



3 February 2017

Recommendations for improving EU Merger Control

KEY MESSAGES

- BUSINESSSEUROPE supports the Commission's intention to make EU merger control more efficient and welcomes procedural simplification for unproblematic transactions as well as for case referrals.
- We deem the introduction of an additional jurisdictional threshold based on the value of the transaction, would be excessive and disproportionate. There is no "enforcement gap" within EU merger control that needs to be rectified, and this idea would significantly increase burdens for businesses.
- BUSINESSSEUROPE strongly supports proposals to streamline procedures and the intention to abolish the two-step procedure and introduce the possibility of filing directly with the Commission.
- We encourage further simplification beyond the Simplified Procedure and a further reduction of time, cost and administrative burdens. Certain types of transactions could be excluded from the formal filing requirement entirely.
- Supporting innovation and putting in place the best possible environment conducive to innovation and the creation, development and success of companies in Europe is key objective where competition policy can play a crucial role.
- In some industries, European businesses compete outside of Europe even if competitors do not yet have business activities or revenues in the EEA. The substantive assessment of a concentration by the Commission in these circumstances should put more weight on the global market environment.



BusinessEurope contribution to the evaluation of procedural and jurisdictional aspects of EU Merger Control

1. Introduction

BUSINESSEUROPE appreciates the opportunity to provide feedback on the recent Commission consultation relating to the evaluation of certain procedural and jurisdictional aspects of EU merger control. The Consultation focuses on the jurisdictional thresholds, the case referral mechanisms as well as the simplified procedure in the EU Merger Regulation (EUMR).

BUSINESSEUROPE supports the Commission's intention to make EU merger control more efficient and welcomes procedural simplifications for transactions that do not raise concerns from a competition law perspective as well as for case referrals.

2. Deal size threshold

BUSINESSEUROPE however opposes the introduction of an additional jurisdictional threshold based on the value of the transaction, which it considers to be excessive and disproportionate.

In its Consultation, the Commission raises the question whether the current revenue-based jurisdictional thresholds in the EUMR are still adequate – in particular in the light of the “Facebook/WhatsApp” case.

The Commission raises the question whether a complementary jurisdictional threshold based on the value of the transaction (deal size threshold) is required to cover concentrations in which an undertaking does not have significant revenues in the European Economic Area (EEA) but has a significant market potential that is reflected in a high transaction value.

We oppose the introduction of a complementary deal size threshold for the following reasons:

- ***No existing “enforcement gap” and significantly increased administrative burden for undertakings and the Commission***

BUSINESSEUROPE is convinced that the introduction of a deal size threshold is neither required nor can it be justified. There is no statistically significant data or empirical analysis showing that there is an “enforcement gap” within the EU merger control regime that needs to be rectified. There is no evidence showing the existence of a significant number of concentrations raising competitive issues but escaping EU merger control scrutiny because they do not fulfil the revenue-based jurisdictional thresholds under the EUMR.

One single case – “Facebook/WhatsApp” – is regularly mentioned in this context. However, this case is not sufficient to establish an “enforcement gap” and to justify substantial structural changes to EU merger control. Moreover, this case was in the end referred to the Commission under Article 4(5) EUMR and cleared in Phase I without remedies. This shows that the current system of thresholds and referrals under EU merger control worked. Even without a referral the case would have been covered by merger control in several jurisdictions within as well as outside the EU. These other jurisdictions, including several national authorities within the EEA, should be trusted to handle the merger review process and assess the competitive effects of the proposed transaction competently. We are not aware of any other comparable concentration – neither in



the digital or pharmaceutical industries nor in any other industrial sector – that escaped a review by the Commission.

An expansion of EU merger control would cause disproportionate burdens. The number of cases to be reviewed by the Commission and requests for guidance on filing requirements would also increase. This would also increase the Commission's workload by creating a filing obligation for a larger number of transactions which most likely will not require enforcement measures in the EU. Since the resources of the Commission are limited we suggest its focus should be on cases which potentially implicate competition in the EEA precisely because they involve sufficient current economic activity in the EEA in the form of turnover.

Against this background the introduction of a deal size threshold would constitute a case of over-enforcement and be contrary to a more effective and efficient system that should be the fundamental aim of the Commission.

Furthermore, there is a serious likelihood that other jurisdictions take any change to the EUMR – as one of the world's leading merger control regimes – as a model for introducing deal size thresholds in their respective merger control regimes as well. Since the ICN has over 125 members, this would lead to a spread of overlapping and burdensome review procedures for (multinational) companies as well as for the different competition authorities.

There are recent proposals to reform the German merger control thresholds to incorporate a second jurisdictional threshold based on the value of the transaction. This is disconnected from the results of the EU evaluation and raises questions about the lack of coordination between Member States and the Commission and the possibility for inconsistent approaches between the national and EU levels.

- ***Inconsistency with local nexus requirement***

BUSINESSEUROPE is concerned that the introduction of a deal size threshold will be inconsistent with the local nexus requirements in the ICN's Recommended Practices since such threshold does not require that the transaction will (potentially) have an effect on competition in the EEA. Therefore, many transactions – in particular large international transactions – would trigger a filing obligation with the Commission solely due to a high transaction value without having any relation to the EEA or (potential) impact on competition in the EEA.

Due to the spread of merger control regimes around the world, there is no need or justification for a single jurisdiction to establish a notification requirement in its merger control regime for concentrations with negligible or no local nexus. To the contrary, other jurisdictions with substantial local nexus can and should be trusted to deal with any competition concerns arising from concentrations affecting supra-national markets.

The possible solution suggested in the consultation – namely that the filing obligation should only apply to transactions “if they are likely to produce a measurable impact within the EEA” – is not satisfactory since this criterion is too vague and does not provide sufficient legal certainty to the undertakings concerned. The requirement of a “measurable impact” is anything but clear and the further criterion of the likelihood requires a prognosis and does not enable undertakings to make a safe decision regarding a potential filing obligation.



This should be seen in the broader context of the debate surrounding the role of competition law in the digital economy, and in particular surrounding big data. This debate is in full swing and there is no consensus for the time being on the fundamental notions of data and big data and the role that competition law can play in this context. Even though the Commission indicates that there would be specific explanatory guidance regarding these criteria, it is highly questionable whether this would enable the undertakings concerned to make a quick and safe decision on a filing requirement in the same way as simple turnover based thresholds.

It is important to note that the “size of the transaction“-test under the Hart-Scott-Rodino Antitrust Improvement Act (“HSR“) often referred to in this context provides for a number of additional requirements, in particular in the case of foreign-to-foreign transactions, which ensure that a merger filing is only required for transactions that (potentially) affect competition in the United States and have a clear local nexus (16 C.F.R. §§ 802.50 und 802.51). BUSINESSEUROPE would like to stress that the value based threshold in the US system is a rarity among merger control regimes worldwide.

- ***Transaction value is no suitable and objective criterion***

BUSINESSEUROPE opposes the introduction of a new deal size threshold, which would lead to significant practical problems and further increase the complexity of the jurisdictional thresholds under the EUMR, for the reasons stated below.

Determining the value of a transaction can be very complex and is often anything but clear. This is the case, for example, if the purchase price is either wholly or partly paid in shares of the acquirer the value of which fluctuates. The same applies for “earn-out“-clauses according to which the purchase price can increase substantially after signing based on the performance of the acquired company.

Moreover, the purchase price in innovation-driven industries might not be finally determined at signing but might be based on a fixed payment at signing and certain milestone payments after closing of a transaction which can depend on conditions such as gaining approval for or admission of a product or reaching certain revenue thresholds in case the product reaches marketability.

Specifically in relation to data and big data, while the Commission has economic and legal tools to analyse mergers involving parties that hold large amounts of data, it seems uncontested that further understanding is certainly needed to assess whether big data in itself generates economic value for firms. This is an additional element confirming the challenges over the determination of the value of a transaction.

These difficulties and uncertainties in determining the transaction value contradict the fundamental principle of the ICN Recommended Practices that jurisdictional thresholds should be objectively-determinable.

Objectively determinable thresholds are essential for parties to a concentration to establish whether or not the transaction triggers merger filing requirements. After all, the merging parties are responsible for this determination and severe consequences follow a wrong decision not to file. In addition, objectively-determinable thresholds also serve the interests of the Commission by clearly establishing which concentrations require a filing and thus minimizing case-by-case consultations or disputes.



Moreover – in case a deal size threshold were introduced – any threshold would have to be sufficiently high to ensure that there is not a multitude of concentrations suddenly captured by the EUMR and it should only apply to well-defined situations. It should not apply to industries in which revenues of a company also reflect the respective company's market position as well as its competitive potential. That way the application of the deal size threshold would be limited to potentially valuable and innovative businesses that do not yet generate significant revenues.

3. Impact on innovation

All EU policies should converge towards common objectives. Supporting innovation and putting in place the best possible environment conducive to innovation and the creation, development and success of companies in Europe is one of the key objectives of the European Union, and competition policy can play a crucial role in this regard, both in positive terms but also potentially in negative ones depending on the choices that will be made, not least in the M&A field.

The consultation points out to digital and pharma industries as areas where acquisitions often concern small companies, which predominantly research and develop new products or have an innovative business model, or have access to data - all of which may have high commercial potential, and do not yet generate any or only little turnover.

However, in many cases R&D is carried out by numerous SMEs and research institutes as well as larger companies. Once the R&D phase is over, smaller players do not have the financial capacity to face the development and marketing phases alone and often rely on collaborations, deals, servicing or acquisitions by larger companies to do so.

BusinessEurope would like to point out that the consultation's suggested approach to these situations may be rather harmful to the innovation potential of these situations. Over the past years, the feeling among the business community is that Europe is becoming less and less attractive not only as an innovation location but also as an investment, growth and thereby jobs creation location.

Regulated industries in particular, but also others are being faced by endless additional layers of doubtful regulatory requirements, documented approval delays, unpredictable regulatory clarifications, and general fogginess of European policy that deters innovation. DG Competition's proposed approach to merger review risks further penalising our region in a moment where financial resources - fundamental for innovation and even more for developing and marketing innovative products - are scarce.

The 2016 Innovation scorecard of the Commission still shows Europe lagging behind all other developed regions. This is a moment when innovation intensive industries need to be supported rather than deterred.

4. Substantive assessment of the Commission should take greater account of global market environment

In some industries, European undertakings also compete outside of Europe with non-European competitors even if these competitors do not (yet) have any business activities or revenues in the EEA. Such competitors are often national champions supported by their respective governments. For the European undertakings in these industries the non-European business is often vital to



support their European activities, for example, in times when European demand is low and technical development is driven mainly by demand from outside of Europe.

BUSINESSEUROPE is convinced that in its substantive assessment of a concentration in these industries, the Commission should not only examine the market conditions in the EEA but should put more weight on the global market environment even in the case of narrower geographical markets. This is even more important if there is an indication that the non-European competitors might become active in the EEA within the foreseeable future.

By not taking into account the global market environment and dynamics in its substantive assessment and by focusing on actual effects in Europe or on narrow geographical markets the Commission creates an uneven playing field and puts European undertakings at a disadvantage in global competition and ultimately also in Europe.

5. Case referral mechanisms

In the Consultation, the Commission revives its considerations regarding changes to the case referral mechanisms already discussed in the White Paper “Towards more effective EU merger control” in 2014. As already stated in its 2014 position paper, BUSINESSEUROPE strongly supports the introduction of simplifications in the case referral mechanisms.

Pre-notification referral to the Commission (Art. 4(5) EUMR)

BUSINESSEUROPE strongly supports the proposal to streamline procedures under Art. 4(5) EUMR and, in particular, the Commission’s intention to abolish the two-step procedure under Art. 4(5) EUMR and to introduce the possibility of filing directly with the Commission.

Parties to a concentration certainly want to avoid administrative burdens as well as internal and external costs. Therefore, they generally favour an exclusive jurisdiction of the Commission if a concentration triggers notification requirements in several member states. It would be a significant step to streamline the procedure as well as save time if a notification could be filed directly with the Commission in cases of Art. 4(5) EUMR.

A transaction triggering several notifications in Member States will be them at EU level. If a merger is notifiable in two Member States, it is by nature cross-border. The number of countries required for referral should therefore be reduced from three to two.

As previously laid out in our submission to the 2014 White Paper, we believe that the veto right for Member States should not be retained. Member States opposing a referral should have the right to put forward a reasoned submission, but the decision should rest with the Commission. The reason for this is that the notification of a concentration is time-consuming and costly for undertakings. In the case that a national competition authority retrospectively opposes the referral to the Commission, the undertaking must repeat the notification, this time to the national competition authorities concerned, causing a significant loss of time and resources.

In case the veto right remains, BUSINESSEUROPE suggests to at least create significant thresholds for its application, namely that Member States can only demand a referral back to the respective Member State in case of substantial reasons, such as legitimate national interests being affected by the concentration. In addition, we suggest reducing the period within which a Member State must exercise its veto right from 15 to 10 working days.



In addition, the current system could be further improved by introducing the option of limiting the geographical scope of the Commission's investigation to the Member States that would have otherwise been competent to review the deal. This would avoid unnecessary collection of data from other non-affected jurisdictions.

Pre-notification referral to Member State (Art. 4(4) EUMR)

BUSINESSEUROPE supports the suggested removal of the requirement under Art. 4(4) EUMR 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.

Post-notification referral to Commission (Art. 22 EUMR)

BUSINESSEUROPE strongly agrees with the Commission's suggestion to expand the Commission's jurisdiction to the entire EEA if it accepts a referral request under Art. 22 EUMR. Such exclusive jurisdiction would reduce the administrative burden on the notifying parties by excluding the possibility that the concentration has to be notified both to the Commission and the national competition authorities. In addition, such exclusive jurisdiction would help to avoid potentially contradictory decisions by national competition authorities.

Nevertheless, here again, we invite the Commission to consider the possibility of limiting the geographical scope of its investigation to the Member States that would have been competent to review the deal absent the referral in order to avoid unnecessary collection of data from other non-affected jurisdictions.

In addition, the right of the Member States to join the initial request within a period of 15 working days should be replaced by a veto right whereby a veto of one or several Member States against the referral request would lead to a renouncement of jurisdiction over the entire EEA.

Furthermore, we are of the opinion that limiting the possibility of requesting a referral to only those competition authorities that have jurisdiction on the basis of their national law will enhance legal certainty.

6. Simplified procedure in the EUMR

In its Consultation, the Commission also asks for feedback whether a further simplification and streamlining of the "Simplified Procedure" could be achieved, e.g. by excluding unproblematic cases from the Commission's jurisdiction.

The "Simplified Procedure" already has positive effects by helping to reduce time, costs and resources required for a notification to a certain extent. However, BUSINESSEUROPE encourages a further simplification and a further reduction of time, cost and administrative burdens. In addition, we believe that certain types of transactions should be excluded from the formal filing requirement entirely.

- ***Abolition of notification requirement for certain types of concentrations***

BUSINESSEUROPE strongly encourages the introduction of a local nexus requirement to make sure that joint venture transactions only trigger a formal notification requirement with the Commission in case the joint venture itself (and not solely the parent entities) will operate in the



EEA or there is a substantiated business plan establishing that the joint venture will operate in the EEA in the near future.

In addition, we suggest an exemption from the formal notification requirement for concentrations subject to the “simplified procedure” under 5(b) and 5(d) of the Commission Notice, i.e. for (i) concentrations without any horizontal or material vertical overlaps between the undertakings concerned or (ii) concentrations where a company acquires sole control over a company over which it already has joint control. For such concentrations, it should be sufficient to provide written information about the concentration to the Commission (as an even more simplified notification). The Commission should then have the option to either clear the concentration within 10 business days or to request a notification under the “Simplified Procedure”. Obviously, businesses value legal certainty over insecurity on a need to file, including uncertainty as to potential alternative filing requirements with national authorities and therefore prefer some form of “decision” from the Commission if this is the best way to rule out uncertainty.

- ***Further simplification of the “Simplified Procedure”***

Despite the Simplified Procedure’s benefits, which businesses appreciate, the administrative burdens for parties filing a concentration are still significant, in particular in relation to the production of information and internal documents. In addition, pre-notification and the issuing and handling of requests for information (“RFIs”) could be further streamlined and optimized.

BUSINESSEUROPE invites the case teams to discuss timing, intended scope and focus of the Commission’s review as well as availability of data and information with the notifying parties already at the beginning of pre-notification.

In addition, we encourage the case teams to limit the number and scope of RFIs as much as possible, to focus on information that is absolutely necessary for the case team’s analysis and to consolidate RFIs as far as possible in order to limit the administrative burden for companies to a reasonable level. Any questions raised by the case team should be specific, unambiguous and tailored to the recipient.

When requesting internal documents the case team should avoid excessive data requests and should ensure that any request is unambiguous, specific and limited to the information absolutely required for the case team’s analysis. In case the Commission requires a large volume of data for its assessment, it should handle such requests during pre-notification. Moreover, we would appreciate if the notifying parties had more flexibility when sending or presenting data to the case team, in particular in case of large data requests.

In addition, the Commission should aim at ruling out – and excluding from RFIs etc. – any issues that are unlikely to lead to substantive competition concerns already during pre-notification and thus before formal review starts.

Finally, also RFIs sent to third parties such as customers and competitors of notifying parties present a significant burden to the businesses involved. Unclear RFIs, questions which are irrelevant to the businesses asked, short deadlines and a sometimes not pragmatic handling of the RFI process raise doubts as to the power of the facts and evidence collected by means of these RFIs. BUSINESSEUROPE encourages the Commission to provide more freedom and flexibility to third parties to respond to RFIs, in particular, where they do not see concerns or



issues regarding a transaction, and to explore other more efficient means to collect information and to better prepare and streamline RFIs.

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