) should **be enhanced to better serve the purpose of departing from the results of the turnover tests where necessary**. There is **room for improvement** especially **with respect to case referrals from Member States to the Commission, both before and after notification**.

Transparency Register identification number:
953933297-85

Transparency register identification number:
60974102057-03

12. Companies welcomed with interest the proposals developed by the Commission in the White paper to simplify the system of case referrals, whilst pointing out that they do not fully meet their expectations:

- Pre-notification referrals: they strongly support the proposal to **abolish the two-step procedure** in case of pre-notification referrals from Member States to the Commission at the request of the notifying parties (Article 4(5)).
- Post-notification referrals: according to the White Paper, one or more competent Member State(s) could request a referral to the Commission within 15 working days of the date it was notified to them. The Commission would be able to decide whether or not to accept a referral request. If the Commission decided to accept a referral request, it would have jurisdiction for the whole of the EEA. However, if one (or more) competent Member State(s) opposed the referral, the Commission would renounce jurisdiction. We are not opposed to most of the proposed amendments. However, the fact that **accepting the referral gives the Commission jurisdiction for the whole EEA is problematic**. While the companies recognise the need to reinforce the 'one-stop-shop' principle, they are of the opinion that **this jurisdiction cannot entail full notification with data for all Member States of the EEA**. In addition, the fact that this wider examination is triggered simply by the Commission accepting a referral would pose a legal basis problem in cases where – for example – neither the thresholds laid down by EU law nor those of Member States had provided for any examination in the States for which the Commission would consequently assume jurisdiction.

13. 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:

- Pre-notification referrals: companies would like to be able to request the referral of cross-border merger cases to the Commission when two or more national competition authorities have jurisdiction to address them, instead of the current three or more authorities
- Other issues:
 - Companies encourage the Commission to call on national competition authorities to apply the substantive rules laid down by EU law in all merger cases notifiable in two or more Member States.
 - Companies are in favour of harmonising the types of thresholds giving rise to the controllability of merger transactions in the EU Member States (but not their level), by only keeping thresholds expressed in terms of turnover due to the fact that they are objective in nature.
 - It is of the utmost importance to reduce the length of procedures: Member States should be compelled to respond in a short period of time.
 - Companies should be granted a right of reply to comment case referrals.
 - A particular attention should be paid to the confidentiality of transaction planification.

IV. Technical aspects

- 14. Companies do not see the need to introduce additional flexibility regarding the investigation time limits, in particular in Phase 2, since the Commission can already decide to lengthen the duration period of phase 2.**
- 15. Companies would like to get more detailed information on the “appropriate sanctions” proposed in the Staff Working Document “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”.**

Transparency Register identification number:
953933297-85

Transparency register identification number:
60974102057-03

16. Companies underline that there is **too much uncertainty as regards the completion of phase 1 of the procedure** (as regards the list and the volume of documents to provide to the Commission). **The number of '5.4. documents'** (analyses, reports studies, surveys and any comparable documents required under article 5.4. of Forms CO) **to be provided should be adequately limited**. In addition, they are sometimes abusively used to stop the clock.
17. Companies would very much appreciate that the Commission **delivers comfort letters for all types of transactions**. In particular, it may be useful to receive a comfort letter even before a letter of intent is signed between the parties to a transaction, in order to reassure the target and/or the seller that there is no competition issue, and therefore that the operation can be swiftly cleared.

About AFEP

Since 1982, Afep is the association which brings together large companies operating in France. The Association is based in Paris and Brussels. Afep aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority. Afep has 112 members. More than 8.5 million people are employed by Afep companies and their annual combined turnover amounts to €2,600 billion.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility.

Contacts:

Emmanuelle FLAMENT-MASCARET

Consumer and Intellectual Property Affairs Director

Email: concurrence@afep.com

Tel: +33 1 43 59 85 44

Jérémie PELERIN,

European Affairs Director,

Head of the Brussels Office

Email: jeremie.pelerin@afep.be

Tel: +32 2 227 57 23

About Cercle de l'Industrie

Based in Paris and Brussels, Cercle de l'Industrie brings together the CEOs of 33 of the largest French industrial companies – state-owned as well as private – along with key political decision-makers close to the right and the left aisles of the French parliament.

Its goal is twofold: to reflect on how industry should tackle challenges in terms of economic growth, sustainable development or technological progress, and to participate in the debates shaping national and European public policies that impact on industry.

Member companies of the Cercle de l'Industrie have a turnover of 865 billion euros and employ 2.7 million people throughout the world.

Contact :

Aurélie PORTALIER,

Representative in Brussels

Email : aurelie.portalier@cercleindustrie.eu

Tel : +32 2 502 88 08