BUNDESRECHTSANWALTSKAMMER

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On the public consultation on the evaluation of procedural and jurisdictional aspects of EU Merger Control

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The Bundesrechtsanwaltskammer appreciates the opportunity to participate in the public consultation on the evaluation of procedural and jurisdictional aspects of EU Merger Control. Please find the replies to the consultation in the attached questionnaire.

Public Consultation on the evaluation of procedural and jurisdictional aspects of EU Merger Control

Questionnaire

I.1. Simplification

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	○	○	○	○	○	○	**X**

Please explain.

Added value should be maintained post-Brexit. An extension of the one stop shop procedure to Norway or Switzerland should be considered.

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
- **X OTHER**

Please explain

Although the burden is reduced information requests by the European Commission are still more extensive than on a national (here: German) level and lead to a more time-consuming procedure. In addition, the very short deadlines for replies to requests for information (RFIs) are problematic. An extension should be considered as well as streamlining RFIs.

The European Commission should consider that the logic of a dynamic market delineation does not correspond with a company's internal reporting systems (e.g. whereas the European Commission requires

local figures the internal reporting systems provide for national figures only). As a consequence, many market figures requested in the RFIs are not readily available but have to be individually collected / estimated. Such a procedure requires enormous efforts and can multiply in cases of multinational companies having to provide information on numerous markets or in conglomerates. The same goes for machine/equipment manufacturers producing tailor-made products. Many departments within a company have to be involved in order to provide answers. The European Commission should take this into consideration when drafting the RFIs and setting the respective deadlines.

The informal guidance which the case teams perform is welcomed but does not compensate for the downsides of the current RFI regime.

(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
- **X OTHER**

Please explain

Please see the answer to question 2(i) above.

(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
- **X OTHER**

Please explain

Please see the answer to question 2(i) above.

(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
- **X OTHER**

Please explain

Please see the answer to question 2(i) above.

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:

X 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.

Please see the answer to question 2(i) above.

(ii) Post notification:

YES
X 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.

N.A.

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?

X YES
NO

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

Please see question 2(ii). Based on previous experience the normal procedure was chosen from the outset in several cases. It is, therefore, likely that a case team will directly request the normal procedure instead of completing the simplified procedure first. Thus, in those cases, there are no gains from the simplified 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
X NO
OTHER

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
- **X 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
- **X NO**

Please explain.

The main observation for all categories under point 5 of the Notice is the still existing bureaucratic approach of the case teams. In particular, the extent of information requests exceeds the level required by national authorities and leads to lengthy procedures. In addition, the very short deadlines for replies to RFIs are problematic. An extension should be considered, or - alternatively - a streamlining of RFIs.

- Transactions falling under point 5b of the Notice:

- YES
- **X NO**

Please explain.

See above

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

- YES
- **X NO**

Please explain.

See above

- Transactions falling under point 5d of the Notice:

- YES
- **X NO**

Please explain.

See above

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

They have been reduced to a minor extent. We recommend that the European Commission clarifies whether filings under the simplified procedure need to be done by an external law firm or can also be done by inhouse lawyers.

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?

X 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;

X YES

NO

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);

X YES

NO

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

X NO

8.4 Other

- YES
- NO

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
- **X NO**
- OTHER

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

- YES
- NO
- **X OTHER**

Please explain

Further improvements can be made by allowing the merging businesses to consistently use a one stop shop review rather than occasionally having to refer to multi-jurisdictional filings.

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?

- **X YES**
- NO
- OTHER

Please explain

The costs seem to be balanced in the light of the one stop shop advantage. It would be beneficial to those conducting EU mergers if the EU procedure would be extended to Norway and Switzerland.

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

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.
- **X 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
- **X 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.

(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?

- **X 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.

A light information system should apply.

(iii) Other.

I.2. Jurisdictional thresholds

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
- **X OTHER**

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

Besides the case of Facebook/Whatsapp no further example known.

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
- **X NO**
- ○ OTHER

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
- **X NO**
- ○ OTHER

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)?

- **X YES**

- NO
- OTHER

Please explain.

There is no relevant enforcement gap which needs to be closed by introducing another transaction-based threshold. Experience has shown that previous introductions of transaction-based thresholds were too general to work sufficiently.

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
- **X OTHER**

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

There is a general risk of data-based market dominance. Yet, the introduction of a general notification threshold for any industries is clearly too far-reaching. It increases - without sound justification - the burden for a majority of companies.

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
- **X OTHER**

Please explain.

Please see the answer to question 18.

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.

N.A.

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.

Connecting transactions to a local nexus would be a tool to correct an extensive deal size threshold which would be a positive development. However, it would need to be ensured that clear criteria are developed in order to sufficiently measure a local nexus (unclear market definitions, on the contrary, would not lead to any improvements).

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?

- **X 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.).
- **X Other.**

Please explain your answer.

We would like to note that the introduction of a deal size threshold results in practical difficulties.

I.3. Referrals

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?

- **X YES**
- NO
- OTHER

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.

N.A.

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
- **X NO**
- OTHER

I.4. Technical aspects

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?

Yes, there is scope to improve the current system. In particular, the allocation of turnover of a jointly controlled joint venture should be modified. It is difficult (or at times impossible) for companies to include figures which are not part of the accounting and reporting system of consolidated companies.

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?

No, no other shortcomings of a technical nature are known.

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
- **X NO**
- ○ OTHER

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?

- **X YES**
- ○ NO
- ○ OTHER