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**COMMISSION STAFF WORKING DOCUMENT**

**EVALUATION**

**of procedural and jurisdictional aspects of EU merger control**

{SEC(2021) 156 final} - {SWD(2021) 67 final}

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## Glossary

Term or acronym	Meaning or definition
1989 Merger Regulation	Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p.1) replaced by the recast 2004 EU Merger Regulation (see below)
2013 simplification package	Reform aimed at simplifying merger procedures, carried out by adopting: (i) Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings; and (ii) Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6)
2014 staff working document	Staff working document (SWD(2014) 221 final) accompanying the white paper <i>Towards more effective EU merger control</i>
2014 white paper	White paper <i>Towards more effective EU merger control</i> (COM(2014) 449 final)
DG COMP	Directorate-General for Competition of the European Commission
ECN	European Competition Network (ECN)
EEA	European Economic Area
EU	European Union
EU Merger Regulation or EUMR	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.01.2004, p. 1)
Evaluation	Evaluation of procedural and jurisdictional aspects of EU merger control

GAFAM	Google, Amazon, Facebook, Apple, Microsoft
Form CO	Form for making a notification of a concentration pursuant to the EU Merger Regulation (Annex I to the Merger Implementing Regulation)
Form RS	Form for making a reasoned submission for a referral of a concentration pursuant to Articles 4(4) and 4(5) of the EU Merger Regulation (Annex III to the Merger Implementing Regulation)
ICN	International Competition Network
Merger Implementing Regulation	Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 336, 14.12.2013, p. 1), as amended by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013
NCA	National competition authority of an EU Member State
Notice on referrals	Commission Notice on Case Referral in respect of concentrations (OJ C 56, 05.03.2005, p. 2)
Notice on simplified procedure	Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6)
OECD	Organisation for Economic Co-operation and Development
Public Consultation	Public consultation launched within the <i>Evaluation of procedural and jurisdictional aspects of EU merger control</i>
Short Form CO	Form for making a notification of a concentration under the simplified procedure pursuant to the EU Merger Regulation (Annex II to the Merger Implementing Regulation)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

## 1. INTRODUCTION

### 1.1. LEGAL AND POLITICAL CONTEXT

- (1) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup> (the EU Merger Regulation or EUMR) entrusts the Commission with the control of major corporate reorganisations<sup>2</sup> that may bring significant structural changes on the market, the impact of which would go beyond the national borders of any one Member State<sup>3</sup>. The objective of the EUMR is to ensure that such operations do not result in lasting damage to competition by significantly impeding effective competition in the internal market or in a substantial part of it<sup>4</sup>.
- (2) To that effect, the EU Merger Regulation grants the Commission exclusive jurisdiction to review these transactions. The Regulation institutes a one-stop shop for the control of concentrations falling under its scope of application (concentrations with ‘an EU dimension’). The latter is defined using quantitative thresholds, based on the individual and combined turnover generated by the undertakings concerned worldwide, in the European Union (EU) and in each Member State<sup>5</sup>. Conversely, concentrations not covered by the EU Merger Regulation may come within the jurisdiction of one or several Member States, in accordance with their respective national rules<sup>6</sup>.
- (3) The EU Merger Regulation contains a corrective mechanism for the application of these quantitative jurisdictional thresholds. Under specific circumstances, this allows for the review of individual cases to be referred between the Commission and one or several Member States. The system of referrals allows the best-placed authority to review cases for which it did not have initial jurisdiction<sup>7</sup>.
- (4) The rules that determine the Commission’s jurisdiction under the EU Merger Regulation – namely its turnover-based jurisdictional thresholds – and the provisions governing the referral of cases to and from Member States are instrumental in ensuring that concentrations that may have a significant impact on competition in the internal market are subject to effective control. In 2008-2009, the Commission reviewed the application and functioning of these provisions<sup>8</sup>.

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<sup>1</sup> [Council Regulation \(EC\) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings](#) (OJ L 24, 29.01.2004, p. 1).

<sup>2</sup> Such operations include: (a) mergers of two or more previously independent undertakings or parts of undertakings; (b) acquisitions, by one or more persons already controlling at least one undertaking, or by one or more undertakings, of (direct or indirect) control of the whole or parts of one or more other undertakings; and (c) creation of joint ventures performing on a lasting basis all the functions of an autonomous economic entity (typically known as ‘full function joint ventures’). Cf. EUMR, Article 3. Joint ventures are companies owned/controlled by several undertakings (the joint venture’s ‘parent companies’).

<sup>3</sup> EUMR, Recitals 3 and 8.

<sup>4</sup> EUMR, Recitals 5 and 6.

<sup>5</sup> EUMR, Article 1.

<sup>6</sup> EUMR, Recitals 8, 9 and 10.

<sup>7</sup> EUMR, Recital 11.

<sup>8</sup> In 2008, the Commission launched a [public consultation](#) to evaluate the functioning of the rules on jurisdictional thresholds and referral mechanisms of the EU Merger Regulation. In 2009, the Commission

- (5) Over the years, the Commission has sought to reduce the administrative burden on notifying firms and third parties resulting from EU merger control proceedings, without undermining the effectiveness of the EU merger control system. In 2000, it introduced a simplified procedure for categories of cases deemed from the outset not to raise competition concerns. In these cases, notifying parties are required to provide less information to the Commission (notably through the use of a shorter notification form), and the Commission generally does not conduct a comprehensive market investigation, which also results in less information being required from third parties. Such procedures are normally completed faster. In 2013, the Commission adopted a number of measures (2013 simplification package<sup>9</sup>) aimed principally at extending the categories of simplified cases treated and at reducing the information requirements for merger notifications. The 2013 simplification package entered into force on 1 January 2014.
- (6) Also in 2014, the Commission adopted the white paper *Towards more effective EU merger control*<sup>10</sup> (2014 white paper). The 2014 white paper and accompanying documents took stock of issues concerning the substantive assessment of EU merger control, in particular the application of the revised legal test<sup>11</sup> – significant impediment to effective competition – for the review of concentrations under the EU Merger Regulation, introduced in 2004. In the white paper, the Commission explained EU merger control’s important contribution to the functioning of the internal market, and described how the new test had enabled the elimination of a possible enforcement gap. The white paper also emphasised how the Commission had strengthened the economic analysis in its enforcement practice, and underlined the increased importance of its work to examine the effects of mergers on innovation and to ensure the effectiveness of merger remedies. The Commission found that ‘merger control at the EU level was strengthened by the 2004 Merger Regulation reforms’ and that the EU Merger Regulation ‘provides a good framework for effectively protecting competition and thus consumers from anticompetitive effects of mergers and acquisitions in the internal market’.

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adopted a [Communication to the Council Report on the functioning of Regulation No 139/2004](#) (COM(2009) 281 final), accompanied by a [Staff Working Paper](#) (SEC(2009) 808 final/2).

<sup>9</sup> The [2013 simplification package](#) included the Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 336, 14.12.2013, p. 1: the ‘[Merger Implementing Regulation](#)’) and a new Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6; the ‘[Notice on simplified procedure](#)’). The 2013 simplification package streamlined the forms required for notifying mergers or making pre-notification referral requests (i.e. Form CO, Short Form CO and Form RS, annexed to the Merger Implementing Regulation), reducing information requirements for both simplified and non-simplified cases.

<sup>10</sup> [White paper Towards more effective EU merger control](#) (COM/2014/0449 final). See as well the accompanying [staff working document](#) (SWD(2014) 221 final), [impact assessment](#) (SWD(2014) 217 final) and [executive summary of the impact assessment](#) (SWD(2014) 218 final). The adoption of the white paper had been preceded by a public consultation in 2013. In 2014, the Commission carried out a [consultation](#) on the white paper.

<sup>11</sup> The test was introduced in 2004 through adoption of the EUMR, recasting and replacing the 1989 Merger Regulation. The 2004 reform constitutes the most significant overhaul of the EU merger regime to date. The adoption of the EUMR was accompanied by the progressive development of specific guidance (generally in form of Commission notices) on the most relevant aspects of merger assessment and enforcement, in order to improve the transparency and predictability of the Commission’s merger analysis.

- (7) The 2014 white paper concluded that no fundamental overhaul of the EU merger system was needed, but identified at that stage ‘two main ways to improve the Merger Regulation through more limited amendments’. In particular, it explored the possibility of extending the Commission’s jurisdiction under the EU Merger Regulation to include acquisitions by undertakings of minority shareholdings that do not result in an acquisition of control but can potentially harm competition. It also considered making procedures simpler and referrals more business-friendly and effective<sup>12</sup>.
- (8) After the adoption of the 2014 white paper, and following further comprehensive analysis, the Commission decided not to further assess the possible extension of the EU Merger Regulation to review non-controlling minority shareholdings. The Commission considered that there was not sufficiently compelling evidence that such a reform was warranted at that point. The work conducted had also identified significant complexities for the effective implementation of this reform at European level<sup>13</sup>.
- (9) Furthermore, after 2014, a debate progressively emerged on the effectiveness of the turnover-based jurisdictional thresholds of the EU Merger Regulation. This debate specifically addressed whether the thresholds make it possible to sufficiently capture those concentrations that can potentially have an impact on competition in the internal market<sup>14</sup>. This notably concerned transactions involving high-value firms that had generated limited turnover at the time of the acquisition – as illustrated by Facebook’s acquisition of WhatsApp in 2014 for a purchase price of USD 19 billion<sup>15</sup>. This market development appeared particularly significant in the digital economy, where services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories before implementing a business model that could result in significant revenues. Furthermore, in sectors like pharmaceuticals, firms appeared ready to pay a high price for the acquisition of innovative companies conducting research and development projects, even if these companies had not yet finalised, let alone exploited

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<sup>12</sup> The staff working document accompanying the 2014 white paper (2014 staff working document) also addressed a number of more technical issues mainly related to the procedural and investigatory mechanisms set out in the EUMR. Those technical aspects were of relatively marginal importance, however. While the Commission asked questions about those aspects in the Public Consultation, they were not the focus of the Evaluation, and as such are not part of the analysis of this staff working document.

<sup>13</sup> In 2016, DG COMP commissioned and published an independent support study for impact assessment concerning the possible review of the EUMR regarding minority shareholdings. In their final report, the authors of the study (Spark Legal Network and Queen Mary University of London) identified a number of reservations concerning the introduction of a system for the control of minority shareholdings in the EUMR. See also the announcement of the then Commissioner Vestager in her speech at the Studienvereinigung Kartellrecht ([Refining the EU merger control system](#)) on 10 March 2016.

<sup>14</sup> In 2015, the study [Challenges for Competition Policy in a Digitalised Economy](#), prepared for the European Parliament’s Committee on Economic and Monetary Affairs, called for revised jurisdictional thresholds at European level based on the number of users and/or network effects. At Member State level, in its 2015 report [Competition policy: The challenge of digital markets](#), the German Monopolies Commission, an independent expert committee, recommended complementing the existing merger control thresholds by additional notification requirements based on the transaction value to close legal gaps.

<sup>15</sup> The transaction consisting of the acquisition of WhatsApp by Facebook was agreed in February 2014 and did not meet the turnover thresholds of the EU Merger Regulation. In May 2014, Facebook requested a referral of the review of this deal to the Commission. The latter approved unconditionally the transaction after a phase I investigation (M.7217 – Facebook/WhatsApp, 2014).



commercially, the results of their innovation activities. Consequently, such transactions concerned firms that already played or would in future play a significant competitive role on the market(s) at stake but had generated little turnover at the moment when they were acquired. They may thus fall outside the Commission's jurisdiction under the EU Merger Regulation, as determined by its turnover-based thresholds. These developments continued in recent years. The outbreak of the COVID-19 pandemic in 2020 has given further importance to these considerations. Due to social distancing measures, EU citizens and businesses have relied even more on digital services. Furthermore, the pandemic and its effects on the health and economic well-being of EU citizens have highlighted the importance of fostering dynamism and innovation in the EU economy, including crucially in the pharmaceutical sector. Making sure that concentrations do not jeopardise the benefits of competitive dynamism – and that, accordingly, the Commission is able to protect competition in the internal market by examining the relevant mergers and dealing with them in efficient procedures – has therefore only gained in importance in the immediate aftermath of the pandemic outbreak and the upcoming recovery phase.

## 1.2. PURPOSE OF THE EVALUATION

- (11) The purpose of the Evaluation of procedural and jurisdictional aspects of EU merger control ('Evaluation') launched in August 2016 was to build upon and complement the initiatives, reforms, work streams, reviews and public consultations conducted by the Commission in previous years (particularly between 2013 and 2014) by assessing the functioning of selected aspects of EU merger control, to inform any related policy action in the future, including possible reforms of the relevant regulatory texts<sup>16</sup>.
- (12) Building on the overall findings of the 2014 white paper – described in paragraphs (6) and (7) above – and the additional work subsequently conducted, the Evaluation focused on specific procedural and jurisdictional aspects of EU merger control where the Commission had identified potential room for improvement. In light in particular of the 2014 white paper's conclusions on how EU merger control was strengthened by the 2004 reforms, the Evaluation did not include aspects concerning the substantive assessment of mergers (namely those aspects related to the examination of whether or not a notified concentration significantly impedes effective competition in the internal market – and, if so, how to remedy it)<sup>17</sup>. While the procedural and jurisdictional aspects under evaluation are to some extent interdependent with those of the substantive assessment, they present clearly defined features, address separate questions and are dealt with by specific provisions of the EU Merger Regulation and accompanying texts.
- (13) The Evaluation, accordingly, did not set out to examine the overall functioning of the EU merger system, but focused principally on two related topical issues.
- (14) First, whether the current framework for EU merger control sufficiently allows the Commission to capture and review concentrations that may have a significant impact on

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<sup>16</sup> See Evaluation Roadmap, page 2.

<sup>17</sup> See, in particular, the 2014 white paper conclusions on the positive effects of the introduction of the test – significant impediment to effective competition – in the recast EU Merger Regulation.

effective competition in the internal market or, conversely, whether potentially problematic mergers may fall outside the Commission's jurisdiction. At the core of this topic lies the aforementioned emerging issue of the effectiveness of the purely turnover-based jurisdictional thresholds of the EU Merger Regulation in view of observed high-price transactions for targets having low turnover in digital, pharma and other sectors.

- (15) Second, whether the initiatives to simplify the EU merger system adopted in 2013 had resulted in a significant reduction in the burden involved in merger proceedings without undermining effective merger control. As a corollary of this second aspect, it appeared appropriate, in line with the Commission's overall priorities and Better Regulation rules, to also explore whether there was potential to further simplify EU merger control and reduce the accompanying burden – including with regard to the system of referral of cases – without unduly reducing its effectiveness.
- (16) These two overarching procedural and jurisdictional topics are instrumental in assessing whether the EU merger system is apt to meet its general objective of ensuring that concentrations do not result in lasting damage to competition in the internal market, while limiting the associated burden and costs where possible.

### 1.3. SCOPE OF THE EVALUATION

- (17) Within this framework, the aforementioned two broad categories of issues informed the design of the scope of the Evaluation, which has included the following specific topics<sup>18</sup>:
  - a. the functioning of the turnover-based jurisdictional thresholds set out in the EU Merger Regulation;
  - b. the functioning of the case referral mechanisms set out in the EU Merger Regulation, the Merger Implementing Regulation and the Commission Notice on referrals<sup>19</sup>; and
  - c. the treatment of certain categories of cases that do not generally raise competitive concerns (generally known as 'simplified cases'), as set out in the EU Merger Regulation, the Merger Implementing Regulation and the Commission Notice on simplified procedure.
- (18) The scope of the Evaluation was closely linked to its targeted purpose and was limited to these selected procedural and jurisdictional aspects of EU merger control.
- (19) Other prominent debates have surfaced in recent years on issues directly or indirectly related to the enforcement of EU merger control. First, on the interaction with EU industrial policy, in particular on whether EU merger control takes sufficiently into account the increased globalisation of the economy and whether it impedes the emergence of European (industrial) champions and the development of an ambitious

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<sup>18</sup> See Evaluation Roadmap, pages 3–4.

<sup>19</sup> Commission Notice on Case Referral in respect of concentrations (OJ C 56, 05.03.2005, p. 2: [Notice on referrals](#)).

industrial strategy<sup>20</sup>. Second, on the lack of a level playing field globally in different economic sectors and the potentially distorting effects of foreign subsidies and third-country state support to companies<sup>21</sup>. Third, on the effects for the substantive assessment of mergers of the increased digitisation of the economy<sup>22</sup>. Fourth, on the observed increased concentration in some economic sectors in past decades, with a few firms significantly increasing their margins to the detriment of their customers and the risk of a rise in inequality<sup>23</sup>.

- (20) The Evaluation does not specifically address these debates, which do not directly concern the procedural and jurisdictional aspects under review and, in some cases, go well beyond EU merger control. In part, these discussions concern the Commission's enforcement practice in interpreting and applying the existing rules in the EU Merger Regulation to individual cases or types of cases.
- (21) The Commission has continued to develop its approach to substantive issues of EU merger control in individual cases and sectors over recent years. For instance, it has put

<sup>20</sup> While this debate is not novel, its resurgence appears to have been prompted by the Commission's prohibition of the merger between railway firms Siemens and Alstom (M.8677, 2019). On 18 December 2018, representatives of 18 EU governments called for a renewed EU industrial policy in a [Joint Statement](#) adopted at the 6<sup>th</sup> Ministerial Meeting of the *Friends of Industry* in Paris. On 19 February 2019, the German Federal Ministry for Economic Affairs and Energy and the French Ministry for Economy and Finances made public the [Franco-German Manifesto for a European industrial policy fit for the 21<sup>st</sup> century](#). Several technical reports from various public bodies followed suit, such as the note of 6 May 2019 [Competition and Trade: which policies for the EU?](#), by the French Council of Economic Analysis and the joint report of 3 June 2019 [Competition policy and EU strategic interests](#) by the Inspectorate General of Finance and the General Council for the Economy. On 4 July 2019, the German and French ministries, together with Poland's Ministry of Entrepreneurship and Technology, published the paper [Modernising EU Competition Policy](#). Furthermore, on 4 February 2020, the Ministries of Economic Development of France, Germany, Poland and Italy addressed a [joint](#) letter to Executive Vice-President Vestager. On 20 July 2020, the French Senate adopted a [resolution](#) on the modernisation of EU competition policy. On 26 November 2019, the Austrian Federal Competition Authority published a [Position paper on national and European champions in merger control](#). Other contributions include a report by the European Political Strategy Centre (EPSC) [EU Industrial Policy after Siemens-Alstom](#) (18 March 2019), an [article](#) by the Nordic Competition Authorities (26 June 2019), papers by the business associations Business Europe [Improving EU Competition and State Aid Policy](#) (4 September 2019) and European Roundtable of Industrialists [Competing at Scale](#) (7 October 2019), a report of the EU Affairs Committee of the French Parliament on *EU Competition Law Facing the Challenges of Globalization* (November 2019), a report by Robert Schuman Foundation [Competition Policy and Industrial Policy: for a Reform of European Law](#) (January 2020), a [letter](#) by the Swedish Minister of Economic Affairs, on behalf of counterparts in eight Member States (March 2020). On 25 November 2020, the European Parliament adopted a [Resolution on a New Industrial Strategy for Europe](#).

<sup>21</sup> See Communication [EU-China – A strategic outlook](#), adopted by the Commission on 12 March 2019, notably its Action 8. The European Council endorsed this strategy in its conclusions of 22 March 2019.

<sup>22</sup> Commission 'Competition Law 4.0' (set up by the Germany Federal Minister for Economic Affairs and Energy), [A New Competition Framework for the Digital Economy](#), September 2019; Stigler Committee on Digital Platforms, [Final Report](#), September 2019; Australian Competition & Consumer Commission (ACCC), Digital Platforms Inquiry [Final Report](#), June 2019; Lear, [Ex-post Assessment of Merger Control Decisions in Digital Markets](#), 9 May 2019; Digital Competition Expert Panel chaired by Professor Furman, [Unlocking Digital Competition](#), March 2019. See also OECD Background Note, [Start-ups, Killer Acquisitions and Merger Control](#), 7 May 2020.

<sup>23</sup> See e.g. De Loecker, J., Eeckhout, J., and Unger, G., *The Rise of Market Power and the Macroeconomic Implications* (2018); Kwoka, J. *Reviving Merger Control, a Comprehensive Plan for Reforming Policy and Practice* (2018); Valletti, T. and Zenger, H.: *Increasing Market Power and Merger Control* (CLPD 2/2019, page 40), and *OECD Productivity Working Papers: 'Industry Concentration in Europe and North America'* (2019).

particular emphasis on assessing the effects of mergers on parameters of competition other than price, as well as on dynamic effects, including in the digital economy<sup>24</sup>. Economic developments, such as the increased concentration of some economic sectors or high levels of common shareholdings, have also played a role in the substantive assessment of mergers. They have been taken into account to the extent that they influence the expected effects of the mergers under assessment<sup>25</sup>.

- (22) Furthermore, the Commission has launched separate specific work streams and initiatives regarding – and going beyond – these topics and addressing, directly or indirectly, recent debates about EU merger control:
- a. In 2018, the Commission conducted a public consultation on competition and digitisation. In 2019, it organised a high-level conference<sup>26</sup> and published a report on competition policy in the digital era<sup>27</sup>. This was prepared by three special advisers, appointed by Commissioner M. Vestager. In December 2020, the Commission presented a legislative proposal for a Digital Markets Act<sup>28</sup>, which includes *ex ante* rules (both prohibitions and obligations) for digital platforms having a gatekeeper role and a market investigation framework to examine digital markets. The companies designated as gatekeepers would also be required to inform the Commission of any proposed acquisition of other providers of core platform services or any other service provided in the digital sector.
  - b. In December 2019, the Commission announced and subsequently launched the evaluation of the Market Definition Notice<sup>29</sup>. The Commission carried out a public consultation<sup>30</sup> between June and October 2020, is consulting the national competition authorities of the Member States, and is carrying out extensive research into best practices in market definition. The topics covered in this exercise relate to: (i) the role of market definition in EU competition law assessments; (ii) potential changes to the Market Definition Notice to reflect the market realities of the digital

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<sup>24</sup> The assessment of the effects of mergers on innovation and quality, which has resulted in a number of interventions or in-depth probes in sectors like digital, pharma, medical devices, agro-chemicals and basic industries, provides a good illustration of that development. See for example the Commission decisions in cases: M.8788 – Apple/Shazam, 2018; M.8124 – Microsoft/LinkedIn, 2016; M.8084 – Bayer/Monsanto, 2018; M.7932 – Dow/DuPont, 2017; or M.7275 – Novartis/GSK Oncology Business, 2015. The Commission’s enforcement decisions in individual cases are taken on the basis of all available evidence and, importantly, take into account feedback from all relevant stakeholders concerned by the merger, including crucially from the industry affected. The Commission decisions are also subject to review by the European courts, whose jurisprudence is a significant factor in EU merger enforcement.

<sup>25</sup> See, for instance, Commission decisions in cases M.8084 – Bayer/Monsanto, 2018, and M.7932 – Dow/DuPont, 2017.

<sup>26</sup> [Shaping competition policy in the era of digitisation](#) (17 January 2019).

<sup>27</sup> Cr  mer, J., de Montjoye, Y-A. and Schweitzer H., [Competition policy for the digital era](#) by (4 April 2019).

<sup>28</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final. This is an internal market tool based on the harmonisation provision of Article 114 TFEU, similar to the regulation of other sectors such as telecommunications, energy or finance. The obligations for digital gatekeepers are inspired, among others, by the Commission’s experience in antitrust enforcement in the digital sector.

<sup>29</sup> [Defining markets in a new age](#), Speech by Commission Executive Vice-President M. Vestager of 9 December 2019; [Roadmap](#) for the Evaluation of the Market Definition Notice published on 3 April 2020; [Public consultation](#) on the Evaluation of the Market Definition Notice launched on 26 June 2020.

<sup>30</sup> [Public consultation](#) on the Evaluation of the Market Definition Notice launched on 26 June 2020.

economy (multi-sided markets and markets with zero monetary price, data-driven markets, digital ecosystems, e-commerce); and (iii) a reflection on the consequences of the increasingly interconnected nature of economies for market definition.

- c. In March 2020, the Commission laid out an ambitious new industrial strategy<sup>31</sup> to ensure that European businesses can lead the twin transition towards climate neutrality and digital leadership. The strategy acknowledges that being competitive requires competition – both at home and in the world. It aims to increase the competitiveness of European industry, both within the internal market and globally, while not being naive in the face of unfair competition.
- d. In line with those considerations, the Commission started preparatory work in 2020 concerning a possible instrument to tackle the anticompetitive effects of foreign subsidies. Thus, in June 2020, the Commission adopted a white paper<sup>32</sup> dealing with the distorting effects caused by foreign subsidies in the internal market. It sought views from all stakeholders on the options set out in the white paper, to help the Commission prepare for appropriate legislative proposals in this area.
- e. In February 2021, the Commission held the conference ‘Competition policy contributing to the European Green Deal’ to launch a European debate on how EU competition policy can best support the Green Deal.<sup>33</sup>

#### 1.4. EVALUATION CRITERIA AND SCHEDULE

- (23) The Evaluation covers the core EU evaluation criteria, namely: (i) effectiveness; (ii) efficiency; (iii) relevance; (iv) coherence; and (v) EU added value. Each of these criteria are applied, as appropriate, to the described procedural and jurisdictional aspects of EU merger control under review.
- (24) The Evaluation focused principally on the period from 2014 onwards, which followed the merger specific work streams, public consultations and assessments already carried out by the Commission on these topics. In specific instances, however, a longer schedule has been considered.
- (25) The Evaluation has been selected by the Regulatory Scrutiny Board as one of the strategic policy evaluations and fitness checks in 2019-2020.

## 2. BACKGROUND TO THE INTERVENTION

### 2.1. DESCRIPTION OF THE INTERVENTION AND ITS INTERVENTION LOGIC

- (26) The EU is committed to establishing an internal market that supports the sustainable development of Europe based on balanced economic growth and a highly competitive

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<sup>31</sup> Communication from the Commission [A New Industrial Strategy for Europe](#) of 10 March 2020; Factsheet [A new Industrial Strategy for a globally competitive, green and digital Europe](#) of 10 March 2020.

<sup>32</sup> [White Paper on levelling the playing field as regards foreign subsidies](#) (COM(2020) 253 final of 17.6.2020). Information about the public consultation can be found [here](#).

<sup>33</sup> Information on the conference can be found [here](#). A particular concern was raised about incumbent companies with a strong position in business that are not environmentally friendly in acquiring undertakings active in ‘green’ innovation, leading to so-called ‘killer’ acquisitions.

social market economy<sup>34</sup>. The EU has exclusive competence to establish the competition rules necessary for the functioning of the internal market<sup>35</sup>. The three instruments of EU competition law are the prohibition of anticompetitive practices<sup>36</sup>, the control of State aid<sup>37</sup> and merger control. The general objective of EU competition law, including merger control, is thus to contribute to the EU's internal market and related goals.

- (27) The need the EU merger control system aims to address is that business concentrations, while often in line with the requirements of dynamic competition, may in certain cases undermine the structure of competition. The general objective of EU merger control, as set out in the EU Merger Regulation, its implementing regulation and related notices and guidelines, is to ensure that these concentrations do not result in lasting damage to effective competition<sup>38</sup>. Such damage could involve decreased choice, increased prices, decreased quality and/or decreased innovation, to the detriment of consumers and businesses and of productivity and economic growth.
- (28) In terms of success criteria, it is inherently difficult to measure the impact of an effective merger control system. One of its effects is deterring anticompetitive mergers – which is impossible to measure as such mergers do not occur where the control is effective. In spite of this, the Commission annually estimates the customer savings resulting from its interventions in mergers, based on the methodology and guidance provided by the OECD<sup>39</sup>. While those measures carry inherent methodological complexities and present some shortcomings (for instance, the need to rely on certain assumptions and the omission of non-price effects, respectively), they can provide a rough indication of some of the benefits of EU merger control. According to these estimates, the average yearly customer benefits resulting from merger interventions by the Commission in the period 2014-2019 was between EUR 7.5 billion and 12.6 billion.

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<sup>34</sup> Article 3(3) of the [Treaty on European Union](#).

<sup>35</sup> Article 3(1)(b) of the [Treaty on the Functioning of the European Union](#) (TFEU).

<sup>36</sup> TFEU, Articles 101-106.

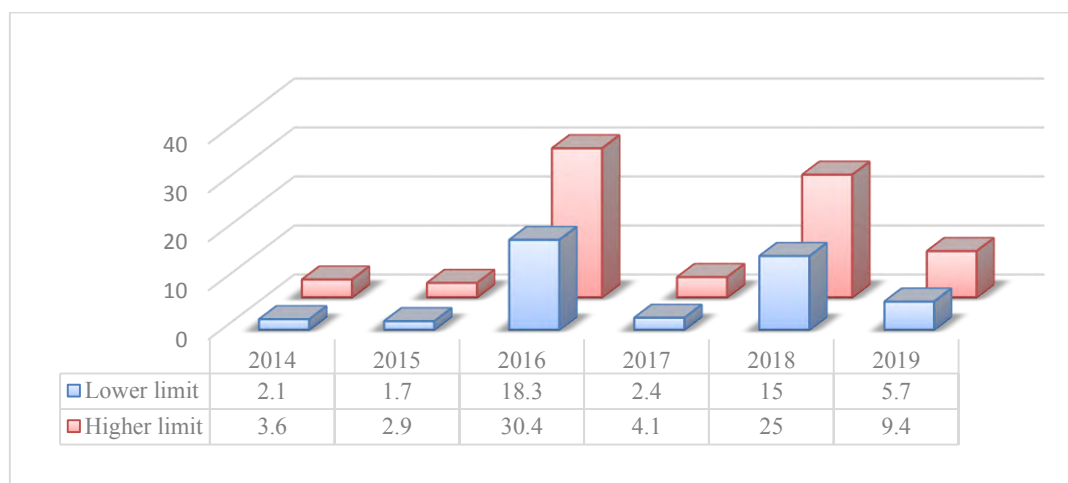
<sup>37</sup> TFEU, Articles 107-109.

<sup>38</sup> EUMR, Recitals 5 and 6.

<sup>39</sup> Every year, the Commission estimates the benefits to customers resulting from its merger interventions and publishes them in DG COMP's annual activity report. The methodology takes into account prohibitions, conditional approvals and withdrawals of notifications in phase II and is based on three main parameters: (i) likely price increase avoided (two assumptions are typically used: 3% and 5% respectively for the lower and upper boundaries of the calculation); (ii) total size (by value) of the product markets affected; and (iii) expected duration of the price increase avoided (in each case, the prevalent barriers to entry are specifically examined in order to estimate the relevant periods). See DG COMP, [Annual Competition Report 2019](#), page 12.



**Figure 1: Estimated consumer benefits (EUR bn) from EU merger interventions (2014-2019)**



- (29) EU merger control provides for a compulsory *ex ante* notification system, where certain concentrations have to be notified to the Commission and can only be implemented after obtaining clearance. To that effect, it grants investigatory powers to the Commission. In terms of specific activities, the EU merger control system therefore:
- Requires merging parties to notify concentrations meeting the jurisdictional criteria of the EU Merger Regulation<sup>40</sup> (by filling out a specific notification form, ‘Form CO’), to delay closing of the concentration until the Commission’s approval is given<sup>41</sup>, and to provide all information that the Commission requests and that is necessary to carry out the merger control investigation<sup>42</sup>.
  - Requires third parties (e.g. customers, competitors and suppliers of the merging parties) to provide all information that the Commission requests and that is necessary to carry out the merger control investigation<sup>43</sup>.
  - Requires the Commission to assess concentrations under a competition test<sup>44</sup>: would the concentration significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position? In its assessment, the Commission defines the relevant product and geographic markets in which the merging companies are active<sup>45</sup>. On that basis, it establishes whether there are horizontal<sup>46</sup>, vertical<sup>47</sup> or

<sup>40</sup> EUMR, Article 4(1). Merger Implementing Regulation, Article 3.

<sup>41</sup> EUMR, Article 7(1).

<sup>42</sup> EUMR, Article 11. Failure to follow these rules can result in fines being imposed on the undertakings (EUMR, Article 14).

<sup>43</sup> EUMR, Article 11. Failure to provide correct and complete information can result in fines being imposed also on the third parties (EUMR, Article 14).

<sup>44</sup> EUMR, Article 2.

<sup>45</sup> Guidance on market definition is set out in the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5: [Market Definition Notice](#)).

<sup>46</sup> Horizontal overlaps arise when undertakings are engaged in business activities in the same product and geographic market. Horizontal overlaps are assessed following the principles set out in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C31, 5.2.2004, p.5: [Horizontal Merger Guidelines](#)).

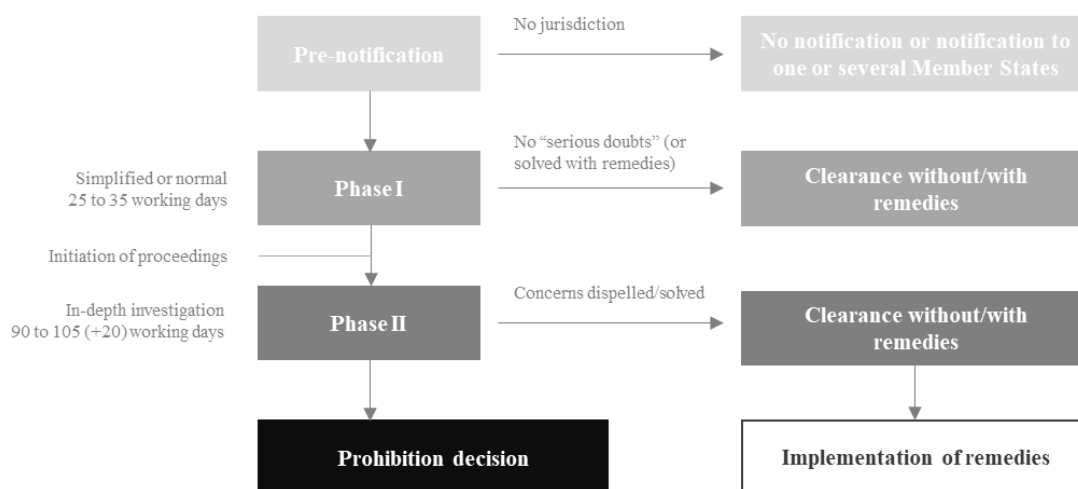
<sup>47</sup> Vertical links arise when an undertaking is engaged in business activities in a product market that is upstream or downstream from a product market in which another undertaking is engaged.

other<sup>48</sup> relevant relationships between business activities of the merging undertakings. If the Commission identifies competition concerns, the merging undertakings may offer remedies, such as divesting parts of their business activities to an independent purchaser. If those remedies are sufficient to remove the competition concerns, the Commission will issue a clearance decision conditional on full implementation of the remedies<sup>49</sup>.

- d. Requires the Commission to issue its decision within short legal deadlines. Upon receipt of the notification, the Commission has to assess within 25 working days (phase I) whether the proposed concentration raises serious doubts as to its compatibility with the internal market. If the Commission does not identify such doubts within phase I or if they can be removed by appropriate remedies offered by the undertakings, the Commission clears the concentration. Conversely, if at the end of phase I the Commission has such serious doubts, it opens an in-depth second phase investigation of an additional 90 working days (phase II), which can be extended under specific circumstances<sup>50</sup>. Failure to issue a decision within the deadlines results in the concentration being deemed to have been approved<sup>51</sup>.

- (30) At the end of the process, the Commission issues a decision setting out whether or not the proposed concentration impedes effective competition in the internal market.. The decision can be an unconditional clearance<sup>52</sup>, a clearance conditional on the implementation of remedies<sup>53</sup>, or a prohibition of the transaction<sup>54</sup>.

**Figure 2: Overview of the EU merger control process (flowchart)**



<sup>48</sup> Other relevant relations may concern for instance conglomerate links where one of the merging undertakings is present in a neighbouring product market closely related to that in which another undertaking is engaged. Vertical and conglomerate relationships are assessed following the principles set out in the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C265, 18.10.2008, p.6: [Non-Horizontal Merger Guidelines](#)).

<sup>49</sup> EUMR, Recital 30, Articles 6(2) and 8(2). Guidance on the assessment of merger remedies is set out in the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C267, 22.10.2008, p.1: [Remedies Notice](#)).

<sup>50</sup> EUMR, Article 10.

<sup>51</sup> EUMR, Article 10(6).

<sup>52</sup> EUMR, Articles 6(1)(b) and 8(1). If the Commission concludes that it does not have jurisdiction over a notified transaction, it records this finding in a decision pursuant to Article 6(1)(a) EUMR.

<sup>53</sup> EUMR, Article 6(1)(b) in conjunction with 6(2) and Article 8(2).

<sup>54</sup> EUMR, Article 8(3).



- (31) In terms of the specific output of the EU merger control process, and depending on the type of decision adopted by the Commission, the merging parties: (a) implement the concentration as originally planned; (b) implement it in line with the conditions attached to the decision (namely the remedies offered by the undertakings, such as the divestment of certain business activities to an independent purchaser); or (c) abandon the concentration.
- (32) The EU merger control system is thus designed to result in preventing concentrations from causing lasting damage to competition in the internal market by allowing the Commission to identify anticompetitive transactions and to impose conditions on their implementation or block them.
- (33) By protecting effective competition in the internal market, the EU merger control system is designed to foster a strengthened EU internal market, balanced economic growth and a highly competitive social market economy.
- (34) Within this overall intervention logic of EU merger control, the procedural and jurisdictional aspects under evaluation pursue complementary specific objectives. Their contribution to the overall intervention logic of EU merger control will be set out in Section 2.1.1 for the jurisdictional aspects and Section 2.1.2 for the procedural aspects.

#### *2.1.1. Jurisdictional aspects*

- (35) The jurisdictional provisions of the EU merger control system have the following aims. First and foremost, they allow it to capture concentrations that may lead to lasting damage to competition in the internal market. As a secondary objective, the provisions allow companies to self-assess whether their proposed transaction falls under the EU merger control rules<sup>55</sup>. The specific objective of the jurisdictional thresholds, set out in Article 1 of the EU Merger Regulation, is therefore to target the application of EU merger control to significant structural changes, the market impact of which goes beyond the national borders of any one Member State<sup>56</sup>.
- (36) These thresholds are central to establishing whether a concentration will need approval from the Commission. If they are not met, it may either need approval from a Member State national competition authority ('NCA') or no approval at all, depending on the applicable national merger rules. Thus, some transactions falling outside the scope of application of the EU Merger Regulation may not be subject to review by any NCA; in other instances, the jurisdiction of the NCA may be insufficient to capture all effects of the proposed concentration in the internal market.
- (37) The turnover-based jurisdictional thresholds of the EU Merger Regulation are set out in Figure 3<sup>57</sup>.

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<sup>55</sup> The solely quantitative turnover criteria are based on the geographical activity of the undertakings concerned (EUMR, Recitals 9 and 10).

<sup>56</sup> EUMR, Recital 8.

<sup>57</sup> EUMR, Articles 1 and 5.

**Figure 3: Jurisdictional thresholds of the EU Merger Regulation**

Article 1(2) EUMR	Article 1(3) EUMR
Combined worldwide turnover of all undertakings concerned > EUR 5 billion	Combined worldwide turnover of all undertakings concerned > EUR 2.5 billion
EU-wide turnover of each of at least two of the undertakings concerned > EUR 250 million	In 3 Member States, combined turnover of > EUR 100 million and turnover of each of at least two of the undertakings concerned > EUR 25 million
	EU-wide turnover of each of at least two of the undertakings concerned > 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 (2/3 rule)	Unless each of the undertakings concerned achieves more than two thirds of its aggregate Union-wide turnover within one and the same Member State (2/3 rule)

- (38) The application of the jurisdictional thresholds leads to an obligation for the merging undertakings to notify their concentration and to delay the closing of their transaction, as set out in paragraph (29)d), and to the Commission's exclusive jurisdiction to appraise it. The jurisdictional thresholds are therefore designed to contribute to the same results and impact as the overall EU merger control system.
- (39) As regards external factors, new market trends and technological developments can adversely affect the impact of the jurisdictional provisions of the EU Merger Regulation, for instance if the purely turnover-based thresholds are no longer capable of properly capturing new business models and market realities.

#### 2.1.2. Procedural aspects

- (40) The specific objective of the EU merger procedure is to enable the Commission to carry out an effective investigation allowing it to properly appraise notified concentrations<sup>58</sup>. To that effect, the Commission should be in a position to focus its resources and investigative capacity on the concentrations that merit a detailed investigation at EU level. The EU merger control procedures should also allow for a quick review and clearance of unproblematic transactions and for an effective and simple assignment of jurisdiction between the Commission and the Member States. The two procedural aspects covered in the Evaluation therefore serve the following specific objectives:
- Assigning cases to the most appropriate authority. The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission are intended to operate as a corrective mechanism to allow for more efficient and effective merger control enforcement<sup>59</sup> as well as to protect the principle of subsidiarity<sup>60</sup>. The specific objective of the referral system therefore

<sup>58</sup> EUMR, Recitals 6 and 38.

<sup>59</sup> EUMR, Recital 12; Notice on case referral, point 5.

<sup>60</sup> EUMR, Recital 11.

also serves the general objective of EU merger control<sup>61</sup>. The intended results of the referral system are to enable the assignment of jurisdiction to permit the most appropriate authority to appraise a concentration, while taking into account the principle of procedural efficiency<sup>62</sup>.

- b. Approving low-risk mergers in a short and simple procedure. The simplified procedure aims to make EU merger control more focused and effective<sup>63</sup>, and to make merger procedures less burdensome, while minimising risks for effective enforcement. This enables the Commission to focus its resources on the cases that merit a detailed examination. Specifically, the simplified procedure allows the Commission to clear, in a speedy manner, concentrations that typically do not raise competition concerns, provided that there are no special circumstances<sup>64</sup>. This achieves cost savings while minimising risks for effective enforcement. The intended results of the simplified procedure are to leave the effectiveness of EU merger control enforcement intact while reducing the administrative burden for all stakeholders in low-risk mergers. The undertakings involved can benefit from reduced pre-notification contacts and a shorter notification form, and third parties are usually not required to contribute to the investigation. As for the Commission, it can forgo a comprehensive market investigation and issue a clearance decision without detailed reasoning, in general considerably ahead of the legal deadline.

- (41) As regards external factors, new market trends and technological developments can adversely affect the impact of the EU merger control procedures. For instance, this includes if information about the impact of concentrations on competition can best be derived from new (digital) sources of evidence or if established procedures fail to realise the potential for faster and simpler merger control processes.

## 2.2. CHART ON THE INTERVENTION LOGIC

- (42) The chart below summarises the overall intervention logic of the EU merger control system. It distinguishes between its general objective of preventing mergers that are harmful to competition in the internal market and the specific objectives of the procedural and jurisdictional aspects in the scope of the Evaluation.

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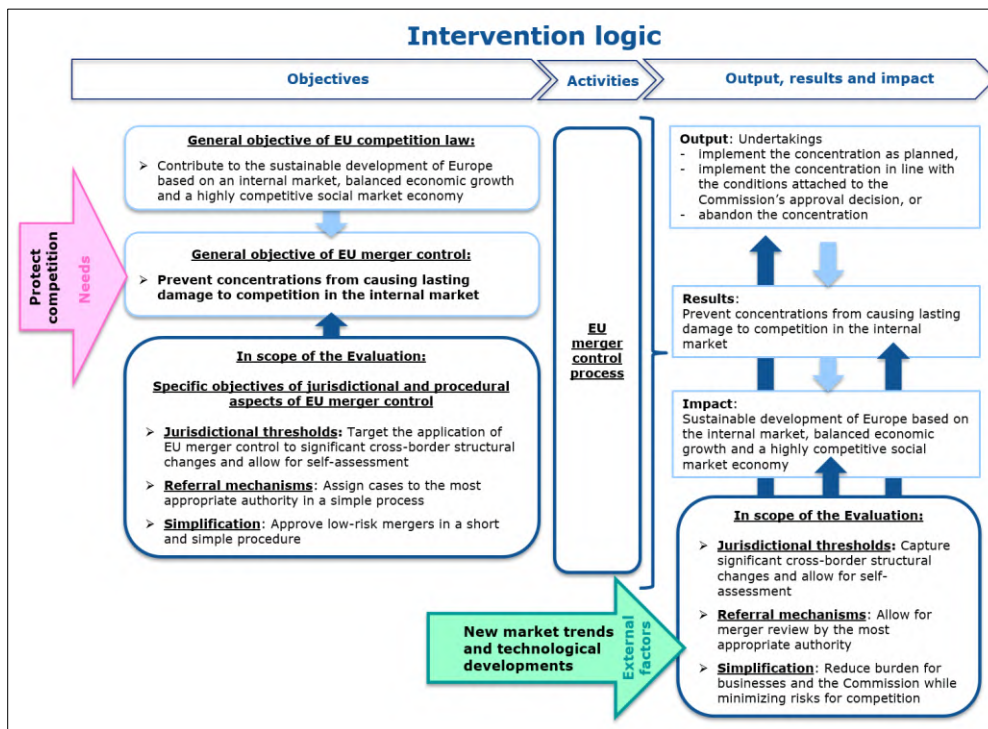
<sup>61</sup> This is most notable in those cases where only a referral allows jurisdiction to be established for certain parts of the EEA that were previously not covered by the jurisdiction of any of the NCAs, such as in certain cases pursuant to Article 22 of the EUMR.

<sup>62</sup> EUMR, Recital 14.

<sup>63</sup> Notice on simplified procedure, point 4.

<sup>64</sup> Notice on a simplified procedure, point 1.

**Figure 4: Intervention logic of the EU merger control system and the procedural and jurisdictional aspects under evaluation**



### 2.3. EVALUATION BASELINES

(43) The Commission services have used the following baselines in the analysis of the procedural and jurisdictional aspects under evaluation:

- Jurisdictional thresholds: the analysis of the turnover thresholds (unchanged since 1998) will focus on deal activity since 2014, the year of the Facebook/WhatsApp transaction that provoked the debate on the appropriateness of these thresholds;
- Referral system: the analysis of these rules (in place since 2004) will focus on 2015 onwards, in order to complement the analysis set out in the 2014 white paper and accompanying staff working document;
- Simplified procedure: the analysis of the effects of the 2013 simplification package will focus on the period after its entry into force in 2014.

### 3. IMPLEMENTATION / STATE OF PLAY

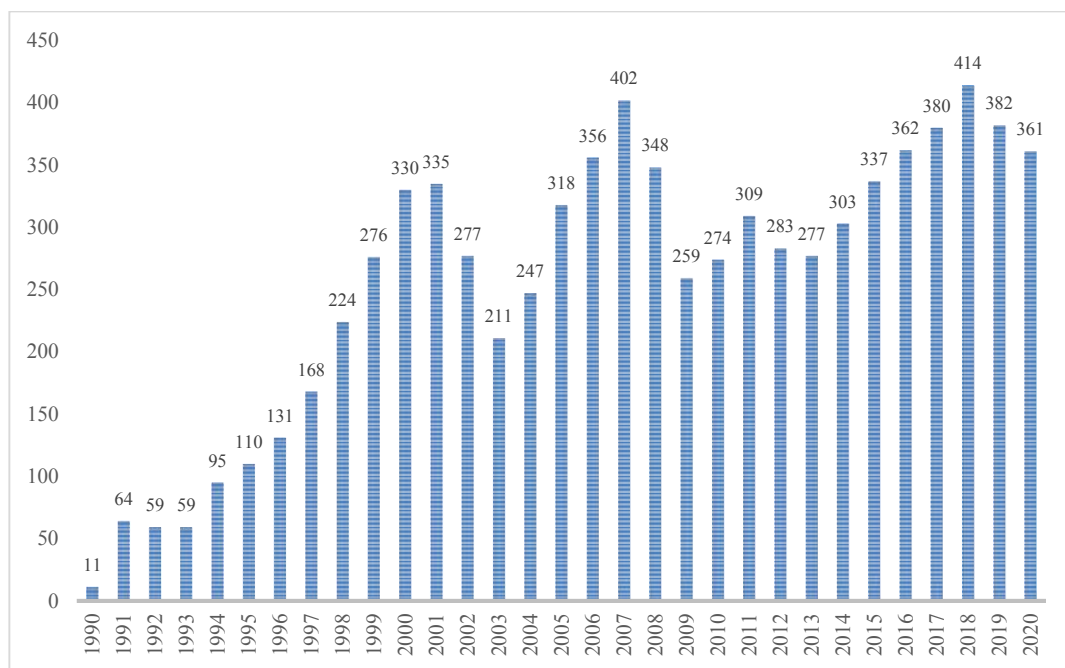
(44) EU merger control became one of the three pillars of EU competition law with the adoption of the first Merger Regulation<sup>65</sup> in 1989. The Merger Regulation was recast in 2004 to strengthen the functioning of EU merger control, in particular by introducing a new substantive test (whether a merger would 'significantly impede effective competition') as the relevant criterion for examining concentrations.

(45) As illustrated in Figure 5, the number of notifications under the EU Merger Regulation has generally shown an upward trend over the years, although economic trends and

<sup>65</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, page 1, the [1989 Merger Regulation](#)).

cycles have an obvious impact on mergers and acquisitions activity which, in turn, has a bearing on merger filings<sup>66</sup>.

**Figure 5: Evolution of the number of notifications under the EUMR (1990-2020)**



- (46) The Commission has examined around 8 000 cases<sup>67</sup> since the entry into force of the first EU Merger Regulation. In the large majority of investigations, it concluded its review after the initial phase I<sup>68</sup> of up to 25 or 35 working days. Since 1990, the Commission has launched an in-depth phase II probe in less than 4% of cases<sup>69</sup>.
- (47) The Commission has cleared the vast majority of mergers unconditionally as it found that no competition concerns arose. Since the early 2000s, it has concluded that the merger may significantly impede effective competition in about 5 to 8% of all notified mergers annually<sup>70</sup>. In most cases, such concerns have been remedied by commitments offered by the undertakings, allowing the Commission to clear them in either phase I or phase II. The Commission has prohibited 30 mergers since 1990, of which 12 since the adoption of the recast Merger Regulation in 2004, which is less than 0.5% of notified mergers.

<sup>66</sup> For instance, after a period of economic growth and, accordingly, a notable increase in merger notifications between 2003 and 2007, the situation drastically changed with the arrival of the economic and financial crisis in 2008. Filings dropped by 36% in 2008-2009. From 2014 onwards, the pace of notifications quickly picked up, coinciding with the recovery of many economic sectors. Notified transactions increased by more than 50% between 2013 and 2018, with this last year holding the absolute record figure of concentrations filed.

<sup>67</sup> By 31 December 2020, the Commission had received 7 962 notifications under the EU Merger Regulation. The statistics on case enforcement are available on DG COMP's website.

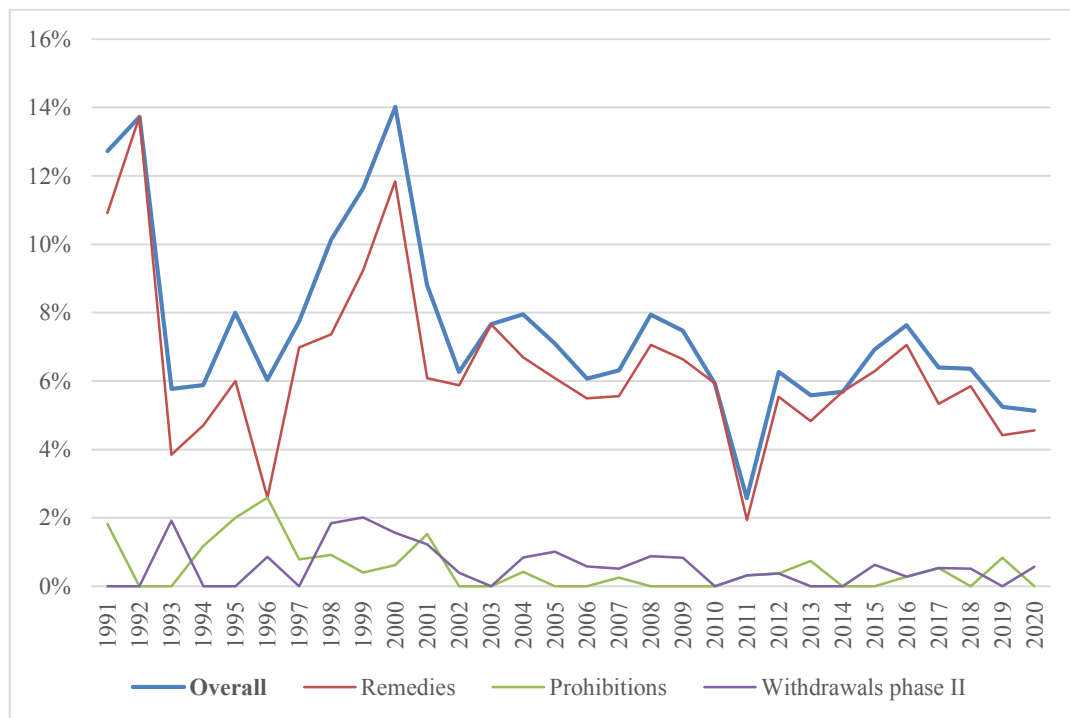
<sup>68</sup> See paragraph (23)d for further details on the phase I and phase II procedures.

<sup>69</sup> Up until 31 December 2020, the Commission cleared 7 055 mergers in phase I, initiated 281 phase II investigations and approved 200 cases in phase II.

<sup>70</sup> The yearly average since 1990 is 7.14%.

- (48) Figure 6 provides an overview of the development of the Commission's intervention rate for the period from 1991-2020<sup>71</sup>. It covers the percentage of remedies decisions, prohibitions and withdrawals in phase II over the total number of merger decisions.

**Figure 6: Commission's intervention rate in procedures under the EUMR (1991-2020)**



- (49) As mentioned in paragraph (28), the Commission's interventions in mergers over the period 2014-2019 led to estimated customer benefits of EUR 7.5-12.6 billion per year on average.

### 3.1. JURISDICTIONAL THRESHOLDS

- (50) As explained in Figure 3 in Section 2.2 above, Article 1(2) and (3) of the EU Merger Regulation sets out a double set of jurisdictional thresholds<sup>72</sup>. Both thresholds strive to ensure that: (a) the combined activities of the undertakings involved in the concentration are sufficiently large (by looking at their aggregate worldwide turnover); (b) at least two of them have significant activities in the EU (by looking at their individual turnover in the EU or in at least three Member States); and (c) the undertakings involved are not principally active in the EU in one and the same Member State (by applying the 'two thirds' rule<sup>73</sup>). The vast majority of cases (80 to 92% in the period 2008 to 2020) are notified under the main thresholds, established in Article 1(2).

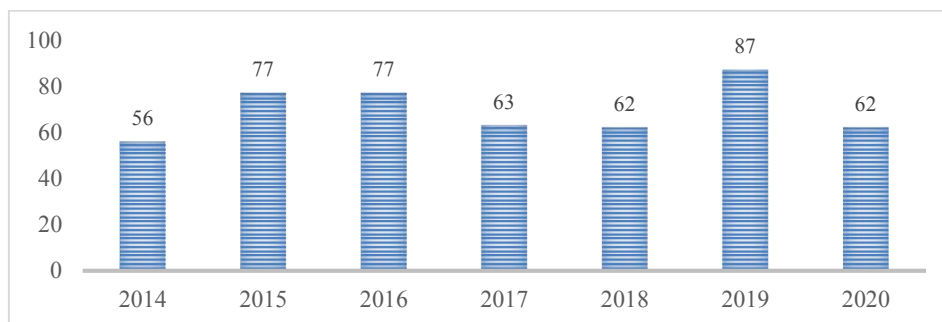
<sup>71</sup> There were only five merger decisions in 1990, none of them an intervention case.

<sup>72</sup> The alternative thresholds established in Article 1(3) have been in place since March 1998, complementing those set out in Article 1(2) of the 1989 Merger Regulation. See [Council Regulation \(EC\) No 1310/97 of 30 June 1997 amending Regulation \(EEC\) No 4064/89 on the control of concentrations between undertakings](#) (OJ L 180, 9.7.1997, p. 1).

<sup>73</sup> According to this rule, a transaction does not have an EU dimension if each of the undertakings concerned achieves more than two thirds of its aggregate EU-wide turnover within one and the same Member State, even if the other turnover thresholds of the EU Merger Regulation are met.

- (51) From the outset, the EU Merger Regulation acknowledged that concentrations effected by undertakings that did not have their principal fields of activities in the EU could also have an impact on competition in the internal market<sup>74</sup>. The turnover-based thresholds capture transactions involving these firms where they have significant activities in the EU.
- (52) The Commission has codified its interpretation of jurisdictional issues in its Consolidated Jurisdictional Notice<sup>75</sup>. This aims to foster consistency in its jurisdictional assessments and to enhance the possibility for businesses to self-assess whether their concentration needs to be notified. If companies are uncertain whether their transaction is notifiable under the EU Merger Regulation, they can initiate a jurisdictional consultation with the Commission services without having to submit, at that stage, information on the competitive assessment. The jurisdictional consultation will result in an informal confirmation from the Commission services that the transaction does or does not fall under the jurisdiction of the EU Merger Regulation. Companies make regular use of this opportunity: in the years 2014-2020, the Commission received 484 jurisdictional consultations (see Figure 7), an average of 69 consultations annually. If the companies do not choose to submit a jurisdictional consultation, any relevant jurisdictional question will be discussed between the Commission and the notifying companies during the normal pre-notification and notification process.

**Figure 7: Consultations on jurisdiction under the EUMR (2014-2020)**



- (53) As set out in Section 1.1, in recent years a debate has emerged on the effectiveness of the turnover-based thresholds of the EU Merger Regulation to sufficiently capture transactions that would merit merger review at EU level. The emergence of this debate can be traced to the Commission's investigation in 2014 into Facebook's acquisition - for a purchase price of USD 19 billion - of WhatsApp<sup>76</sup>, a mobile messaging service with, at the time, 600 million users worldwide and [50-150] million users in the European Economic Area (EEA). Given that WhatsApp's turnover – despite its high valuation by Facebook reflected in the purchase price – did not meet the thresholds of Article 1 of the EU Merger Regulation, the transaction only came under the Commission's review further to a pre-notification referral pursuant to Article 4(5), as it fell under the jurisdiction of three Member States<sup>77</sup>. This raised the question whether the

<sup>74</sup> See e.g. 1989 EU Merger Regulation, recitals (9) and (11).

<sup>75</sup> [Commission Consolidated Jurisdictional Notice under Council Regulation \(EC\) No 139/2004 on the control of concentrations between undertakings](#), OJ C 95, 16.4.2008, p.1.

<sup>76</sup> M.7217 – Facebook/WhatsApp (2014), paragraph 84.

<sup>77</sup> At the time, the transaction fell under the jurisdiction of Cyprus, Spain and the United Kingdom.

jurisdictional thresholds sufficiently ensure their intended results of effectively identifying transactions with market effects beyond the national borders of any one Member State and of allowing one-stop-shop review of those concentrations.<sup>78</sup>

### 3.2. REFERRAL MECHANISMS

- (54) In 2004, the recast EU Merger Regulation enhanced the possibilities for referring merger cases from Member States to the Commission and vice versa. It did this by introducing the possibility of pre-notification referrals at the request of the notifying parties. There are currently four different types of referral, set out in Table 1 below.

**Table 1: Types of referral under the EU Merger Regulation**

	<u>Pre-notification</u> referral at the request of the <u>undertaking(s)</u>	<u>Post-notification</u> referral at the request of <u>Member State(s)</u>
<b>From the Commission to Member State(s)</b>	Article 4(4) EUMR	Article 9EUMR
<b>From Member State(s) to the Commission</b>	Article 4(5) EUMR	Article 22 EUMR

- (55) Each type of referral is subject to specific legal criteria, as set out in Articles 4(4), 4(5), 9(2) and 22 of the EU Merger Regulation. In addition, as clarified in the Referral Notice<sup>79</sup>, the Commission and Member States retain considerable discretion in deciding whether or not to refer or accept to deal with cases meeting these criteria.
- (56) It is important to note, for the purposes of this Evaluation, that the legal requirements of Article 22 of the EU Merger Regulation do not make reference to, or distinguish between, concentrations capable of being reviewed under national merger control systems or transactions falling outside the respective jurisdictional thresholds of Member States. Article 22 only requires that the concentration: (i) must affect trade between Member States; and (ii) must threaten to significantly affect competition within the territory of the Member State(s) making the request. There has been a progressive establishment of national regimes for merger control in most Member States. Given this, the Commission, in exercising its discretion granted by the EU Merger Regulation<sup>80</sup>, has developed a practice of discouraging Member States from requesting under Article 22 the referral of transactions for which they did not have jurisdiction. This practice was notably based on the notion that such transactions were of a limited size and were generally not likely to have a significant impact in the internal market. Therefore, the Commission's practice in recent years has been limited to referrals of transactions that fell under the jurisdiction of at least one referring Member State.

<sup>78</sup> The United Kingdom ('UK') left the EU on 31 January 2020. Arguably, this has increased the turnover thresholds of the EUMR as the UK contribution to the turnover of the merging parties is no longer taken into account under Article 1(2) and (3) of the EUMR. Conversely, the enlargement of the EU over the years arguably reduced the turnover thresholds

<sup>79</sup> Notice on Referrals, paragraph 7, OJ C 56, 5.3.2005, p. 2–23.

<sup>80</sup> Cf. EUMR, Article 22(3). See also Notice on Referrals, paragraph 7.



- (57) Finally, if the Commission accepts referrals under Article 22, it will only obtain jurisdiction for the territory of the Member State(s) that have requested the referral or joined another Member State's request.

### 3.3. SIMPLIFIED PROCEDURE

- (58) The application of the EU Merger Regulation results in the need to notify and delay closing of a number of transactions every year, most of which are ultimately cleared unconditionally without a need for a detailed investigation. The Commission seeks to focus its investigations on those cases where the competitive impact may matter for EU businesses and citizens. It also seeks to reduce the burden on companies, and the Commission, without compromising on effective enforcement. In pursuing these aims, the Commission has progressively adopted specific measures to streamline the treatment of certain categories of cases that are generally not likely to raise competition concerns. This is subject to the condition that the information provided by the parties confirms that the case falls into one of the predefined categories and that there are no special circumstances that make further investigation necessary. The Commission thus introduced, in 2000, a simplified procedure and, in 2004, a related shorter notification form<sup>81</sup> and has since gradually reviewed and adapted them<sup>82</sup>. The latest review of the simplified procedure resulted in the adoption of the 2013 simplification package<sup>83</sup>. This widened its scope of application, simplified the notification forms and adopted measures to streamline the pre-notification phase.
- (59) The simplified procedure<sup>84</sup> may be applied to the following categories of cases: (i) transactions where undertakings acquire joint control of a joint venture, which has no, or negligible, actual or planned activities in the EEA (point 5(a) of the Notice on simplified procedure); (ii) transactions where there are no horizontal<sup>85</sup> or vertical relationships<sup>86</sup> between the business activities of the undertakings (point 5 (b)); (iii) transactions where: the combined market share of all the undertakings in horizontal relationships is less than 20% and the individual or combined market shares of all the undertakings with vertical links are less than 30% (point 5 (c) – raised from the previous thresholds of 15% and 25% respectively in the 2013 simplification package); (iv) transactions that entail a change from joint to sole control over the target (point 5(d)); and (v) transactions where the combined market share of all the undertakings in a

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<sup>81</sup> [Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation \(EEC\) No 4064/89](#) (OJ C 217, 29.07.2000, p. 32); Merger Implementing Regulation of 21 April 2004.

<sup>82</sup> The first review of the simplified procedure was carried out in 2005, replacing the previous text of 2000 (OJ C 56, 05.03.2005, p. 32).

<sup>83</sup> See footnote **Error! Bookmark not defined.**.

<sup>84</sup> The Commission Notice on a simplified procedure 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 may revert at a later stage to a full assessment under the normal procedure.

<sup>85</sup> As explained in paragraph (23)d, horizontal relationships arise when undertakings are engaged in business activities in the same product and geographic market.

<sup>86</sup> As explained in paragraph (23)d, vertical relationships arise when an undertaking is engaged in business activities in a product market that is upstream or downstream from a product market in which another undertaking is engaged.

horizontal relationship is less than 50% and the increment in market share is low<sup>87</sup> (point 6, newly introduced in the 2013 simplification package).

- (60) The 2014 white paper made some proposals to further simplify procedures under the EU Merger Regulation, namely: (a) exclusion of certain non-problematic transactions from the scope of the Commission's merger review; and (b) reduction of the notification requirements for other cases currently dealt with under the simplified procedure.

#### **4. METHOD**

- (61) The Evaluation has been carried out in-house by staff of DG COMP, on the basis of a broad body of evidence and through a wide-ranging consultation of, and discussion with, interested stakeholders, as set out in Annexes 6 and 2 to 4 respectively<sup>88</sup>. These notably included undertakings subject to or otherwise involved in EU merger control, industry and business organisations, consumer associations, formal and informal organisations of professionals in EU competition law and economics, NCAs, national ministries and other government bodies in charge of competition policy and academia.
- (62) The Evaluation was launched in August 2016. As will be explained below, a number of developments occurred in the course of the Evaluation, including legislative reforms in Germany and Austria, which introduced additional, value-based jurisdictional thresholds, a core issue covered by the Evaluation. Moreover, new market developments continued to take place in some of the sectors specifically under consideration, notably in digital and pharma. Also, a far-reaching reflection on the consequences of digitisation on competition policy, including on merger control, took place in the EU and in other countries and jurisdictions. These developments were particularly relevant for some of the topics under evaluation and thus required close monitoring, additional research and further examination.
- (63) The Evaluation builds upon and complements previous work and initiatives conducted by the Commission on procedural and jurisdictional aspects of EU merger control, including notably the 2014 white paper and accompanying documents (see paragraph (6) above). These work streams included two public consultations, in 2013 and 2014.
- (64) Furthermore, as an integral part of the Evaluation, the Commission carried out a public consultation in 2016-2017 on the specific topics under examination<sup>89</sup>. It allowed the Commission services to collect views and opinions from interested stakeholders and gather relevant factual information. For some issues, the Commission services principally set out to assess whether the stakeholder opinions and replies obtained in previous consultations were still valid or had evolved or changed in the meantime (and, if so, what were the underlying reasons). For other issues, the Commission services enlarged the subject matters under consideration or added new topics that had become relevant. In response to the Public Consultation, the Commission services received

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<sup>87</sup> Specifically, where the increment measured by the Herfindahl-Hirschman Index is below 150. That index is calculated by adding the squares of the individual market shares of all the firms in the market.

<sup>88</sup> The Evaluation Roadmap can be found [here](#).

<sup>89</sup> See the [consultation strategy](#) and the [questionnaire](#) of the public consultation.

around 100 submissions from stakeholders in both the public and private sectors. The Commission services prepared and made public a summary of these contributions and the results of the Public Consultation. Annex 2 includes an executive summary of the stakeholder consultation and Annex 4 lists the submissions received.

- (65) The Commission services consider the results of the public consultation to be sufficiently robust and still valid to inform the Evaluation results today. This is because the Commission services cross-checked and complemented these results with other evidence. First, the Commission services have been in continuous contact with stakeholders since the finalisation of the Public Consultation. From 2016 onwards, they proactively organised meetings and interviews with stakeholders and stakeholder groups to discuss all matters covered by the Evaluation or specific topics<sup>90</sup>. Second, since 2017, both private- and public-sector stakeholders have – in other forums – reiterated the main points raised in the replies to the Public Consultation, such as in the specialised press or at conferences, and these were also taken into account. Third, the Commission services have checked the results of the Public Consultation on the jurisdictional thresholds against the results of the 2018 call for contributions and of the 2018 high-level conference described in paragraph (66). Fourth, the regulatory framework and the Commission’s enforcement practice with respect to the procedural and jurisdictional aspects under review have not changed, at EU level, since 2016/2017. As regards national notification thresholds, the 2018 call for contributions gave stakeholders an opportunity to bring their views to the Commission services’ attention with respect to the transaction value thresholds introduced by Germany and Austria in 2017; a number of stakeholders made use of that possibility<sup>91</sup>.
- (66) In 2017-2019, the Commission services conducted a number of specific work streams on the effects and challenges for competition policy of the digitisation of the economy. First, the then Commissioner Vestager appointed a panel of three special advisers from outside the Commission to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. Second, the Commission services sought written contributions from stakeholders involved in or affected by the digitisation of the economy (the 2018 call for contributions<sup>92</sup>). Third, on 17 January 2019, the Commission services held a high-level conference<sup>93</sup> on ‘Shaping competition policy in the era of digitisation’. In April 2019, the special advisers delivered their report<sup>94</sup>. These initiatives were designed to provide input to the Commission services’ reflection process about how EU competition policy can best serve European consumers in a fast-changing world and how to identify problems and solutions as markets go

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<sup>90</sup> Annex 2 contains an executive summary of the discussions held with the various stakeholders. Annex 5 contains a list of these meetings with their respective dates. In line with the results of the public consultation, private sector stakeholders have generally maintained their concerns about the duration of the pre-notification phase or the burden of requests for information and have generally not expressed additional concerns about an enforcement gap due to the turnover-based thresholds.

<sup>91</sup> See Section 5.1.1.3.

<sup>92</sup> The submissions received in reply to the call for contributions launched on 6 July 2018 are available [here](#). There were 104 contributions (42 from interest groups, 25 from companies, 19 from academics, and a few contributions from NCAs, law firms, and individuals).

<sup>93</sup> Information on the conference can be found [here](#).

<sup>94</sup> A report by Cr mer, J., de Montjoye, Y-A. and Schweitzer H.

through rapid changes. These work streams provided additional input on which the findings of the Evaluation are based.

- (67) Further to these consultations and related initiatives, the Commission services conducted comprehensive research on each topic under evaluation, as explained in the following sub-sections.

#### 4.1. JURISDICTIONAL THRESHOLDS

- (68) The Evaluation specifically looked at whether potentially problematic acquisitions of high-value target companies with low turnover – in sectors like digital, pharma and others – have fallen outside the Commission’s jurisdiction. The Commission services carried out wide-ranging research on whether the turnover-based thresholds may have resulted in an enforcement gap. To that effect, Commission staff researched and analysed transactions that took place in each of the years 2015, 2016, 2017, 2018 and 2019 (and, where relevant, earlier known examples).
- (69) The Commission staff reviewed, in particular, transactions recorded in Bloomberg’s deal list financial database. As an initial proxy to identify highly valued acquisitions, the Commission staff focused on those whose recorded value exceeded the equivalent of EUR 1 billion, but conducted additional examinations at different value thresholds<sup>95</sup> (principally, the equivalent of EUR 5 billion), categorising them by economic sectors. It then quantitatively and qualitatively analysed these transactions. Beyond the transactions recorded in the Bloomberg database, the Commission staff conducted additional research to identify other relevant deals. Further details as to the methodology followed can be found in Annex 3.
- (70) The Commission services also identified those high-value transactions, notably in digital and pharma, for which it did not originally have jurisdiction but which were ultimately reviewed by it, further to a referral from NCAs under Articles 4(5) or 22.
- (71) The Commission services also analysed the enforcement practice to identify intervention cases where at least one of the companies did not yet achieve any or substantial turnover in the problematic markets, but was expected to grow quickly and/or substantially in the future.
- (72) Moreover, the Commission services closely monitored the application of additional jurisdictional thresholds based on the value of the transaction in Austria and Germany, countries which introduced the thresholds in 2017 and adopted an additional joint guidance paper<sup>96</sup> in July 2018. The Commission services also examined relevant studies, proposals and initiatives conducted in other Member States<sup>97</sup>.

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<sup>95</sup> See footnote **Error! Bookmark not defined.** for an explanation of why these values were chosen.

<sup>96</sup> *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9(4) KartG)*, accessible [here](#).

<sup>97</sup> See Section 5.1.1 for a more detailed analysis.

#### 4.2. REFERRAL MECHANISMS

- (73) The Commission services built upon the work carried out in the context of the 2013 public consultation and the subsequent 2014 white paper and public consultation. The relevant topics examined in these initiatives were specifically included in the latest public consultation and discussed with stakeholders in meetings throughout the Evaluation<sup>98</sup>. Additionally, the Commission services examined the enforcement practice in recent years on the instruments and provisions at stake, in order to gauge their prevalence and functioning in practice.

#### 4.3. SIMPLIFICATION

- (74) The Evaluation examined in detail the Commission's enforcement practice to assess: (i) whether there are indications that the 2013 simplification package has had an impact on effective EU merger enforcement; (ii) to what extent the latter resulted in additional cases benefiting from the simplified treatment, and in companies benefiting from streamlined forms and procedures; and (iii) to what extent it may have fallen short of its objectives by not capturing further potential scope for streamlining without compromising effective merger control enforcement.

#### 4.4. LIMITATIONS OF THE ANALYSIS AND MITIGATING MEASURES

- (75) Of all the procedural and jurisdictional topics under examination in the Evaluation, assessing the effectiveness of the turnover-based thresholds of the EU Merger Regulation proved to be the most challenging. These aspects required the Commission services to identify and assess transactions, across very different economic sectors, which had not been notified to it and for which limited information was available. Three difficulties are worth mentioning. First, the relevance, completeness and correctness of information extracted from the external databases used depended on the accuracy, categorisation and comprehensiveness of the data recorded therein. Second, the exercise entailed the review of thousands of transactions, which required the use of certain criteria and thresholds to identify those potentially more relevant. Third, the qualitative assessment of individual (non-notified) transactions (in order e.g. to determine the existence or not of a local nexus with the EU internal market, their cross-border nature or their potential effects) had to be based often on the relatively limited information in the public domain and was thus, by its very nature, unavoidably approximate<sup>99</sup>. In addition, in all aspects under evaluation, the Commission staff faced a certain lack of representativeness of stakeholder feedback, with small companies, consumers and academics under-represented. It also encountered difficulties with obtaining concrete evidence on costs and benefits of the provisions under evaluation. In particular, the Commission services have not calculated cost savings in monetary terms for the Commission, the NCAs or the undertakings concerned, given the complexity of such calculations. The Commission has instead relied on proxies in terms of working days for the Commission, number of merger reviews not carried out at national level for the

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<sup>98</sup> See Annex 2 for an executive summary of the discussions held with the various stakeholders; and Annex 5 for a list of these meetings with their respective dates.

<sup>99</sup> The comprehensive information typically required in order to accurately assess these aspects with certainty only becomes accessible to the Commission in the course of its merger control procedure.

NCAs and days saved until receiving merger control clearance for the undertakings concerned, which are useful proxies for achieved cost savings.

- (76) Concerning the scarcity of available information about deals not notified to it, in a number of cases the Commission staff could rely on the reviews of these transactions conducted by NCAs or agencies in other jurisdictions (e.g. the US Federal Trade Commission and Department of Justice) and could therefore mitigate this challenge<sup>100</sup>. Moreover, the Commission conducted comprehensive research and examined publicly available information from diverse sources to compare and cross-check the evidence.

## **5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS**

- (77) In the following sections, the Commission services will examine, in light of the various sources of evidence gathered, whether the procedural and jurisdictional aspects under review pursue their objectives effectively and efficiently, whether their objectives remain relevant, whether they are pursued coherently, and whether they provide EU added value. Sub-sections 5.1 to 5.5 analyse each of those specific evaluation criteria, taking as a starting point the evaluation questions identified at the outset of the exercise<sup>101</sup>.

### **5.1. EFFECTIVENESS**

- (78) The Evaluation has assessed to what extent the aspects under scrutiny are effective in reaching their respective specific objectives and, consequently, in contributing to achieve the general objective of EU merger control.

#### *5.1.1. Jurisdictional thresholds*

- (79) The scope of application of the EU Merger Regulation is defined according to ‘the geographical area of activity of the undertakings concerned and limited by quantitative thresholds in order to cover those concentrations, which have [an EU] dimension<sup>102</sup>’. The Evaluation sought to assess to what extent establishing the Union dimension of a concentration exclusively on the basis of the firms’ turnover is effective in ensuring that EU merger control applies sufficiently to competitively significant transactions.
- (80) The questions the Evaluation sought to answer were two-fold and intrinsically related. The first question was whether transactions that potentially have an impact on the internal market are sufficiently captured by the current jurisdictional thresholds, based on the aggregate turnover of the undertakings concerned, complemented by the possibilities opened by the referral system<sup>103</sup>. The second question was whether the

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<sup>100</sup> While this undoubtedly helped, the outcome of such a review is not necessarily an indication that a potential examination under EU merger control would have led to the same result, given not only the prevailing differences in the respective legal frameworks but also different market circumstances in the EU as a whole and in its individual Member States or third countries.

<sup>101</sup> See Evaluation Roadmap.

<sup>102</sup> EUMR, Recital 9.

<sup>103</sup> According to Article 4(5) of the EU 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. In addition, according to Article

absence of complementary jurisdictional criteria, in particular a transaction value-based threshold, impairs this goal of capturing sufficiently relevant transactions.

- (81) The Commission services' findings will be based on the following complementary sources of evidence discussed in the next sections: (i) previous reports and consultations (Section 5.1.1.1); (ii) the results of the Public Consultation, complemented by meetings with stakeholders (Section 5.1.1.2); (iii) the results of the 2018 call for contributions (Section 5.1.1.3); (iv) the results of the Commission services' internal research (Section 5.1.1.4); (v) the analysis of the effects of the existing referral system (Section 5.1.1.5); (vi) the lessons learnt from Austria and Germany's introduction and application of transaction value thresholds (Section 5.1.1.6); and (vii) the 2019 report of the special advisers (Section 5.1.1.7).

#### 5.1.1.1. Previous reports and consultations

- (82) As mentioned in paragraph (4), the Commission assessed the functioning of the turnover-based thresholds in 2008/2009, concluding with a report to the Council in 2009<sup>104</sup>. At that time, stakeholders took the view that these thresholds provide a reasonably good proxy for which cases have a Union dimension and considered that they constitute a simple and objective mechanism enabling the companies involved to determine if their transaction has to be notified under the EU Merger Regulation<sup>105</sup>. The Commission concluded that these thresholds allocated jurisdiction between the Commission and the Member States in a satisfactory way, particularly when taken in conjunction with the referral mechanisms<sup>106</sup>.
- (83) The review launched by the 2014 white paper subsequently confirmed that the turnover thresholds of the EU Merger Regulation serve as a 'bright-line' test for whether or not a merger is likely to have a European or cross-border dimension<sup>107</sup>.
- (84) In the wake of the 2014 white paper, as set out in Sections 1.1 and 3.1, a debate emerged on the effectiveness of these turnover-based jurisdictional thresholds and on whether there is a 'jurisdictional gap' in the EU Merger Regulation. In that context, some stakeholders advocated complementing the existing thresholds by additional notification requirements based on alternative criteria, such as the value of the transaction.
- (85) Hence, while previous reports and consultations found that the jurisdictional thresholds coupled with the referral system of the EU Merger Regulation constitute relatively clear

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22 of the EU Merger Regulation, Member States may request the referral of a case to the Commission after notification, if certain conditions are met.

<sup>104</sup> See EUMR, Recital 9. In 2008, the Commission launched a [public consultation](#) to evaluate the functioning of the rules on jurisdictional thresholds and referral mechanisms of the EU Merger Regulation. In 2009, it adopted a [Communication to the Council on the Report on the functioning of Regulation No 139/2004](#) (COM(2009) 281 final), accompanied by a [staff working paper](#) (SEC(2009) 808 final/2).

<sup>105</sup> [Staff working paper](#) (SEC (2009) 808 final/2), paragraph 28. Respondents to the Public Consultation generally did not see the need to change the turnover threshold system of the EU Merger Regulation.

<sup>106</sup> [Staff working paper](#) (SEC (2009) 808 final/2), paragraph 79.

<sup>107</sup> 2014 white paper, paragraph 59.



criteria and are effective, recent changes in the economy lent merit to investigating again whether relevant transactions are escaping the Commission's merger review.

#### 5.1.1.2. Results of the 2016/2017 Public Consultation

- (86) The Public Consultation carried out during the Evaluation specifically enquired about three issues: (i) the possible existence of an enforcement gap concerning acquisitions of (notably high-value) targets with no or limited turnover, and, if so, the type of transactions and industry sectors concerned; (ii) whether the current referral system combined with merger control at the level of Member States is sufficient to deal with these transactions without Union dimension; and (iii) whether the absence of complementary jurisdictional criteria impairs the goal of capturing all relevant transactions, in particular by inquiring about (a) the need for complementary jurisdictional thresholds and the possible design of such thresholds; and (b) specifically the need for a transaction value threshold and its appropriate level, how to ensure a local nexus (i.e. how to ensure that the transaction has a sufficient economic link with the EEA) and the possibility of having additional filters. The Commission services held numerous meetings with stakeholders, during and after the Public Consultation, to discuss in detail their views<sup>108</sup>.
- (87) First, as regards the potential enforcement gap and types of transactions and sectors concerned, the majority of respondents to the questionnaire (public and private-sector stakeholders alike) did not perceive a (significant) gap as regards acquisitions of target companies that do not generate sufficient turnover to meet the jurisdictional thresholds of Article 1 of the EU Merger Regulation<sup>109</sup>.
- (88) However, a minority of responding NCAs considered that these thresholds do not allow the Commission to capture and review all relevant cross-border concentrations<sup>110</sup>. Several other responding public bodies also identified an enforcement gap<sup>111</sup>. The digital sector was most frequently cited as an area where the EU Merger Regulation may fail to catch some competitively significant cross-border transactions. Some NCAs also pointed to the pharmaceutical and biotechnology sectors, as well as to patent portfolio acquisitions. These authorities referred to a number of individual transactions not caught by the notification thresholds as evidence for an enforcement gap<sup>112</sup>.

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<sup>108</sup> See Annex 2 for an executive summary of the discussions held during these meetings and Annex 5 for the list of these meetings and their respective dates.

<sup>109</sup> Replies to questions 14 to 16 of the Public Consultation. Overall, 61 respondents (out of 98) considered that there is no enforcement gap/no significant enforcement gap; among these were seven NCAs, 1 research institution, 23 associations, 12 companies and all the law firms that replied to these questions.

<sup>110</sup> Replies to questions 14 to 16 of the Public Consultation. Only 3 out of the 15 responding NCAs considered that there is an enforcement gap. One other NCA did not answer conclusively, but warned about the risks involved in introducing a complementary jurisdictional threshold within the 'currently well-functioning' EU merger control system. Another NCA saw 'space for an additional jurisdiction'.

<sup>111</sup> Replies to questions 14 to 16 of the Public Consultation.

<sup>112</sup> Replies to questions 14 to 16 of the Public Consultation. Mention was made of the transactions Amadeus/Navitaire (M.7802, 2016, deal value USD 830 million) and Dolby/Doremi (M.7297, 2014, deal value around USD 100 million), both referred under Article 22 EUMR. Both cases were cleared unconditionally by the Commission. Other cases mentioned were Google/DoubleClick (M.4731, 2008, an Article 4(5) referral unconditionally cleared by the Commission in phase II) and the US prohibition case



- (89) A minority of responding business and lawyers' associations and a consumer association also perceived an enforcement gap<sup>113</sup>, with a minority of respondent companies expressing the same view<sup>114</sup>. In addition to the aforementioned *Facebook/WhatsApp* case, mention was made of several acquisitions by a number of large internet companies of smaller companies that escaped merger control scrutiny at EU level<sup>115</sup>. Furthermore, some of the responding education and research institutions perceived an enforcement gap, but they did not propose the introduction of a complementary jurisdictional threshold<sup>116</sup>.
- (90) Second, as regards the effects of the referral system, the majority of respondents (public and private-sector stakeholders alike) considered that the mechanisms in Articles 4(5) and 22 of the EU Merger Regulation, combined with national merger review systems in the Member States, sufficiently ensure that the relevant cases without an EU dimension are reviewed at European level<sup>117</sup>. Some respondents noted, however, that the extent to which high-value acquisitions of firms with limited turnover could be caught through the referral system depends on the existence of non-turnover-based notification thresholds in at least some Member States<sup>118</sup>.
- (91) Third, as regards the question whether the absence of complementary jurisdictional criteria impairs the goal of capturing all relevant transactions, a minority of responding NCAs and several public bodies saw the need to introduce a complementary threshold based on the value of the transaction<sup>119</sup>. They pointed out that the level of such threshold should be set sufficiently high to leave sufficient cases within the jurisdiction

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Bazaarvoice/PowerReviews, a merger that did not meet the US deal-size threshold of USD 76 million and which was successfully challenged post-implementation by the Department of Justice. Also mentioned were the Adidas/Runtastic (a fitness app maker acquired for EUR 220 million) and PotashCorp/Kali+Salz transactions.

- <sup>113</sup> Replies to questions 14 to 16 of the Public Consultation. An enforcement gap was identified by 5 out of the 31 responding associations.
- <sup>114</sup> Replies to questions 14 to 16 of the Public Consultation. An enforcement gap was identified by 5 out of the 21 responding companies.
- <sup>115</sup> The respondents listed acquisitions by Google of DailyDeal (2011 – USD 114 million transaction value), Waze (2013 – USD 1.1 billion), Nest Labs (2014 – USD 3.2 billion), Dropcam (2014 – USD 555 million), DeepMind Technologies (2014 – USD 600 million), Dark Blue Labs and Visual Factory (2014 – USD 50 million); Skybox (2014 – USD 500 million) and Moodstock (2016); in addition, they mentioned the acquisition by Microsoft of Mojan AS (2014 – USD 2.5 billion) and the acquisition by Facebook of Oculus VR (2014 – USD 2 billion). No responding association or company provided specific examples of competitively significant transactions in other industries than digital that had not been captured by the EUMR thresholds: Replies to questions 15 to 16 of the Public Consultation.
- <sup>116</sup> Replies to questions 14 to 16 of the Public Consultation. An enforcement gap was identified by two out of the four responding education and research institutions.
- <sup>117</sup> Replies to question 17 of the Public Consultation. Only 8 respondents (out of 98) considered that the referral mechanism is insufficient to deal with the possible shortcomings of the turnover-based thresholds.
- <sup>118</sup> Replies to question 17 of the Public Consultation. Some 4 respondents made this point.
- <sup>119</sup> Replies to question 19 of the Public Consultation. 5 out of the 15 responding NCAs and 5 out of the 7 responding national bodies saw the need to introduce a complementary jurisdictional threshold based on the value of the transaction. While not taking a firm view on the existence of a gap, two NCAs nevertheless seemed open to exploring an additional threshold. One NCA (while identifying an enforcement gap) felt that introducing an additional threshold would not be proportionate, considering instead that the current referral system and a reform of Article 22 EUMR could be enough to address this issue.

of the national regimes, in application of the principle of subsidiarity<sup>120</sup>. Most associations and companies that perceived the existence of an enforcement gap similarly proposed the introduction of a complementary jurisdictional threshold based on the value of the transaction<sup>121</sup>.

- (92) In contrast, the large majority of respondents (public and private-sector stakeholders alike) considered that the absence of complementary jurisdictional thresholds did not harm the achievement of the goals of EU merger control<sup>122</sup>. Most of these stakeholders insisted that there is no cogent empirical evidence of an enforcement gap and that introducing additional thresholds would be disproportionate and create unnecessary red tape. Furthermore, they argued that such thresholds would put a brake on innovation and investments in Europe<sup>123</sup>. They also argued that the risk of catching large numbers of ‘false positive’ cases<sup>124</sup> and/or spending time on consultations to clarify jurisdictional questions would potentially take away resources from the Commission’s assessment of competitively significant cases. Moreover, a number of respondents mentioned that the EU Merger Regulation is a role model for third-country agencies and feared that jurisdictions with relatively new merger control systems could follow the EU in modifying their jurisdictional thresholds in ways that would be, in their view, non-compliant with the Recommended Practices<sup>125</sup> issued by the International Competition Network (‘ICN’).
- (93) Furthermore, the majority of respondents (public and private-sector stakeholders alike) stressed the difficulties in determining the value of the transaction in practice, entailing risks for effective self-assessment. It was also argued that purchase price is a subjective matter agreed upon between the parties and does not give any indication of a transaction’s possible competitive significance. Moreover, it was submitted that a jurisdictional test based on the value of a transaction does not ensure sufficient local nexus with the EEA. In this view, there would be a need to require both parties to have local turnover or assets in the EEA. It was argued that, while such a requirement exists in the US merger control system, it would likely not capture transactions such as *Facebook/WhatsApp*, where the target only generates very little turnover and has no assets in the EEA<sup>126</sup>.

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<sup>120</sup> Replies to question 20 of the Public Consultation.

<sup>121</sup> Replies to questions 18 and 19 of the Public Consultation. Here, 5 out of the 31 responding associations and 3 out of 21 responding companies argued in favour of a complementary jurisdictional threshold based on the value of a transaction. Only one association proposed, as an alternative criterion, expanding the Merger Regulation’s jurisdiction by adding a notification requirement based on the number of consumers directly impacted by the merger.

<sup>122</sup> Replies to questions 18 and 19 of the Public Consultation.

<sup>123</sup> In their view, given that less venture capital is available in the EU than in the US, mergers and acquisitions constitute an important ‘exit strategy’ for European start-ups and enable them to receive the necessary funding to scale up and expand.

<sup>124</sup> The concept of false positive cases denotes mergers or acquisitions incorrectly considered anticompetitive and thus blocked or cleared conditionally (i.e. with remedies) when in fact they should have been allowed unconditionally as they posed no real threat to competition.

<sup>125</sup> ICN *Recommended Practices for Merger Notification and Review Procedures* (2018). Replies to questions 19 to 22 of the Public Consultation.

<sup>126</sup> Replies to questions 19 to 22 of the Public Consultation.

- (94) Accordingly, the large majority of respondents neither identified a significant enforcement gap (particularly when account is taken of the effects of the referral system), nor saw a concern arising from the absence of complementary jurisdictional thresholds in the EU Merger Regulation. The opinions expressed during the Public Consultation were generally reiterated in subsequent calls and meetings with different groups of stakeholders<sup>127</sup>.

#### 5.1.1.3. Results of the 2018 call for contributions

- (95) As mentioned in paragraph (66), in July 2018 the Commission services published a call for contributions on competition and digitisation, explicitly targeting stakeholders involved in or affected by the digitisation of the economy. It did not specifically focus on merger control, but covered broader issues of EU competition enforcement<sup>128</sup>.
- (96) Out of 104 contributions received<sup>129</sup>, 10 private stakeholders (interest groups, companies, academics and individuals) mentioned the issue of notification thresholds in the digital economy. Most of those respondents (7 out of 10) supported the introduction of complementary notification thresholds in addition to the existing turnover thresholds. The proponents of this change highlighted the need for EU merger control to review strategic acquisitions of small, innovative firms with high competitive potential. Those respondents suggested, for instance, adopting notification thresholds that would include transaction value, data value, market shares, or which would be based on the number of consumers affected by the transaction. Conversely, one respondent (an industry association) explicitly argued against the introduction of additional thresholds, stating that the current competition framework is well-equipped to tackle competition challenges in the digital economy.
- (97) Furthermore, two NCAs shared their experiences on administering non-turnover-based thresholds, but did not express any view on the need for additional thresholds at EU level. The Austrian NCA, which had recently adopted transaction value thresholds, indicated that the introduction of these criteria, at that stage in the process, had not generated a big burden for the authority. At the same time, the new thresholds had not yet led to assessments of major deals within the digital economy, the captured transactions being in the healthcare, real estate and machine equipment sectors. The Spanish NCA noted that its existing market share thresholds had enabled it to review some digital mergers or to refer them to the Commission.
- (98) Accordingly, most of the submissions to the 2018 call for contributions did not mention the topic of merger thresholds. The small number of participants that did refer to this topic generally supported the idea of introducing additional jurisdictional thresholds to address a perceived enforcement gap.

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<sup>127</sup> See Annex 2 for an executive summary of the discussions held during these meetings and Annex 5 for the list of these meetings and their respective dates.

<sup>128</sup> Contributors were invited to cover one or more of the following topics: (i) a digital platform's market power; (ii) competition, data, privacy and AI; and (iii) preserving digital innovation through competition policy.

<sup>129</sup> The contributions received are available [here](#).

#### 5.1.1.4. Results of research

- (99) The Commission services undertook comprehensive research to assess the possible existence of an enforcement gap in EU merger control and the consequences of the absence of a jurisdictional threshold based on transaction value. The Commission services' research focused on three areas. Firstly, it quantitatively and qualitatively analysed transactions listed in the Bloomberg financial database 'deal list' that exceeded the value of EUR 1 billion (the methodology used is further described in Annex 3 to this document); over the five-year period considered (2015-2019), this amounted to a review of over 3 500 transactions (as summarised in paragraphs (100)-(107)). Secondly, the Commission services reviewed the Commission's enforcement practice (paragraph (108)). Thirdly, the Commission services conducted further specific research into the transactions of the 'GAFAM' companies (Google, Amazon, Facebook, Apple and Microsoft) and reviewed economic literature (paragraphs (109)-(111)).
- (100) First, the analysis of Bloomberg data revealed that there are numerous high-value transactions<sup>130</sup> above EUR 1 billion (as well as above EUR 5 billion) every year worldwide which do not fall under the scope of the EU Merger Regulation. The percentage of transactions reviewed by the Commission from the years 2015-2019 was estimated at between 10% and 13% for transactions above EUR 1 billion and between 18% and 29% for transactions above EUR 5 billion<sup>131</sup>.
- (101) However, many of those transactions did not have any local nexus with the EEA<sup>132</sup>. As explained in paragraph (105) below, a qualitative analysis of 744 transactions from the

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<sup>130</sup> These thresholds of EUR 1 and 5 billion were adopted as alternative and complementary proxies to identify high-value acquisitions based on different considerations. A transaction value threshold of EUR 5 billion at EU level had originally been suggested by the German Monopolkommission in 2015 (see footnote 14). Germany later introduced in its national merger regime a value threshold of EUR 400 million: considering the respective GDPs of Germany and the EU, this would translate into a threshold of around of EUR 1.5 to 2 billion at EU level. EUR 5 billion is also the combined turnover-based threshold that the undertakings concerned must achieve worldwide to be captured by the EU Merger Regulation, which uses this proxy to ensure that the overall business activities involved in the concentration are sufficiently large. Finally, a value threshold of EUR 1 billion represents a ratio of 4 times the requirement of EUR 250 million turnover that the target of the acquisition must realise in the EU in order to fall under the scope of application of the EU Merger Regulation: such a ratio between value and sales is generally considered as indicative of a high valuation (in that regard, the Commission observes that the median value-to-shares ratio in the transactions recorded in Bloomberg, where the relevant data were available, was the following in the last 5 years: 2015: 2.20; 2016: 2.25; 2017: 2.41; 2018: 2.15; and 2019: 0.72).

<sup>131</sup> For example, the Commission has not reviewed high-value transactions such as Google/Looker (2019), Publicis/Epsilon (2019), VMware/Pivotal (2019), Paypal/iZettle (2019), GSK/Tesaro (2018), Sanofi/Ablynx (2019) (all above EUR 1 billion but below EUR 5 billion), and Salesforce/Tableau (2019), Ely Lilly/Loxo Oncology (2019), Pfizer/Array BioPharma (2019), Novartis/The Medicines Company (2019), Salesforce/Mulesoft (2019) (all above EUR 5 billion).

<sup>132</sup> To assess whether transactions could be deemed to have a sufficient local nexus with the EEA beyond the scenarios captured by the turnover thresholds of the EU Merger Regulation, the research looked at whether the target company's activities were conducted in the EEA and whether the nature of the activity was such that it was likely to include future marketing in the EEA. It was not always possible, however, to adequately measure how significant that eventual local nexus would be or to filter transactions on that basis. In that sense, the figures cited are likely over-inclusive. The assessment of the local nexus was done on the basis of publicly available information and as such may not include all areas of companies' activities.

period 2015-2019 revealed that only around 26% of them appeared to constitute concentrations with some local nexus with the EEA and a cross-border dimension<sup>133</sup>.

- (102) Second, the Commission services' research<sup>134</sup> did not indicate that its review rates in the sectors of digital and pharma deviated significantly from its overall review rate (significantly lower review rates could have constituted a first indication of a possible enforcement gap in specific sectors).
- (103) Third, the Commission services analysed specifically transactions with a high ratio between transaction value and turnover of the target (which could be considered as typical examples of acquisitions of start-ups or nascent competitors). These constitute a small proportion of all high-value transactions, with real estate and REITS<sup>135</sup> deals accounting for the largest part. For the purposes of the exercise, the Commission services considered transactions with a value-to-turnover ratio above 10 or 5. Although the turnover data were not available for all transactions above EUR 1 billion recorded in the Bloomberg database, the research showed that from 2015 to 2018, transactions with a ratio of above 10 constituted between 9% and 14% of the high-value transactions, whereas transactions with a ratio above 5 represented between 23% and 28% of the high-value transactions. The year 2019 appears to be an exception in that respect<sup>136</sup>, with a much lower proportion of high-ratio transactions (only 4% above 10 and 8% above 5).
- (104) Fourth, the Commission services undertook a qualitative analysis of a large subset of high-value transactions above EUR 1 billion contained in the Bloomberg database. The aim was to identify cases which could have merited a review or could even potentially have led to an intervention if the Commission had had jurisdiction<sup>137</sup>. **However, it**

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<sup>133</sup> Further, the Commission services' research of transactions recorded in 2019 (last full year available) showed that, at best, only around 50% of the transactions identified could potentially have a connection to the EEA. When looking only at those transactions, the Commission's review rate increased to 27% for transactions above EUR 1 billion and to 43% for transactions above EUR 5 billion in 2019. However, some of the transactions recorded in the Bloomberg database were mere projects that never materialised and thus would not have been ultimately subject to review. In addition, Bloomberg also includes investments, which would not be deemed to constitute a concentration for the purposes of the EU Merger Regulation. These review rates, should not, therefore, be taken as an indication that the remaining cases unduly escaped merger review or as a delineation of the size of the enforcement gap. Only a more in-depth qualitative review could indicate how many of those transactions were of any relevance from the competition perspective.

<sup>134</sup> The Commission services categorised the high-value transactions identified in the Bloomberg database by industry sector and focused its analysis on the digital sector (using the communications and technology category as a proxy) and the pharmaceutical sector (incorporating biotechnology). The average review rates in the communications and technology sector did not appear to be consistently lower than the average rate of review of transactions across all sectors. The conclusion was similar for pharmaceuticals, although the Commission appears to have reviewed few high-value transactions falling into the biotechnology segment.

<sup>135</sup> REITs are companies that own or finance income-producing real estate and are modelled on mutual funds.

<sup>136</sup> These figures correspond to all transactions identified, irrespective of whether or not they presented a possible local nexus with the EEA. For 2019, the Commission services specifically examined the subset of transactions presenting such a local nexus with the EEA: the results did not vary greatly, with 4% of deals with a ratio above 10 and 10% with a ratio above 5.

<sup>137</sup> This subset contains notably the following categories of cases: (i) high-value transactions recorded in Bloomberg in all economic sectors with a ratio value/sales higher than 5; and (ii) all high-value

**should be noted from the outset that this examination was conducted on the basis of public, and hence limited, information; therefore, while instructive, the examination should be treated with caution.**

(105) In particular, the Commission services conducted a qualitative examination of 744 transactions over the years 2015-2019. Out of these, 191 transactions appeared to constitute concentrations with some local nexus with the EEA and a cross-border dimension<sup>138</sup> (i.e. 26%). Of these, the Commission services considered that 87 transactions (corresponding to 12% of all qualitatively assessed transactions) were cases where the activities of the merging parties presented some non-insignificant overlaps or other commercial links (e.g. activities in vertically related or neighbouring sectors). Those transactions, in sum, could be potential candidates for a review under the EU Merger Regulation<sup>139</sup> (henceforth ‘cases that might have potentially merited review’). The split of these transactions between different industry sectors is presented in Table 2. These numbers should, however, be read with caution. In particular, the ‘cases that might have potentially merited review’ category should not be understood as including predominantly (let alone only) transactions likely to be problematic, or even competitively significant cases (i.e. cases deserving close non-simplified merger assessment). In fact, this category includes any potential overlaps without a detailed assessment of the competitive significance of those overlaps or in-depth analysis of the market involved, since research was based on publicly available information.

**Table 2: Qualitative assessment of selected transactions recorded by Bloomberg (2015 to 2019)**

	Digital	Pharmaceutical (& biotechnology)	Other sectors	Total
All relevant transactions with local nexus and a cross-border dimension	91	52	48	191
Cases that might have potentially merited review	42	24	21	87

(106) Of these 191 cases, roughly 50% were reviewed by at least one NCA (or appeared as candidates for review at national level). None required any remedies under applicable national merger control rules in the EU<sup>140</sup>. Furthermore, according to the information

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transactions recorded in Bloomberg in the pharmaceutical and biotechnology industries and in the advertising, internet, software and media sectors (as a proxy for digital cases).

<sup>138</sup> The requirement of a cross-border dimension is mentioned notably in Recital 8 of the EU Merger Regulation: ‘[T]his Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State’. The exercise was attempting to replicate that dimension and filter out transactions whose impact would be limited to a single Member State.

<sup>139</sup> E.g. Shire/Dyax, AbbVie/Pharmacyclics, Expedia/HomeAway, SS&C Technologies Holdings/Advent Software, Pfizer/Medivation, Danaher Corp/Cepheid, Intel/Mobileye, Takeda Pharmaceuticals/ARIAD Pharmaceuticals, Ingenico Group/Bambora, Allergan/Zeltiq Aesthetics, Marvell Technology Group/Cavium, Cisco Systems/Broadsoft.

<sup>140</sup> Namely the Stryker Corp/Wright Medical Group case concerning medical healthcare products, where remedies have been accepted in the context of a review by the UK competition authority and the US Federal Trade Commission. The transaction has also been reviewed in Austria and Germany.

available, it appears that only one of the identified transactions raised competition concerns in other jurisdictions<sup>141</sup>.

(107) The Commission services also specifically considered the category of high value-to-turnover ratio transactions recorded by Bloomberg from 2015 to 2019. Out of these, 45 transactions whose value exceeded the target turnover by a multiple of 10 appeared to constitute concentrations with some local nexus with the EEA and a cross-border dimension. Around 60% of these transactions (27 transactions in total) were deemed to constitute cases which might have potentially merited review under the EU Merger Regulation. For the entire period, transactions in the pharma/biotech sector accounted for the largest share (roughly 33%) of relevant transactions and of the transactions potentially meriting review (37%). Transactions in the digital sector (comprised of advertising, internet, software, media) accounted for 10 out of the 27 transactions, and 7 were classified as cases which might have potentially merited review. If a multiple of 5 was considered, 90 transactions were qualified as appearing to constitute concentrations under the EU Merger Regulation, with some local nexus with the EEA and a cross-border dimension; out of those, 46 were qualified as cases which might have potentially merited review. Both in the pharmaceutical/biotech sector and digital, 21 transactions were considered as relevant (corresponding to 23% each), while 12 and 11 respectively were considered cases potentially meriting review. These results are presented in Table 3 below.

**Table 3: Qualitative assessment of selected high value-to-turnover ratio transactions recorded by Bloomberg (2015 to 2019)**

		Digital	Pharmaceutical (& biotechnology)	Other sectors	Total
Transactions with a ratio >10	All relevant transactions with local nexus and a cross-border dimension	10	15	20	45
	Cases that might have potentially merited review	7	10	10	27
Transactions with a ratio >5	All relevant transactions with local nexus and a cross-border dimension	21	21	48	90
	Cases that might have potentially merited review	12	11	23	46

(108) Fifth, to complement the inherently difficult analysis of non-notified mergers, the Commission services examined the Commission's enforcement record and identified groupings of cases where the turnover of the companies in a particular market was not indicative of the transaction's potential effects in that market. The Commission staff observed that it had identified competition concerns at the EEA-wide or even worldwide level in several cases in recent years where one of the merging companies has no or very limited turnover in selling products in the relevant market. The Commission could

<sup>141</sup> This, however, need not be necessarily indicative of the competition assessment that would be performed by the Commission, had the transactions fallen under its jurisdiction.

assess those overlaps under EU merger control rules only because the companies marketed products (and thus achieved turnover) in markets unrelated to the (potentially) problematic overlaps (or in other markets which were problematic on their own). Such groupings of cases concerned primarily those where at least one of the companies was engaged in research and/or was developing a new (source for a) product or service with large competitive potential. Examples identified include cases from the pharmaceutical, agro-chemical and industrial sectors in particular. Several of those assessments led the Commission to identify competition concerns in the research and development overlaps that were only dispelled after the merging companies offered remedies<sup>142</sup>.

- (109) Sixth, in a similar vein, based on its market knowledge and continued market monitoring over the years, the Commission services identified possible examples of groupings of cases described in paragraph (108), or, more generally, of acquisitions of potentially nascent competitors, which failed to meet the Commission's jurisdictional thresholds and did not reach a EUR 1 billion deal value threshold, but could potentially have warranted review at EU level<sup>143</sup>.
- (110) Seventh, economic literature published in recent years also indicates that transactions with potentially significant competitive effects may escape the jurisdiction of competition authorities and of the Commission. A well-known US-centred study on pharmaceutical acquisitions concludes that there are on average around 50 acquisitions per year in the pharmaceuticals industry where an incumbent may acquire innovative targets solely to discontinue the target's innovation projects and pre-empt future competition. The authors also indicate that such 'killer acquisitions' disproportionately occur just below the US transaction value thresholds for merger control review<sup>144</sup>. Another study purports that, as the probability of detection by antitrust authorities falls, the likelihood that rivals pursue mergers rises<sup>145</sup>. In the Commission services' view, this research, while generally focusing on the situation in the US, lends support to the conclusion that some anti-competitive mergers may take place below the notification thresholds at both the EU and national levels.

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<sup>142</sup> See, for example, M.9547 – J&J/Tachosil (2020; notification withdrawn in phase II), M.9554 – Elanco/Bayer Animal Health (2020), M.8658 – UTC/Rockwell (2018), M.8084 – Bayer/Monsanto (2018), M.7932 – Dow/DuPont (2017), M.8401 – J&J/Actelion (2017), M.7278 – GE/Alstom (2015), M.7559 – Pfizer/Hospira (2015), M.7872 – Novartis/GSK Oncology Business (2015), M.7326 – Medtronic/Covidien (2014), M.6166 – Deutsche Börse/NYSE Euronext (2012) and M.6203 – Western Digital/Hitachi (2011).

<sup>143</sup> See, for example, Facebook/Giphy (2020), Facebook/Play Giga (2019), Amazon/Ring (2018), Apple/NextVR (2020), Takeaway/Delivery Hero (2018), Merck/Immune Design (2019), Roche/Spark Therapeutics (2019) and Mitsubishi/Bombardier regional aircraft business (2019).

<sup>144</sup> Cunningham, Colleen and Ederer, Florian and Ma, Song, [Killer Acquisitions](#) (April 19, 2020). According to the authors, at least between 5.3% and 7.4% of all acquisitions in their sample (or about 46 to 63 pharmaceutical acquisitions per year) are 'killer acquisitions'. They also noted that acquisitions of overlapping targets bunch just below the FTC acquisition transaction value threshold, while there is no such pattern for non-overlapping acquisitions.

<sup>145</sup> Wollmann, Thomas G., [Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act](#) (AER: Insights 2019, 1(1): 77–94). The study finds that, as a result of an increase in US merger review thresholds in the year 2000, around 300 additional mergers between direct competitors took place every year. The author argues that this can result in 'stealth consolidation': anticompetitive deals whose individual size enables them to escape regulatory scrutiny but whose cumulative effect is large.



- (111) Eighth, the Commission services specifically looked at acquisitions by large tech companies and found that – despite these companies’ significance for competition in the internal market – very few of their acquisitions had been caught by the Commission’s jurisdiction over the last few years. Media reports and academic contributions to conferences and studies indicate that the GAFAM companies have made hundreds of acquisitions during recent years, the vast majority of which have escaped merger control<sup>146</sup>.
- (112) The Commission services examined, in particular, the value of those individual transactions on the basis of Bloomberg data, the annual reports of the companies concerned and data provided by the latter. The large majority of these acquisitions would appear to have a transaction value below EUR 1 billion (often well below this figure; in fact, research revealed that the value agreed in many of these transactions was actually rather small). In the period 2015-2019, the Commission identified only six transactions by the GAFAM companies above EUR 1 billion<sup>147</sup>, including three above EUR 5 billion: among the latter, two were reviewed by the Commission (M.8994 – Microsoft/GitHub (2018) and M.8124 – Microsoft/LinkedIn (2016)), while the last one did not concern the digital sector and did not have a link to the EEA (Amazon/Whole Foods Market).
- (113) Accordingly, the Commission services’ research identified a number of cases that have not been caught by the Commission’s direct merger control jurisdiction (since the merging companies’ turnover fell below the relevant thresholds), but which could have merited investigation at EU level. Generally, the absence of a complementary value-based jurisdictional threshold did not, however, appear to have necessarily been a decisive factor in potentially relevant transactions not being captured by the EU Merger Regulation. This was because not all of those identified transactions would appear to constitute high-value deals and the transaction value may not always be sufficiently correlated with the potential competitive significance of the companies acquired.

#### 5.1.1.5. Jurisdiction obtained through the referral system

- (114) The Commission’s enforcement practice shows that the referral mechanisms under Article 4(5) (at the request of the notifying parties) and Article 22 (at the request of the Member States) have allowed it to review important transactions which did not meet the thresholds of the EU Merger Regulation. There are, however, limitations to these referrals’ effectiveness as a corrective mechanism to the turnover-based thresholds.

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<sup>146</sup> The UK Report of the Digital Competition Expert Panel, *Unlocking Digital Competition*, of March 2019 mentioned the figure of 250 GAFAM transactions in the past 5 years. The French Council of Economic Analysis, note 51, Competition and Trade: Which Policies for Europe, of May 2019 mentions 634 acquisitions for a total amount of more than USD 142 billion made by the GAFAM companies between 1991 and 2018. This trend could have been reinforced by the COVID-19 pandemic as there have been reports of increased numbers of acquisitions by large tech companies in 2020 compared to the years 2016-2019: ‘Big Tech goes on pandemic M&A spree despite political backlash’, *Financial Times*, 28 May 2020; according to this article, the GAFA(M) companies announced 19 deals between January and May 2020, the fastest pace since 2015; reported (potential) deals include Amazon/Zoox, Facebook/Reliance/Jio and Facebook/Giphy.

<sup>147</sup> Microsoft/GitHub, Amazon/Whole Foods Market, Microsoft/LinkedIn, Google/HTC assets, Google/Looker, Google/Fitbit.

These are due, in particular, to the Commission's current approach of discouraging Article 22 referrals for concentrations that fall beneath national merger control thresholds, which restricts the number of transactions that it reviews. In practice, thus, only transactions which were notifiable in at least one Member State have been referred under Article 22, even though the provision allows for accepting any referral requests that concern concentrations that affect cross border trade and threaten to significantly affect competition within the territory of the Member State(s) making the request, regardless of the competence of the national competition authorities to review the transaction by themselves. This limitation is compounded by the fact that national merger regimes in the EU present differing jurisdictional thresholds and mechanisms.

- (115) First, the Commission's case practice shows that referrals have resulted in the Commission acquiring jurisdiction for a number of competitively important concentrations in the internal market.
- (116) Between 2004 and 2020<sup>148</sup>, the Commission received a total of 384 requests on the basis of Article 4(5) and 34 requests on the basis of Article 22. Among those cases, there were around 30 particularly significant transactions<sup>149</sup> in the digital and pharmaceutical sectors (more comprehensive figures of referral cases in all sectors are provided in other sections of this document).
- (117) Notable transactions referred to the Commission included, in the digital area, the following cases: M.9424 – Nvidia/Mellanox (2019), M.8994 – Microsoft/GitHub (2018), M.7217 – Facebook/WhatsApp (2014), M.4731 – Google/DoubleClick (2008), M.4854 – TomTom/Tele Atlas (2008) and M.4942 – Nokia/Navteq (2008). In the pharmaceutical sector, examples include M.5555 – Novartis/EBEWE Pharma (2009) and M.5530 – GSK/ Stiefel (2009). The transaction value in all of these cases exceeded EUR 1 billion. There were also other important transactions referred to the Commission, where the transaction value was below EUR 1 billion, such as M.9547 – J&J/Tachosil (2019), M.8788 – Apple/Shazam (2018), M.8416 – Priceline/Momondo (2017), M.7802 – Amadeus/Navitaire (2015) and M.7716 – Pfizer/GSK Menacwy business (2015). A more comprehensive list of these significant referred cases is provided in Table 4 below.

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<sup>148</sup> For Article 4(5) referrals, the Commission does not adopt a formal decision to accept the referral. The date of the final decision, following notification to the Commission, was taken as a reference. For Article 22 referrals, the date of the referral decision was taken as a reference.

<sup>149</sup> The cases presented in Table 4 do not constitute a comprehensive list of all referrals in digital and pharmaceutical sectors, but only a selection of cases involving major players active in these sectors.

**Table 4: Significant digital and pharma transactions reviewed by the Commission following Article 4(5) and Article 22 referrals**

		Article 4(5)	Article 22	Above EUR 1 bn?	Phase II and/or intervention?
<b>Digital</b>					
1.	M.9424 – Nvidia/Mellanox (2019)	X		Yes	No
2.	M.9005 – Booking Holdings/HotelsCombined (2018)	X		No	No
3.	M.8994 – Microsoft/GitHub (2018)	X		Yes	No
4.	M.8788 – Apple/Shazam (2018)		X	No	Yes
5.	M.8416 – Priceline/Momondo (2017)	X		No	No
6.	M.7802 – Amadeus/Navitaire (2015)		X	No	No
7.	M.7678 – Equinix/Telecity (2015)	X		Yes	Yes
8.	M.7202 – Lenovo/Motorola Mobility (2014)	X		Yes	No
9.	M.7217 – Facebook/WhatsApp (2014)	X		Yes	No
10.	M.6007 – Nokia Siemens/Motorola network business (2010)	X		No	No
11.	M.6095 – Ericsson/Nortel (2011)	X		No	No
12.	M.5983 – Tyco Electronics/ADC (2010)	X		Yes	No
13.	M.5669 – Cisco/Tandberg (2010)	X		Yes	Yes
14.	M.5732 – HP/3Com (2010)	X		Yes	No
15.	M.4731 – Google/DoubleClick (2008)	X		Yes	Yes
16.	M.5317 – IBM/Ilog (2008)	X		No	No
17.	M.4747 – IBM/Telelogic (2008)	X		No	Yes
18.	M.4854 – TomTom/TeleAtlas (2008)	X		Yes	Yes
19.	M.4942 – Nokia/Navteq (2008)	X		Yes	Yes
20.	M.4910 – Motorola/Vertex (2007)	X		No	No
21.	M.4881 – Dell/Asap (2007)	X		No	No
22.	M.4523 – Travelport/Worldspan (2007)	X		Yes	Yes
<b>Pharmaceuticals</b>					
23.	M.9547 – J&J/Tachosil (2019)		X	No	Yes
24.	M.7716 – Pfizer/GSK Menacwy business (2015)	X		No	No
25.	M.7685 – Perrigo/GSK Divestment Business (2015)	X		No	No
26.	M.7583 – CSL/Novartis Influenza Vaccines Business (2015)	X		No	No
27.	M.6205 – Eli Lilly/Janssen Pharmaceutical animal health (2011)	X		N/A	No

28.	M.6033 – J&J/Crucell (2011)	X		Yes	No
29.	M.5843 – Eli Lilly/Pfizer animal health assets (2010)	X		N/A	No
30.	M.5555 – Novartis/EBEWE Pharma (2009)	X		Yes	No
31.	M. 5530 – GSK/ Stiefel (2009)	X		Yes	No

- (118) As Table 4 shows, almost 30% (9 out of 31) of these transactions referred to the Commission in digital and pharmaceutical sectors were subject to either an intervention or an in-depth investigation. This percentage is significantly higher than the Commission's overall rate over all notifications in the same period (around 8%). This shows that more problematic and complex cases were generally referred to the Commission in these sectors and that, thus, the referral mechanisms have been a useful tool to catch relevant transactions falling outside the current turnover thresholds in these sectors.
- (119) Furthermore, as Table 4 also shows, those referrals concerned not only high-value transactions involving targets with limited turnover, but also, in nearly half of the referral cases listed, transactions where the consideration paid for the target was less than EUR 1 billion.
- (120) Second, in past years, the Commission – in exercise of the discretion it has to accept or reject referrals – informally discouraged referral requests under Article 22 of the EU Merger Regulation from Member States which did not have jurisdiction over the transaction<sup>150</sup>. This has limited the scope for such referrals. Thus, concentrations falling below the Member States' respective jurisdictional thresholds have not been referred to the Commission and have therefore escaped control at both national and EU level, although it would have been legally possible for the Commission to accept such referrals, as explained in paragraph (56).
- (121) Third, there are differences in the national merger control thresholds, since each Member State designs its own merger control system and sets the relevant jurisdictional criteria. Although the national jurisdictional regimes in the EEA have progressively converged over time and are generally based on turnover-based thresholds<sup>151</sup>, they do continue to differ. For instance, the size of the required turnover(s) varies (both in absolute terms and in relative terms, i.e. when compared to the size of the country/economy in question). Furthermore, some countries use additional jurisdictional mechanisms<sup>152</sup>. Accordingly, under the current practice of the Commission regarding

<sup>150</sup> The Commission did, however, accept that Member States without jurisdiction could join a referral request introduced by a Member State which did have competence over the transaction if the legal conditions of Article 22 of the EU Merger Regulation were met.

<sup>151</sup> The large majority of Member States follow the principles established under the EU Merger Regulation by basing their jurisdictional thresholds on turnover (which could be considered a further indication of the effectiveness of this method of filtering cases).

<sup>152</sup> This is illustrated by the value-based thresholds introduced by Germany and Austria in 2017, the market-share thresholds used by Spain and Portugal, or the possibility to request jurisdiction over a concentration beneath the thresholds under certain conditions, as included in the merger control systems of Ireland, Sweden, Latvia and Slovenia.

referrals under Article 22, those Member States whose merger control systems establish jurisdiction more broadly, including acquisitions of low-turnover targets with high competitive significance, are potentially able to refer more concentrations to the Commission<sup>153</sup>. Conversely, Member States whose merger control systems establish jurisdiction more narrowly are able (de facto, under the current practice) to request fewer referrals under Article 22<sup>154</sup>. Thus, the Commission's current practice regarding the application of Article 22 limits the scope for referrals and leads to uneven possibilities for Member States when requesting a referral.

#### 5.1.1.6. Monitoring of the application of new value-based thresholds in Austria and Germany

- (122) As mentioned in paragraph (71), the Commission has closely monitored the application of additional jurisdictional thresholds based on the value of the transaction introduced in Germany in June 2017<sup>155</sup> and in Austria in November 2017<sup>156</sup>. In July 2018, the two NCAs issued joint guidance about the application of their new jurisdictional thresholds<sup>157</sup>.
- (123) While it may be still too early to draw firm conclusions on the functioning of the new thresholds in Austria and Germany, the experience of these Member States can be taken into account when deciding whether or not to introduce a similar type of threshold at EU level.
- (124) In Germany<sup>158</sup>, from the entry into force of the new value-based thresholds in June 2017 to June 2020, 28 notifications were made on this basis. Of these, 19 cases were cleared

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<sup>153</sup> Further, these Member States will also count towards the minimum three national merger notifications required for referrals under Article 4(5) of the EU Merger Regulation.

<sup>154</sup> Also, these Member States cannot be taken into account for referrals under Article 4(5) of the EU Merger Regulation.

<sup>155</sup> In Germany, under the new jurisdictional threshold, mergers are notifiable if: (i) the combined worldwide turnover of all the participating undertakings exceeds EUR 500 million; (ii) one participating undertaking achieves a Germany-wide turnover of more than EUR 25 million, but neither the target nor any other participating undertaking achieved a Germany-wide turnover of more than EUR 5 million; (iii) the consideration for the transaction exceeds EUR 400 million; and (iv) the target company is active in Germany to a considerable extent. The new threshold came into force on 9 June 2017.

<sup>156</sup> In Austria, under the new jurisdictional threshold, mergers are notifiable if: (i) the combined worldwide turnover of all the participating undertakings exceeds EUR 300 million; (ii) the combined national turnover of the participating undertakings exceeds EUR 15 million; (iii) the consideration for the transaction exceeds EUR 200 million; and (iv) the target company is active in Austria to a considerable extent. The new threshold came into force on 1 November 2017.

<sup>157</sup> 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)', accessible [here](#). The joint guidance focuses on issues regarding the definition of the value of a consideration, significant domestic activity, and the notion of concentration, as well as procedural issues. With regard to the criterion of 'significant domestic activity' or a 'significant local nexus' the guidance paper states that only current activities are relevant, and that domestic turnover is generally not a relevant criterion for establishing a local nexus. The guidance also notes that different criteria may apply to different industries. Factors that may be relevant for 'domestic activity' are, for example: (i) in the digital sector, user numbers ('monthly active users'), the access frequency of a website ('unique visitors'), or the number of 'daily active users'; (ii) the location of the customer, i.e. the place where a service is provided or a product is sold, even where the service or product is free; (iii) R&D activities within Germany or activities intended to enable German market entry (e.g. local infrastructure, staff, distribution system, etc.).

<sup>158</sup> 8 notifications in 2017, 10 notifications in 2018 and 9 notifications in 2019 and 1 in the first half of 2020.

in phase I and 9 cases were withdrawn after the German NCA's confirmation that there was no notification obligation<sup>159</sup>. 4 notifications were filed by digital companies, while the remaining 24 notifications related to the pharmaceutical and other sectors. In Austria, between November 2017 and the end of the year 2020, 53 notifications<sup>160</sup> were made on the basis of the new thresholds (out of about 500 notifications on a yearly basis). 5 notifications concerned the digital sector, while the other 48 related to the pharmaceutical and other sectors. None of the cases led to an in-depth investigation before the Cartel Court, with one case being refiled with modifications.

- (125) Accordingly, based on the enforcement practice so far of the respective NCAs, it seems that the new thresholds in Germany and Austria have not resulted as yet in capturing additional anticompetitive transactions, as all transactions notified on the basis of the new thresholds have been cleared unconditionally. As to the digital sector in particular, these thresholds do not appear so far to have brought many additional relevant cases under review.

#### 5.1.1.7. The 2019 report of the special advisers

- (126) As mentioned in paragraphs (20) and (66), in 2018 Commissioner Vestager appointed a panel of three special advisers from outside the Commission to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age.
- (127) In their report, published in April 2019<sup>161</sup>, the special advisers concluded that there is no need to change the EU Merger Regulation's jurisdictional thresholds at this stage. The special advisers acknowledged that turnover-based thresholds may not be a good proxy for capturing transactions involving start-ups in the digital industry as such firms focus on building up a large user base and have a small turnover. The special advisers considered, however, that broadening the scope of the EU Merger Regulation's jurisdiction would entail several difficulties, in particular given that new, non-turnover-based jurisdictional thresholds: (i) would need to ensure clarity as to whether a given transaction must be notified; (ii) should minimise the additional administrative burden and transaction costs that would be triggered; (iii) should point to the existence of a local nexus with the EEA; (iv) should ensure harmonious co-existence of a non-turnover-based threshold for EU merger control with national merger control systems; and (v) should be set in such a way as to not capture too many irrelevant transactions.
- (128) Given all these complexities, the special advisers considered that the EU Merger Regulation's jurisdictional thresholds should only be amended if the existing regime exhibits serious gaps. The special advisers noted that some digital mergers that the Commission recently examined were caught by the referral system and that others which escaped the Commission's jurisdiction were reviewed by NCAs.

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<sup>159</sup> 5 withdrawals in 2017, 2 withdrawals in 2018, 2 withdrawals in 2019 and no withdrawals in the first half of 2020.

<sup>160</sup> 2 notifications in 2017, 18 notifications in 2018, 15 notifications in 2019 and 18 notifications in 2020.

<sup>161</sup> See footnote 94.

- (129) Accordingly, while acknowledging certain shortcomings of the turnover-based jurisdictional thresholds, the special advisers considered that it was, for the time being, advisable to focus on monitoring: (i) the performance of the transaction value-based thresholds recently introduced by Austria and Germany; and (ii) the functioning of the referral system.

#### 5.1.1.8. Conclusion

- (130) The purpose of the Evaluation was to assess; (i) whether the current jurisdictional thresholds, exclusively based on the aggregate turnover of the undertakings concerned, complemented by the referral system, sufficiently capture transactions potentially having an impact in the internal market; and (ii) whether the absence of complementary jurisdictional criteria, in particular a transaction value-based threshold, impairs the goal of capturing sufficiently relevant transactions. Taking into consideration and weighing the overall body of evidence described in Sections 5.1.1.2 to 5.1.1.7, the Commission services conclude the following:
- (131) First, the current jurisdictional thresholds, complemented by the referral system, have allowed the Commission to review a number of transactions with potential impact in the internal market. The Commission's referral practice under Article 22 of the EU Merger Regulation has, however, resulted in transactions only being referred under this mechanism when at least one Member State had jurisdiction over the case.
- (132) In the first place, while the turnover-based thresholds determine the Commission's jurisdiction for many of the competitively significant transactions with cross-border effects in the EEA, they have not captured all such transactions. This means that a number of relevant cases have escaped the Commission's direct merger control jurisdiction. This is indicated by different sources of evidence, including most notably the Commission services' research into deal activity and the Commission's enforcement practice, as well as the results of external reports, academic publications and studies. Those sources show limitations in the turnover-based thresholds in a specific category of cases, namely acquisitions involving at least one company with (as yet) low turnover but with significant competitive potential, such as nascent competitors and innovative companies, including in (but not limited to) the digital, pharmaceutical, biotechnology and certain industrial sectors. That evidence is further supported by stakeholder feedback. While most stakeholders did not consider that a significant enforcement gap exists, they did not generally contest that some relevant transactions were not captured by the current thresholds. The Commission services note that substantiated submissions of stakeholders have provided rigorous arguments why (and which) cases with cross-border effects in the EEA have escaped the Commission's direct jurisdiction. At the same time, the results of the Evaluation show that it is very difficult to quantify the number of such cases, despite the Commission services' best efforts to do so through their internal research.
- (133) In the second place, the results of the Evaluation show that this shortcoming is mitigated by the referral mechanisms under Article 4(5) and Article 22 of the EU Merger Regulation. As demonstrated by past enforcement practice, these referral mechanisms have enabled the Commission to review important transactions with cross-border effects

falling below the thresholds of the EU Merger Regulation, in particular significant transactions in the digital and pharmaceutical sectors. There are, however, limitations to the effectiveness of referrals to serve as a corrective mechanism for the turnover-based thresholds. These limitations result from the Commission's current approach of discouraging Article 22 referral requests from Member States without jurisdiction over the concentration at stake (i.e. cases that fall beneath national merger control thresholds).

- (134) Second, the overall body of evidence suggests that the absence of complementary jurisdictional thresholds – particularly based on the value of the transaction – has not in itself significantly contributed to impairing the effectiveness of the EU Merger Regulation's jurisdictional thresholds.
- (135) In the first place, the Commission services' research shows that while a high value or a high value-to-turnover ratio may well be indicative of competitively significant transactions, it is not in itself decisive since many such transactions appear to carry little competitive significance. Moreover, the Commission services' research also identified potentially significant transactions that did not meet the criteria of high-value or high value-to-turnover-ratio transactions, including notably in the digital sector.
- (136) In the second place, while it may be too early to draw conclusions, the enforcement experience of the German and Austrian merger control jurisdictions seems to suggest that so far the new transaction value thresholds have not captured additional anticompetitive transactions and appear to have captured few transactions concerning the digital sector in particular.

#### *5.1.2. Referral mechanisms*

- (137) The Evaluation aimed principally at corroborating the findings of the 2014 white paper and the corresponding public consultation as to the effectiveness of the case referral system. Specifically, it set out to assess to what extent the application of the referral provisions allowed for an effective allocation of jurisdiction to the most appropriate authority.
- (138) The Commission services' conclusions will be based mainly on the following sources of evidence discussed in the next sections: (i) previous reports and consultations (Section 5.1.2.1), (ii) the results of the Public Consultation (Section 5.1.2.2) and (iii) a review of the Commission's enforcement practice (Section 5.1.2.3).

##### *5.1.2.1. Previous reports and consultations*

- (139) As mentioned in paragraph (4), the Commission services reviewed the application and functioning of the provisions governing the referral of cases to and from Member States in 2008/2009. The Commission's 2009 report to the Council highlighted that the rules on referrals had worked well overall and that the pre-notification and post-notification mechanisms introduced in 2004 had considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU<sup>162</sup>. However, while noting these

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<sup>162</sup> 2009 Report, paragraphs 16 et seq.



mechanisms' success<sup>163</sup>, the report found that there was scope for further improvements and suggested that additional concentrations could be reviewed by the Commission and that there could be scope for more referrals to Member States in application of Article 4(4) of the EU Merger Regulation.

- (140) Along the same lines, the 2014 white paper concluded that the reform in 2004 had made the referral mechanisms more effective and had enabled more cases to be reviewed by the more appropriate authority<sup>164</sup>. Furthermore, while the 2014 white paper did not identify a need for any fundamental changes to the referral system<sup>165</sup>, it included a number of proposals to make the procedure more effective, which were generally welcomed by public and private stakeholders. These proposals were: (i) abolishing the two-step procedure under Article 4(5), which requires that parties first file a referral request and then the notification of the concentration; (ii) expanding the Commission's jurisdiction to the entire EEA where it accepts a referral request under Article 22, or conversely, renouncing jurisdiction completely if one or several Member States oppose such referral request<sup>166</sup>; and (iii) removing the requirement under Article 4(4) for the parties to assert that the transaction may 'significantly affect competition in a market', to remove a perceived 'element of self-incrimination'.

#### 5.1.2.2. Results of the Public Consultation

- (141) During the Public Consultation, the majority of stakeholders submitted that the current system allows for the effective allocation of cases between the Commission and the NCAs. They did, however, note that some amendments could make the system even more effective.
- (142) Public-sector stakeholders expressed support in particular for the substantive proposals in the white paper regarding post-notification referrals to the Commission under Article 22 of the EU Merger Regulation, with some making suggestions on some procedural aspects<sup>167</sup>. Moreover, several NCAs and other national bodies reiterated their suggestions for a reform of post-notification referrals to Member States under Article 9 of the EU Merger Regulation, in particular to remove or limit the Commission's discretion to refer<sup>168</sup>.
- (143) Private-sector stakeholders generally agreed with the envisaged changes to the referrals to the Commission under Article 22 of the EU Merger Regulation. Some, however, requested that this mechanism be repealed or, at least, that its scope be further limited.

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<sup>163</sup> 2009 Report, paragraph 23.

<sup>164</sup> 2014 white paper, paragraph 59.

<sup>165</sup> 2014 staff working document, paragraph 130.

<sup>166</sup> If the Commission accepts referrals under Article 22, it only obtains jurisdiction for the territory of the Member State(s) that have requested the referral or joined another Member State's request (or on broader geographic markets including these countries), cf. footnote 45 of the Referral Notice. The proposal of the white paper would largely avoid the risk of parallel investigations in cases where one or several Member States oppose a referral request under Article 22 EUMR. The 2014 white paper also provided for the introduction in the referral process of an early information notice circulated by Member States as soon as they receive a notification or are made aware of a transaction with a cross-border dimension.

<sup>167</sup> Public-sector stakeholders' replies to questions 23, 24 and 25 of the Public Consultation.

<sup>168</sup> Public-sector stakeholders' replies to questions 23, 24 and 25 of the Public Consultation.

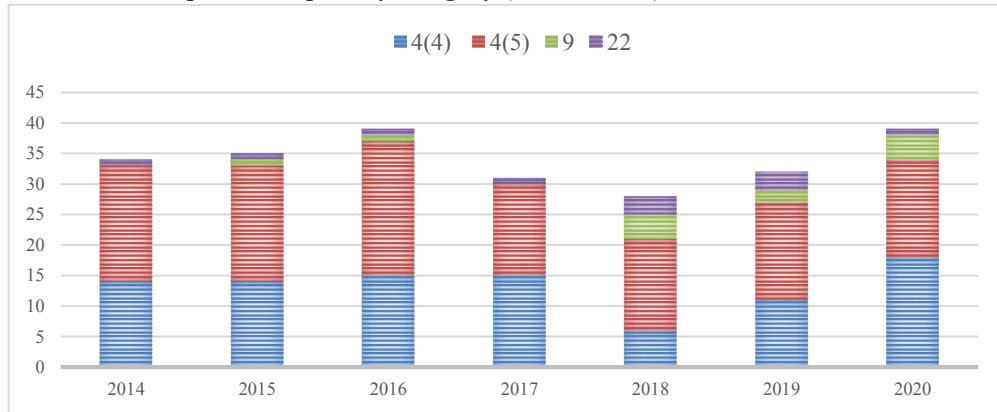
Moreover, several respondents suggested that, for pre-notification referrals to the Commission under Article 4(5) of the EU Merger Regulation, the Commission's jurisdiction should be limited to an assessment of worldwide or EEA-wide markets, or, if the notified transaction concerns markets that are national or even smaller, to the territories of those Member States that would have jurisdiction over the transaction under their national merger control laws. As regards referrals to the Commission under Article 9 of the EU Merger Regulation, no private-sector stakeholders requested removing or limiting the Commission's discretion under this provision<sup>169</sup>.

#### 5.1.2.3. Review of the Commission's enforcement practice

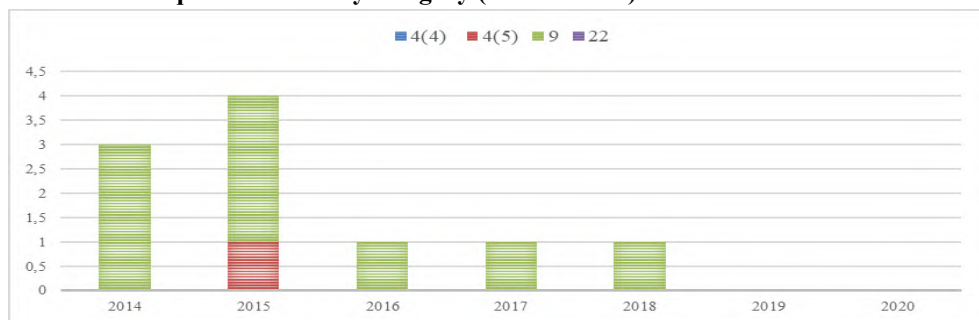
(144) In terms of enforcement practice, between 2014 and 2020 pre-notification referrals were the most frequently used, accounting for more than 80% of the referral requests received<sup>170</sup>.

(145) Figure 8 and Figure 9 below respectively present the number of referrals requests accepted and refused from 2014 to 2020, divided by type of referral.

**Figure 8: Referral requests accepted by category (2014 to 2020)**



**Figure 9: Referral requests refused by category (2014 to 2020)**



(146) In particular, the Commission services observe the following:

<sup>169</sup> Private-sector stakeholders' replies to questions 23, 24 and 25 of the Public Consultation.

<sup>170</sup> From 2014 to 2020, 123 referral requests constituted pre-notification referral requests from Member States to the Commission under Article 4(5) of the EU Merger Regulation, followed by 93 partial or full pre-notification referrals from the Commission to Member States under Article 4(4). In the same period, the Commission received 21 post-notification requests for full or partial referrals on the basis of Article 9 and 10 post-notification requests on the basis of Article 22.

- a. Pre-notification referrals to the Commission under Article 4(5) of the EU Merger Regulation. A total of 123 requests were made, an average of 17.5 a year. This represented close to 5% of the total number of cases notified to the Commission. Only one referral request was refused, which confirms the finding of the 2014 white paper that referrals are rarely vetoed by Member States<sup>171</sup>. The proportion of cases which gave rise to in-depth investigations (close to 2%) was lower than the rate of phase II investigations among the Commission's overall caseload (close to 4%). However, a significantly higher proportion of these referred cases (10.5%) was approved subject to remedies in phase I (a rate around three times higher than that for the Commission's overall caseload in the same period, of around 4%). In addition, far fewer cases were treated under the simplified procedure (33% vs the percentage of more than 70% simplified cases in the overall Commission caseload in the same period). This shows that more problematic and complex cases were generally referred to the Commission. Furthermore, the one-stop-shop review in each of those 123 cases has removed the risk of potentially conflicting outcomes.
- b. Post-notification referrals to the Commission under Article 22 of the EU Merger Regulation. Requests in a total of 10 cases were submitted under this provision between 2014 and 2020, with none being refused by the Commission. Out of these cases, 3 were subject to an in-depth investigation, 3 cases were cleared conditionally subject to remedies and no case was treated under the simplified procedure, reflecting a considerably higher proportion of significant cases compared to the overall average of the Commission's merger investigations. These findings thus show that application of Article 22 often results in the referral to the Commission of potentially problematic cases (or, at least, cases which merit a deeper investigation). Most of these cases involved transactions affecting markets which were wider than national in scope<sup>172</sup>. All these referral requests were accepted by the Commission, as it found it appropriate to conduct the investigation and remedy discussions (where necessary) at Commission level<sup>173</sup>. A smaller number of cases consisted in transactions involving a series of markets with a national or narrower geographic scope but where a coherent treatment of the case at the EU level was considered desirable<sup>174</sup>. The Commission's enforcement practice between 2014 and 2020 thus confirms that this referral mechanism has effectively served to treat cases with European relevance at EU level. This shows that referrals

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<sup>171</sup> 2014 white paper, paragraph 65.

<sup>172</sup> This is indeed the first category of cases deemed normally most appropriate for referral to the Commission according to the Referral Notice (cf. paragraph 45).

<sup>173</sup> The last formal rejection of a referral request under Article 22 of the EU Merger Regulation took place in 2012, in case M.6502 – London Stock Exchange Group/LCH Clearnet Group. The requests by Portugal, France and Spain were rejected, despite the fact that the concerned markets were most likely at least EEA-wide, given that the UK, who also had jurisdiction over the transaction, did not join the referral. The Commission considered that the benefits of the one-stop shop could not be realised through accepting the referral requests and that it would not be best placed to deal with the case.

<sup>174</sup> Whether a referral is appropriate in cases involving national (and even more, sub-national markets) has to be decided, therefore, on a case-by-case basis in light notably of the considerations set out in the Referral Notice (paragraphs 42 et seq.) In two cases (both from before 2014), the Commission rejected referral requests under Article 22 of the EU Merger Regulation in constellations where the concerned markets were national, in exercise of its discretion: see case M.3986 – Gas Natural/Endesa (2005) and M.4124 – Coca Cola Hellenic Bottling Company/Lanitis Bros (2006).

to the Commission under Article 22 of the EU Merger Regulation have effectively complemented the mechanism instituted by Article 4(5) of the EU Merger Regulation in cases where the notifying parties did not (or could not) trigger the referral on their own initiative. As noted in Section 5.1.1.5, however, the Commission's practice of discouraging referral requests from Member States not having original jurisdiction over the case limited the use of this provision and thus its effectiveness as a corrective mechanism.

- c. Pre-notification referrals to Member States under Article 4(4) of the EU Merger Regulation. The Commission received a total of 93 requests, an average of around 13 per year. This was an increase on previous years (from 2004 to 2013 the Commission received 91 requests, i.e. 9 per year). None of these requests were refused (in 10 cases, the referral request concerned only part of the transaction). Since these cases concerned markets which were national or narrower in scope, the referral resulted in the allocation to Member States of transactions which had a clear national or narrower geographic focus. This referral mechanism effectively enabled the allocation of those cases to the more appropriate authority.
- d. Post-notification referrals to the Commission under Article 9 of the EU Merger Regulation. The Commission received 21 referral requests from Member States between 2014 and 2020, of which slightly more than 40% were refused. In those cases, the Commission considered itself the authority best placed to deal with the transaction, for example, in light of EU-wide developments affecting the sector which needed to be assessed in a consistent way (such as convergence in the telecom sector or the development of 'over-the-top' platforms<sup>175</sup>), in light of the Commission's experience in the sector, or in light of the extensive market investigation already conducted<sup>176</sup>. The average number of referrals under Article 9 of the EU Merger Regulation slightly decreased in this period (from 4.5 per year from 2004 to 2013 to 3 per year from 2014 to 2020). The geographic scope of the markets considered in the cases referred was national or narrower.

(147) Furthermore, as explained in Section 5.1.1.5, the referral system, both through Article 4(5) and Article 22 referrals, has contributed to ensuring a review at EU level of transactions involving undertakings with limited turnover, notably in the digital and pharmaceutical sectors.

(148) In light of the above, the Commission services conclude that referrals continue to be an effective tool to allocate investigations between the Commission and NCAs both before and after notification. However, as discussed in Section 5.1.1.5, there are also signs that the Commission's practice in applying Article 22 appears to have limited its potential as a corrective mechanism for competitively significant transactions that escape the jurisdiction of the EU Merger Regulation and the Member States.

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<sup>175</sup> M.8665 – Discovery/Scripps (2018); M.8257 – NN Group/Delta Loyd (2017); M.7612 – Hutchison 3G UK/Telefonica UK (2015); M.7000 – Liberty Global/Ziggo (2014).

<sup>176</sup> M.7978 – Vodafone/Liberty Global/JV (2016).

#### 5.1.2.4. Conclusion

- (149) The Commission services have based their conclusions on the overall body of evidence detailed in Sections 5.1.2.1 to 5.1.2.3 above, with particular emphasis on the assessment of its decisional practice set out in Section 5.1.2.3. The Commission services consider that the latter should be given substantial weight since: (i) it shows the functioning of the referral system in practice when applied to specific transactions; (ii) the Commission's referral decisions under Article 4(4), 9 and 22<sup>177</sup> contain specific reasoning on a number of key pertinent criteria such as the scope of the relevant geographic markets, the effect on trade between Member States and how well-placed NCAs or the Commission would be to review the transaction; and (iii) for cases referred to the Commission under Article 4(5) and 22, the outcome of the Commission investigations (i.e. whether the case is cleared unconditionally, subject to remedies or prohibited) show whether or not more problematic cases are referred to the Commission.
- (150) Based on the results of the Evaluation, the Commission services conclude that the referral mechanisms of the EU Merger Regulation have generally worked effectively as a corrective tool to achieve their objectives of allocating cases to the most appropriate authority. However, the Commission's restrictive approach to accepting Article 22 referrals has limited its use and thus its effectiveness, in particular for concentrations where the turnover of at least one of the undertakings concerned does not reflect its competitive potential.
- (151) First, all sources of evidence (previous consultations, the Public Consultation and the Commission's enforcement practice) indicate that overall the referral system works well and that the referral mechanisms are used effectively to allow the Commission to review transactions having a wider impact in the EEA, while allowing NCAs to review concentrations that impact specific Member States.
- (152) In this first place, this is confirmed by the Commission's decisional practice, which shows that depending on the type of referral, cases concerning wider geographic markets (EEA-wide or larger) have indeed been referred to the Commission and, conversely, that cases concerning smaller geographic markets (national or narrower) have been referred to the relevant NCAs.
- (153) In the second place, as evidenced in Section 5.1.2.3, referral requests were ultimately rejected in a very small percentage of cases, supporting the conclusion that the parties and the authorities involved have generally used the mechanism to refer appropriate candidate cases and that there is often consensus as to the usefulness of the referral and a good understanding of the Commission's decisional practice.
- (154) In the third place, the enforcement practice shows that referrals provided the Commission with the opportunity to review cases which were – on average – more likely to require a comprehensive investigation and concerned a number of significant

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<sup>177</sup> The Commission does not adopt a formal decision with respect to referrals under Article 4(5).

transactions with potential cross-border impacts on competition in the internal market, including in the digital and pharmaceutical sectors.

- (155) Second, however, the results of the Evaluation indicate that the Commission's practice of discouraging Article 22 referral requests in cases where the referring Member State did not have jurisdiction reduced its effectiveness as a corrective mechanism. This was particularly the case for concentrations where the turnover of at least one of the undertakings concerned did not reflect its competitive potential.
- (156) Third, although some possible changes to the referral provisions were supported by certain stakeholders, the Commission services consider that, at this stage, these changes do not appear to justify a reform of the EU Merger Regulation or, if introduced, would risk impairing the referral system's effectiveness. Thus, while extending the Commission's jurisdiction to the whole of the EEA in all Article 22 referrals would allow the Commission to examine the effects of some transactions more comprehensively, such extension would in practice only concern the rather few cases where the markets at stake are national or smaller in geographic scope (see paragraph (146)b). Overall, thus, amending Article 22 in this way, while potentially useful, does not appear a pressing issue at this stage, but may merit further consideration in the future. By contrast, limiting the Commission's jurisdiction in Article 4(5) referrals to the markets that include the territory of the referring Member State could have the reverse effect of preventing the Commission from protecting competition across the internal market and would therefore reduce the effectiveness of EU merger control. As regards the suggestion to limit the Commission's discretion in granting or rejecting Article 9 referral requests, the Commission considers that this would impair, in certain cases, the need to ensure a consistent approach to EU-wide developments in the review of the merger and exclude the benefits derived from relying on the Commission's prior experience and the extensive investigation already carried out (see paragraph (146)d)). Furthermore, the Commission services note that it has rejected only 3 Article 9 referral requests in the last 5 years (2016-2020) while it has accepted 11 such requests, in full or in part.

### *5.1.3. Simplification*

- (157) The Evaluation sought to assess to what extent the 2013 simplification package has met its objectives effectively. The overarching objective in this context was to reduce the overall burden for businesses and the Commission of having certain categories of typically unproblematic cases subject to EU merger control, without impairing the general objective of the EU Merger Regulation of preventing concentrations from causing lasting damage to competition in the internal market.
- (158) As explained in paragraphs (5) and (58), while intending to leave the effectiveness of EU merger control enforcement unaffected (as discussed in Section 5.1.3.1), the 2013 simplification package aimed to simplify the Commission's merger review procedures in three ways: (i) widening the scope of its simplified procedure (Section 5.1.3.2), (ii) reducing information requirements, notably in cases notified under the simplified procedure (Section 5.1.3.3), and (iii) streamlining the pre-notification phase, with an emphasis again on simplified cases (Section 5.1.3.4).

- (159) The Commission services' findings in this regard are based mainly on the following sources of evidence, discussed in the next sections: (i) a review of the Commission's enforcement practice and internal statistics; and (ii) the results of the Public Consultation and feedback from meetings with stakeholders throughout the Evaluation.

#### 5.1.3.1. Leaving the effectiveness of EU merger control enforcement unaffected

- (160) The Evaluation assessed to what extent the 2013 simplification package preserved the effectiveness of the EU merger control system. The following paragraphs summarise the main findings in this regard.
- (161) First, the Notice on simplified procedure contains a number of safeguards and exclusions aimed at ensuring that the Commission can review under the normal procedure those transactions that *a priori* fall under one or several categories of simplified cases but may require a close investigation<sup>178</sup>. Importantly, the Commission retains full discretion to revert to the normal review procedure. In cases notified under the simplified procedure, the Commission assesses whether any of the exclusionary criteria are fulfilled, based on the information provided by the notifying parties and on additional desk research.
- (162) Second, the Evaluation showed that the Commission makes use of the safeguard and exclusion clauses in its case practice where necessary. Between 2014 and 2020, 22 cases were switched from a simplified to a normal review procedure after notification (i.e. around 1% of all simplified cases notified). None of them resulted, however in an intervention by the Commission<sup>179</sup>. Furthermore, in several additional cases, the change from simplified to normal procedure occurred during the pre-notification phase, for instance where the Commission disagreed with the notifying party's qualification of the case as simplified or, even if the case fell under one of the simplified categories, if there was any specific reason for reviewing the transaction under the normal procedure. The evidence available to the Commission services suggests that those changes from the simplified to the normal procedure occur more often in the pre-notification stage than after notification and concern several cases per year<sup>180</sup>.
- (163) Third, the Commission publishes all notifications in the Official Journal and on its website, encouraging third parties to contribute relevant information to the Commission's merger control review. Such feedback from third parties is an additional safeguard for the Commission, enabling it to identify cases that may not be suitable for

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<sup>178</sup> Paragraphs 8 to 19 of the Notice on simplified procedure contain safeguards and exclusions from the use of the simplified treatment. Some examples of cases in which the Commission may switch from a simplified to normal procedure include those in which the notifying parties' approach to market definition and market share calculation differs from the approach adopted by the Commission or those falling under paragraphs 5(a) or 5(d) of the Simplified Notice, but the parties have significant combined market shares (for instance exceeding the thresholds in paragraph 5(c)).

<sup>179</sup> Most of these transactions were 5(c) cases, where the application of the simplified procedure may depend on the plausible (alternative) market definitions, which, in the absence of (recent) precedents, may present some difficulties. This finding confirmed the opinions voiced in the Public Consultation (see paragraph (169)).

<sup>180</sup> A precise quantification of those cases is, however, not possible on the basis of the Commission's internal case statistics.

simplified treatment. Third parties have made use of that possibility in a number of instances.

- (164) Fourth, since the entry into force of the simplification package in 2014, the Commission has not received substantiated complaints from third parties after the adoption of a clearance decision under the simplified procedure. Furthermore, none of the Commission decisions under the simplified procedure has been subject to a Court appeal since 2014.
- (165) Fifth, as illustrated in Figure 6, the Commission's merger enforcement rate has remained stable at 5-8% of all cases since 2000, without experiencing any specific reduction since the simplification package's adoption in 2013. The European Court of Auditors' special report on the Commission's EU merger control and antitrust proceedings ('ECA special report') recently concluded that the Commission has made good use of its enforcement powers in merger control<sup>181</sup>.
- (166) In light of the above, the results of the Evaluation indicate that the 2013 simplification package has not negatively affected effective merger control enforcement in the EU.

#### 5.1.3.2. Widening the scope of the simplified procedure

- (167) The 2013 simplification package aimed to increase the number of simplified cases by widening the scope of the simplified procedure by raising the relevant market share thresholds under paragraph 5(c) of the Notice on simplified procedure<sup>182</sup> and by adding a new category of simplified cases (new paragraph 6 of the Notice on simplified procedure<sup>183</sup>).

##### (A) Review of enforcement practice

- (168) Since the introduction of the simplification package in 2013, the number of cases dealt with under the simplified procedure has indeed increased both in absolute and relative terms. Figure 10 illustrates the use of the normal and the simplified procedure between 2000 and 2020, showing the steep increase after 2013.

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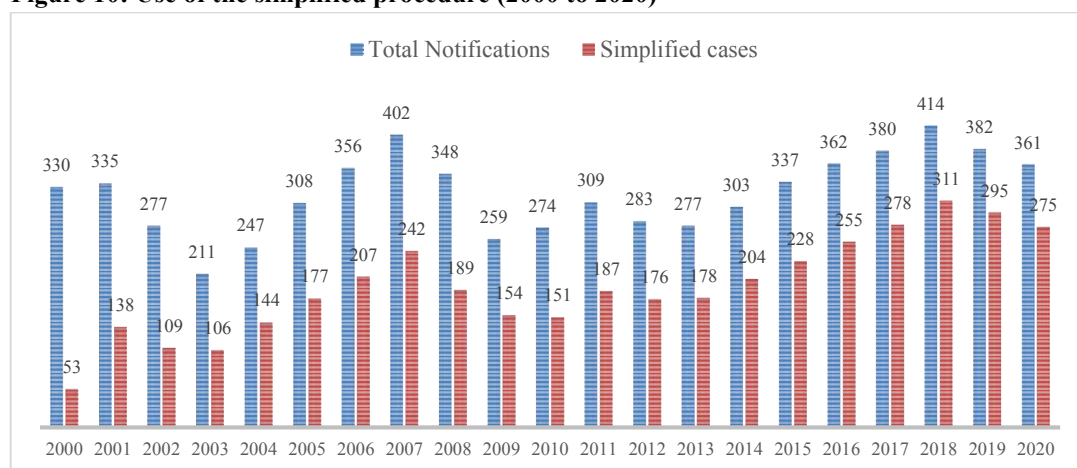
<sup>181</sup> ECA special report *The Commission's EU merger control and antitrust proceedings: a need to scale up market proceedings*, paragraph 91.

<sup>182</sup> For markets in which two merging companies compete (i.e. horizontal relations) the threshold was raised from 15% to 20%; for markets where one of the merging companies sells an input to a market where the other company is active (i.e. vertical relations) the threshold was raised from 25% to 30%. The thresholds for horizontal or vertical relationships apply to any plausible alternative product and geographic market definition that may have to be considered in each case. As a result, the notifying parties have to provide information on all plausible market definitions in order to verify that the thresholds of paragraph 5(c) are not exceeded.

<sup>183</sup> Horizontal mergers can also qualify for a simplified review when the companies' combined market shares are between 20% and 50%, but when the increase in market share after the combination of their activities is very small (cases where the change to the level of concentration in the market (known as the 'HHI delta') is less than 150).

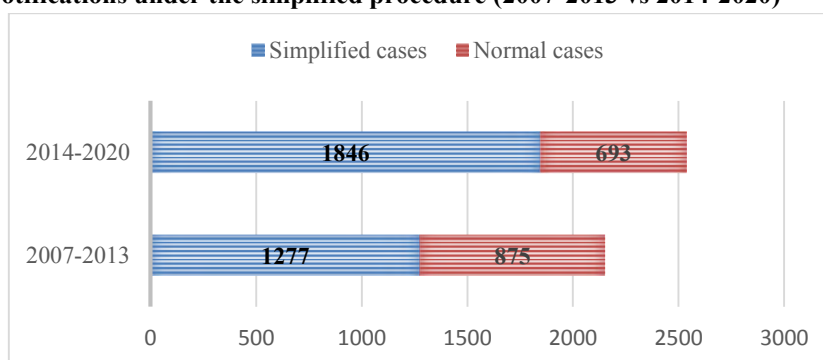


**Figure 10: Use of the simplified procedure (2000 to 2020)**



(169) In absolute terms, there was an increase of 569 cases notified under the simplified procedure when comparing the seven-year periods 2014-2020 and 2007-2013, equivalent to around 81 additional cases per year on average. In relative terms, there was an increase by 14 percentage points in cases falling under the simplified procedure when comparing those two seven-year periods (increase from 59% to 73% out of total number of notifications).

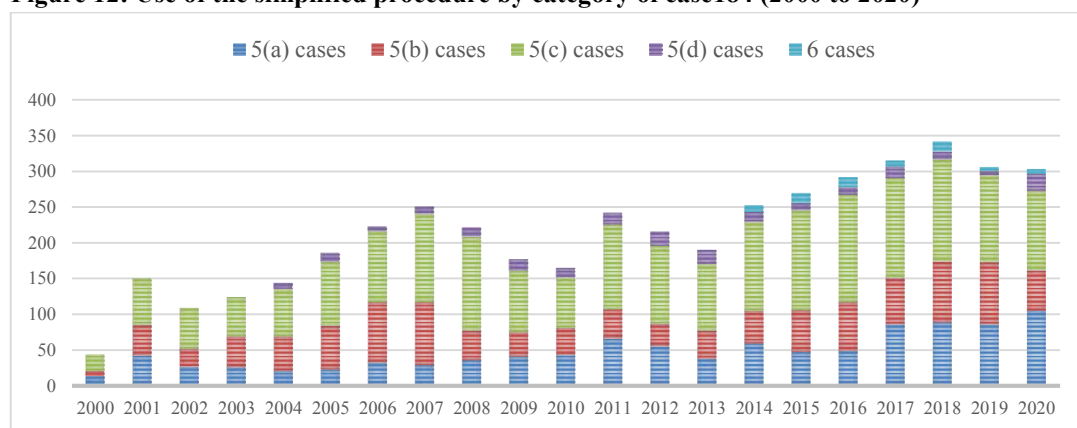
**Figure 11: Notifications under the simplified procedure (2007-2013 vs 2014-2020)**



(170) In 2013, the year before these measures entered into force, notifications under the simplified procedure (166 cases) represented 60% of the total notifications received. This figure increased to 76% in 2020 (275 cases). Figure 10 and Figure 11 above illustrate the steady and significant increase in the number of cases dealt with under the simplified procedure from 2014 to 2020.

(171) Focusing more particularly on the categories of cases targeted by the 2013 simplification package, Figure 12 presents the split of all simplified cases by category used under the Notice on simplified procedure.

**Figure 12: Use of the simplified procedure by category of case<sup>184</sup> (2000 to 2020)**



(172) The Evaluation shows that a total of 792 cases fell under paragraph 5(c) of the Notice on simplified procedure between 2014 and 2020, representing a yearly average of 113 cases. This marks a clear increase compared to the situation before the 2013 simplification package entered into force: in 2013, 71 cases fell under paragraph 5(c); in the period 2007-2013 a total of 559 cases fell under this category (an average of 80 cases per year). As a result, in absolute terms, 233 additional cases benefited from the simplified category provided for in paragraph 5(c) of the Notice on simplified procedure between 2014 and 2020, an increase of 41% on 2007-2013. While the number of total notifications also increased in 2014-2020 compared to 2007-2013, this increase is less stark (18%), which means that the simplification package resulted in a net increase in the number of cases falling under paragraph 5(c).

(173) Furthermore, since 2014, a total of 65 cases have fallen under the new category introduced in paragraph 6 of the Notice on simplified procedure, of which 39 did not fall in any other category of the Notice and therefore additionally benefited from streamlined treatment.

## (B) Results of the Public Consultation

(174) Respondents to the Public Consultation, mostly private-sector stakeholders, largely welcomed the streamlining efforts undertaken when the 2013 simplification package was adopted, and acknowledged its positive effects. Indeed, the majority of private-sector respondents considered that the simplified procedure in general and the 2013 simplification package in particular have contributed to reducing the burden on companies<sup>185</sup>.

(175) Focusing on the specific changes, private-sector stakeholders particularly welcomed the increase in the market-share thresholds under paragraph 5(c). They indicated that their experience of the review of these transactions under a simplified procedure had been positive and stressed the low likelihood that such cases raise competition concerns.

<sup>184</sup> Simplified cases may fall under several categories. This graph contains thus some double counting with regard to cases falling under more than one category.

<sup>185</sup> Private stakeholders' replies to question 8 of the Public Consultation.

- (176) A number of private-sector stakeholders indicated further that they had been involved in merger cases that had switched from a simplified to a normal review procedure. As indicated in paragraph (162), this change of procedure may occur before or after the case has been notified to the Commission. Respondents, however, noted that these instances were rare and that they mostly concerned potential cases under paragraph 5(c) of the Notice on simplified procedure, where the Commission and the merging parties took diverging positions on the relevant plausible market definition or the parties realised that under an alternative plausible delineation the combined market shares exceeded the thresholds set out in the Notice<sup>186</sup>. This possibility to switch from a simplified to normal procedure was perceived by private stakeholders as a useful tool allowing the Commission to review more cases under the simplified procedure while at the same time retaining the power and flexibility to adapt the procedure for cases that merit a more detailed review<sup>187</sup>.
- (177) Nevertheless, private-sector stakeholders also identified room for further improvement. Several indicated that the simplified procedure should be extended to additional categories of cases which typically do not raise competition concerns. Two specific suggestions were made: (i) the possibility to increase the thresholds in paragraph 5(c) of the Notice on simplified procedure; and (ii) the possibility to expand the categories of vertical cases which typically do not raise competition concerns<sup>188</sup>. Other suggestions made by private-sector stakeholders included: (i) the possibility for the Commission to retain flexibility to review under the simplified procedure cases that marginally exceed the thresholds under paragraph 5(c); (ii) the possibility to review under the simplified procedure cases where no competition concerns can be expected after pre-notification discussion (regardless of whether they fall in the categories of the Simplified Notice); and (iii) further simplification of transactions in the real estate sector.
- (178) On the other hand, public-sector stakeholders, and NCAs more particularly, were generally satisfied with the existing categories of cases reviewed under the simplified procedure and expressed the view that no further categories of cases should be reviewed under such procedure<sup>189</sup>.

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<sup>186</sup> Some respondents indicated that they have been involved in transactions (mostly paragraph 5(c) cases) where the merging parties decided themselves to follow the normal review procedure even though the case was potentially eligible for notification under the simplified procedure. This was normally done to avoid discussions in pre-notification on the suitability of the simplified procedure in case different alternative market definitions appeared plausible, or where it was difficult to calculate market shares under these different alternatives. See private-sector stakeholders' replies to question 4 of the Public Consultation. However, the figures mentioned in paragraph (169) above show that since 2014 the increase in cases notified under paragraph 5(c) of the simplified procedure has been significant. This confirms that merging parties have generally preferred to opt, where possible, for the simplified procedure.

<sup>187</sup> Private-sector stakeholders' replies to question 3 of the Public Consultation.

<sup>188</sup> For instance by introducing a category similar to paragraph 6 for vertical cases where one party had a market share in excess of 30% while the other only has a *de minimis* market share. Or by introducing thresholds focusing on a share of purchasing market instead of downstream supply market (e.g. in cases where there is a vertical relationship and where the 30% market share threshold is exceeded because the downstream market is local, even though the market share on the purchasing market – which is wider than local – is limited).

<sup>189</sup> Public-sector stakeholders' replies to question 5 of the Public Consultation.

(C) Conclusion

- (179) Based on the review of the Commission's enforcement practice (Heading A above) and the results of the Public Consultation (Heading B above), the Commission services consider that the 2013 simplification package has met its objective of widening the scope of the simplified procedure, as the number of cases treated under this procedure has significantly increased.
- (180) The proportion of cases falling under the simplified procedure has progressively reached a very high percentage of the total number of all notified cases. As suggested by some stakeholders, and on the basis of the Commission's enforcement experience, there may be additional, albeit possibly limited, room for additional expansion of the simplified procedure (for instance for some of the categories of cases described in paragraph (177)). Nevertheless, the efficiency gains from any such expansion would have to be weighed carefully against any potential risks for effective competition enforcement and may have to be accompanied by additional safeguards.
- (181) In particular, the Commission's practice shows that market share calculations can be difficult and market shares by themselves may not always be indicative of the presence or absence of competition concerns, due to specific market circumstance and competition dynamics<sup>190</sup>. Against that background, the Commission's merger practice has benefited from the flexibility granted under the Notice on simplified procedure to switch, at its full discretion, from the simplified to the normal procedure. Conversely, in the interest of simplification, similar flexibility making it possible to treat cases under the simplified procedure that (slightly) exceed the criteria of the Notice on simplified procedure could further result in benefits for firms<sup>191</sup> and the Commission. This would be particularly valid in cases where other indicators of competition dynamics, the Commission's knowledge of the relevant markets and/or the results of a preliminary investigation confirm the absence of competition concerns<sup>192</sup>.

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<sup>190</sup> The Commission's *Horizontal Merger Guidelines* acknowledge this by explaining that '[m]arket shares and concentrations levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors' [emphasis added] and that '[i]n any event, the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth'. *Horizontal Merger Guidelines*, paragraphs 14 and 15.

<sup>191</sup> See opinions of stakeholders in paragraph (171) above.

<sup>192</sup> Furthermore, the Commission has identified examples among its clearance decisions under the normal procedure where the competitive assessment was short and standardised without requiring confirmation from multiple sources of evidence. Those examples concerned in particular specific constellations of vertical cases where the market structure gave strong indications of the absence of competition concerns, in the absence of specific circumstances. For instance, the transaction in case M.9517 – Mylan/Upjohn gave rise to some vertically affected markets, but the Commission was able to dismiss concerns about customer foreclosure (i.e. that upstream rivals' access to a sufficient customer base may be restricted) following a light assessment given that the purchasing share of the downstream company was negligible (despite having large market shares in the downstream market). In case M.8870 – E.ON/ Innogy, the Commission carried out a short assessment of some vertical relationships where there was a natural monopoly in the upstream market and the increment downstream was small (therefore, the concentration added very little to a pre-existing situation of vertical integration). In case M. 9014 – PKN Orlen/Grupa Lotos, which gave rise to competition concerns on a number of horizontal and vertical markets, there were nevertheless some technically affected vertical overlaps between the parties' activities where input and customer foreclosure concerns were ruled out in a succinct manner.

#### 5.1.3.3. Reducing notification requirements

- (182) The 2013 simplified package aimed at reducing information requirements, particularly in cases notified under the simplified procedure. To that end, it eliminated certain information requirements from the notification forms in both normal and simplified cases (Form CO and Short Form CO respectively) and introduced a ‘super simplified procedure’ for cases without overlaps and for extra-EEA joint ventures<sup>193</sup>. Moreover, the modified notification forms specifically identified categories of information for which notifying parties may request a waiver.
- (183) While the Commission has had overall positive experiences with the updated notification forms in its case practice, private-sector stakeholders have identified remaining shortcomings in their view. These relate to the notification forms themselves, as well as to the use of information requests. The Commission services consider in this respect that additional reductions in information requirements may be possible in certain case constellations, but cannot be to the detriment of effective merger control enforcement. They would therefore need to be assessed carefully.
- (184) As regards the assessment of cases without overlaps and of extra-EEA joint ventures, some respondents to the Public Consultation expressly welcomed the introduction of the super simplified procedure and indicated positive results when using it. However, several respondents called for further simplification in the treatment of extra-EEA joint ventures, in view of their limited to non-existent impact on the EEA<sup>194</sup>. The Commission services note in this respect that while the competitive assessment is indeed generally straightforward in most of such constellations<sup>195</sup>, some of these cases require a comprehensive analysis (including requests of additional information and discussions with the notifying parties) for the assessment of jurisdiction. These information requirements correlate with the benefits of obtaining legal certainty through EU merger control clearance<sup>196</sup>. The Commission services also note that private-sector stakeholders acknowledged the benefits of obtaining a clearance decision under the one-stop-shop review of the EU Merger Regulation in those cases and in particular generally no longer argued for exempting extra-EEA joint ventures from the scope of the EU Merger Regulation if those cases may consequently fall under the national merger control laws of several Member States<sup>197</sup>.
- (185) As regards notification requirements, some stakeholders responding to the Public Consultation advocated for more frequent use of waivers in practice and generally called for a further reduction in information requirements. This partly corresponds to the

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<sup>193</sup> Under such super simplified procedure, the information requirements are limited to the description of the companies’ business activities, the description of the transaction and the provision of the turnover figures.

<sup>194</sup> Private-sector stakeholders’ replies to question 2(iii) of the Public Consultation.

<sup>195</sup> Exceptions may include assessments of potential competition or of conglomerate links in cases where otherwise there is no existing link between the activities of the undertakings concerned.

<sup>196</sup> This includes the finding, under a one-stop-shop procedure, that the transaction falls under the Commission’s jurisdiction under the EU Merger Regulation and that it is compatible with the internal market.

<sup>197</sup> Private-sector stakeholders’ replies to question 6 of the Public Consultation. This proposal had been explored in the 2014 white paper and had gathered general support in the accompanying public consultation.

Commission's experience over the years in its enforcement practice, according to which at least some information requirements could be further streamlined or clarified for both simplified and normal cases (for instance, jurisdictional assessments). Also, additional categories of information could be identified as candidates to be waived at the request of the parties for certain non-simplified cases, notably in Section 8 of Form CO.

- (186) Furthermore, a few private-sector stakeholders responding to the Public Consultation noted that the 2013 simplification package had introduced additional information requirements, namely regarding internal documents of the merging firms<sup>198</sup>. The Commission services note firstly that this obligation was introduced only for some simplified cases<sup>199</sup> and that it serves as a safeguard to ensure effective merger control enforcement, while allowing additional cases to benefit from the simplified procedure. Secondly, the internal documents targeted are documents readily available in the context of a transaction, which can be easily identified and are easy to collect without the need for any technical capabilities or forensic tools. Thirdly, the number of documents concerned is generally very limited but give the Commission useful insight into the deal rationale. The Commission services therefore consider that requesting those documents is proportionate with a view to safeguarding effective merger control enforcement.
- (187) Similarly, a few private stakeholders responding to the Public Consultation also observed that the 2013 simplification package had, in their view, extended certain information requirements by requiring firms to provide market data under all plausible market definitions. The Commission services note, however, that such obligation already existed prior to 2014 and that the simplification package merely clarified it.

#### 5.1.3.4. Streamlining the pre-notification phase

- (188) The 2013 simplification package also aimed to streamline the pre-notification phase, in particular for simplified cases. In addition to reducing the information requirements as discussed in Section 5.1.3.3, it identified transactions that do not give rise to horizontal overlaps or vertical links (paragraph 5(b) cases) as good candidates to be notified directly without pre-notification.

##### (A) Review of enforcement practice

- (189) Overall, the 2013 simplification package has contributed to reducing the duration of pre-notification in simplified cases. While in 2013 and prior years, duration was 20-22 working days on average, in recent years it has remained stable at ~18-19 working days.
- (190) As regards the different categories of simplified cases:

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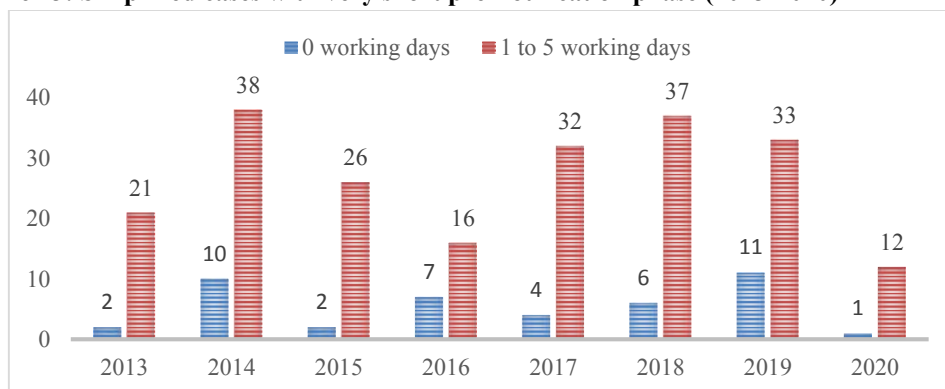
<sup>198</sup> It is only in cases giving rise to overlaps that notifying parties are required under paragraph 5.3 of Short Form CO to provide 'copies of all presentations prepared by or for or received by any member of the board of management, or the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing the notified concentration.'

<sup>199</sup> Namely mainly for cases falling under paragraph 5(c) of the Notice of simplified procedure, giving rise to horizontal or vertical links between the activities of the notifying parties in the EEA.

- The duration of the pre-notification phase for cases with overlaps under point 5(c) of the Notice on simplified procedure is similar to the duration of the pre-notification phase in all simplified cases, including cases without overlaps, although the latter generally involve an even simpler competitive assessment. That suggests that the duration of the pre-notification phase in simplified cases is not generally driven by the complexity of the competitive assessment: the Commission's experience suggests that in a significant number of cases it is rather the examination of jurisdictional questions which extends the length of the pre-notification phase<sup>200</sup>.
- The duration of the pre-notification phase in cases with overlaps pursuant to point 5(c) of the Notice on simplified procedure remained stable at between 16 and 20 working days between 2014 and 2019 (below the average of 21 working days in 2013). That indicates that the increased and/or clarified information requirements introduced in the 2013 simplification package did not on average result in longer pre-notification contacts, contrary to the concerns voiced by some private stakeholders discussed above in paragraphs (185) and (187).

(191) Moreover, as shown in Figure 13, from 2014 onwards there has been an increase in the number of cases notified directly without pre-notification<sup>201</sup> or within less than one week. However, these cases still represent a minority of all simplified notifications.

**Figure 13: Simplified cases with very short pre-notification phase (2013-2020)**



\*Working days calculated since first draft (Short) Form CO

(192) Finally, if one considers all merger cases (and not only simplified cases), the overall duration of merger review proceedings also appears to have become shorter. This may be partly explained by the fact that the average time to adopt a clearance decision is shorter in simplified cases: the simplified decisions are usually adopted around working day 16, while decisions under the normal procedure usually take 25 working days (in phase I cases with no remedies), 35 working days (in phase I cases with remedies) or even longer in phase II investigations. For instance, in 2019, the average duration of proceedings was approximately 21 working days, compared to around 24 in 2013.

<sup>200</sup> See the opinion of stakeholders in that regard in paragraph (187) below.

<sup>201</sup> Pre-notification contacts are calculated from the date of the submission of first draft Form CO or Short Form CO until the date of notification.

(B) Results of Public Consultation

- (193) During the Public Consultation, some private-sector stakeholders indicated that there remain some practical constraints to making full use of the invitation in the 2013 simplification package to notify 5(b) cases directly without pre-notification. Private-sector stakeholders emphasised as well that discussions on jurisdictional issues sometimes extend considerably the duration of the pre-notification phase.

(C) Conclusion

- (194) The results of the Evaluation indicate that the 2013 simplification package has yielded positive effects in reducing the average duration of the pre-notification phase, particularly in simplified cases. Nevertheless, the duration of pre-notification contacts necessarily varies from case to case and, in simplified cases, it appears notably to be influenced more by the complexity of any jurisdictional issues raised than by the complexity of the competitive assessment.

5.1.3.5. Conclusion

- (195) The Evaluation sought to assess to what extent the 2013 simplification package has effectively met its objectives, namely reducing the overall burden for businesses and the Commission in reviewing categories of typically unproblematic cases, without impairing effective merger control enforcement.
- (196) Based on the results of the Evaluation, the Commission services conclude that the 2013 simplification package has overall been effective in reaching its objectives. First, it appears not to have impaired the effective enforcement of EU merger control. Second, the results of the Public Consultation, coupled with the review of the Commission's enforcement practice and internal statistics, show that the simplification package has resulted in a significant increase in the number of cases reviewed under the simplified procedure. Third, the overall body of evidence shows a general reduction in the information requirements in a number of cases. Fourth, the Commission's statistics point to a shortening of the pre-notification phase, particularly for simple cases.
- (197) Nevertheless, based on the review of the Commission's practice over the past 7 years and taking into account the stakeholder feedback, there appears to be some room for further simplification, in particular as regards some, albeit potentially limited, further expansion of the use of the simplified procedure, as well as further clarifications and reductions of the information requirements. The efficiency gains from any such changes would, however, have to be weighed carefully against any potential risks for effective competition enforcement.

5.2. EFFICIENCY

- (198) The Evaluation sought to assess the extent to which the procedural and jurisdictional aspects of EU merger control under scrutiny have met their general and specific objectives in an efficient way, taking into account their costs and benefits.



### 5.2.1. Jurisdictional thresholds

- (199) The Evaluation assessed to what extent the purely turnover-based thresholds of the EU Merger Regulation made it possible to efficiently identify competitively significant transactions in the internal market with a cross-border dimension.
- (200) In this respect, the Commission services observe the following.
- (201) First, the Commission's practice indicates that the turnover-based thresholds have generally been fairly straightforward to apply by companies self-assessing their notification requirements. While the Commission devotes every year a significant amount of time and resources to providing guidance to notifying parties on jurisdictional matters<sup>202</sup>, these jurisdictional matters do not generally involve the application of the turnover-based thresholds.
- (202) Second, notification thresholds based on companies' turnover are generally considered by both private and public stakeholders to provide objective, clear and simple criteria<sup>203</sup>. The verification of turnover levels does not generally require substantial resources on the part of companies since consolidated audited financial accounts are usually readily available for the large companies which are typically subject to EU merger control. Furthermore, compliance with the current turnover-based thresholds is made easier by the comprehensive and detailed guidance provided by the Commission in its Consolidated Jurisdictional Notice, notably its provisions on the calculation and allocation of turnover<sup>204</sup>.
- (203) Third, the Evaluation examined the potential cost of a possible transaction value-based notification thresholds at EU level.
- (204) In the first place, the feedback from the Public Consultation suggests that transaction value-based thresholds entail a number of complexities, may increase the cost of compliance with the notification obligation, and risk diminishing the clarity provided by turnover-based thresholds. During the Public Consultation, a large majority of respondents considered that the absence of a complementary jurisdictional threshold, notably one based on the value of the transaction, had not impaired the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA were made subject to merger control at EU level; accordingly, those respondents opposed the introduction of alternative thresholds<sup>205</sup>. Their main criticisms of transaction value-based thresholds were the following: (i) the purchase price is subjective and does not give any indication of the possible competitive significance of a transaction; (ii) the

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<sup>202</sup> See, for instance, figure [6] above, which only includes separate jurisdictional consultations (and thus not jurisdictional discussions in cases in pre-notification or once they have been notified). The application and calculation of the turnover thresholds generally triggers far fewer such jurisdictional discussions between the parties and the Commission than other jurisdictional aspects such as the full functionality of joint ventures or whether a transaction gives rise to a change of control.

<sup>203</sup> Since the EU Merger Regulation's entry into force in 1990, the Commission has adopted only one infringement decision for a failure to notify a concentration under Article 4(1) of the EU Merger Regulation where the reason for such a failure was related to an incorrect calculation of the turnover by the acquirer. See case M.969 – A.P. Møller (1999).

<sup>204</sup> See, in particular, Section C, paragraphs 124 to 220.

<sup>205</sup> Replies to questions 19 of the Public Consultation.

value of a transaction<sup>206</sup> is difficult to determine in many constellations, and hence may lead to difficulties in the self-assessment<sup>207</sup>; and (iii) a jurisdictional test based on the value of a transaction does not ensure sufficient local nexus<sup>208</sup>. Were these thresholds to be introduced, the majority of respondents saw a need for additional criteria limiting their scope of application, in order to ensure a smooth and cost-effective system of EU merger control<sup>209</sup>.

- (205) In the second place, the results of the Evaluation showed that a transaction value threshold would have led to the notification of many additional transactions, including from sectors of the economy where turnover appears to represent a rather good proxy for the competitive significance of the undertakings concerned.
- (206) Research conducted by the Commission staff in respect of high-value transactions enabled it to make an approximate estimate of the number and types of cases that would have come under the Commission's jurisdiction if the EU Merger Regulation had contained a complementary threshold based on the value of the transaction.
- (207) If the existence of a sufficient local nexus were factored in, a transaction value threshold set at a level of EUR 1 billion<sup>210</sup> would have brought around 300 new cases under the Commission's review per year, which would have meant increasing the annual number of merger notifications to the Commission by around 75%. A threshold set at EUR 5 billion would have brought over 50 additional transactions, representing an increase of 10 to 15% in merger notifications to the Commission. While a number of those would have likely fallen under the simplified procedure, it would still have considerably increased the Commission's workload<sup>211</sup>. Conversely, the Evaluation showed that

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<sup>206</sup> In reply to the question 22 of the Public Consultation, most respondents did not provide a specific figure for the appropriate level of a possible transaction value threshold. Several respondents noted the difficulty of estimating the appropriate transaction value that should trigger the notification obligation. It was suggested that this value would have to be high enough to capture only exceptional cases (and certainly higher than at the national level, for example, in Germany and Austria). For those respondents who provided estimates, the figures ranged from EUR 500 million to EUR 20 billion.

<sup>207</sup> Respondents cited a number of factors that can all significantly modify the value of the transaction: for instance, contractual earn-out provisions or conditional milestone payments, fluctuations of share prices between e.g. the announcement of a transaction and its closing, and exchange rate fluctuations.

<sup>208</sup> The Public Consultation specifically asked about appropriate solutions to ensure that only transactions that have a significant economic link with the EEA (local nexus) would be covered by a complementary threshold, assuming that the highly valued target company does not (yet) generate any substantial turnover (see question 21). Respondents generally considered that it may be difficult to set the appropriate criteria for determining the local nexus (i.e. determining the significance of the economic link to the EEA). Several respondents favoured a general clause requiring notification of concentrations which meet the deal size threshold only if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance. Industry-specific guidance was discarded by most respondents as potentially discriminatory, complex and not future-proof. Some of the mentioned criteria relevant for determining the local nexus were the target's presence and activities in the EEA, as potentially measured by the target's turnover, assets (including data and intellectual property), market shares, number of users/subscribers, etc. in the EEA.

<sup>209</sup> Replies to questions 22 of the Public Consultation.

<sup>210</sup> See footnote number **Error! Bookmark not defined.** above on the possible levels of value-based thresholds.

<sup>211</sup> An additional jurisdictional threshold filter, e.g. in the form of a high transaction value-to-turnover ratio requirement, would have narrowed down the number of newly notifiable transactions (more or less, depending on the ratio applied).

relevant transactions meriting review by the Commission may well have fallen below either of these value-based thresholds.

- (208) As regards the digital and pharmaceutical sectors, while transactions in those sectors constituted a significant part of transactions with high transaction value-to-turnover ratio, they represented nonetheless a minority of all high-value transactions (15-25% of transactions above EUR 1 billion) and even of high value-to-turnover-ratio transactions (real estate and REITS forming the biggest part of the latter<sup>212</sup> ).
- (209) On the basis of the above and the evidence collected during the Evaluation, the Commission services conclude that the current system of turnover-based thresholds has overall been efficient at capturing relevant transactions having cross-border effects between Member States. Complementary transaction value-based thresholds would have increased the costs of the system for the Commission and the merging parties, without necessarily capturing all relevant missing transactions.

#### 5.2.2. *Referral mechanisms*

- (210) The Evaluation also set out to verify whether the findings of the 2014 white paper and respective public consultation on the administrative burdens associated with the case referral system were still valid and up to date. Assessing the efficiency of the referral mechanisms involved balancing their overall costs against the benefits of ensuring that the more appropriate authority (be it the Commission or one or more NCAs) reviews each concentration.
- (211) In this respect, the Commission services observe the following.
- (212) First, as explained in detail in Section 5.1.2.3, a review of the Commission's merger practice shows that the number of referral requests received was significant in the period 2014-2020. Only a handful of requests were not granted and generally the referrals appear to have resulted in efficiently allocating jurisdiction (see paragraph (144) above). Referrals to the Commission (which represented 55% of all the referrals granted in 2014-2020) have resulted in a reduced risk of inconsistent decisions, and thus reduced the burden on firms and NCAs alike (see paragraph (144) above), while bringing to the Commission's review genuine cross-border cases which generally merited a comprehensive investigation.
- (213) Second, while the referral procedure may result in some administrative burdens and entail certain additional time (in particular in the case of post-notification referrals), by far most of the referrals have been triggered by the notifying parties themselves, and not the competition agencies. The referrals took place before notification to the initially competent authority or authorities (i.e. around 90% of referrals granted in 2014-2020 were submitted on the basis of either Article 4(4) or 4(5)), indicating that from the companies' perspective the benefits of such referrals outweighed their costs.

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<sup>212</sup> In the years 2015-2019, communication and technology (proxy for digital) and pharmaceutical transactions formed between 15% and 40% of transactions with a transaction value-to-turnover ratio above 5.

(214) Third, the referral system has brought substantial cost savings for the merging parties and NCAs. A distinction should be made between referrals from the Member State(s) to the Commission (under Articles 4(5) and 22) and from the Commission to the Member State(s) (under Articles 4(4) and 9).

(215) With regard to referrals from the Member States to the Commission between 2014 and 2020:

- A total of 122 requests for referrals under Article 4(5) were granted, which obviated 612 filings in Member States. Thus, each referral avoided an average of around five filings in Member States, removing the need for as many NCAs investigating the same operation in parallel and for merging parties submitting parallel national filings. Slightly more than 30% of these cases were treated by the Commission under the simplified procedure, which is significantly less burdensome than notifying the transaction in several Member States. While there are no data available that would make it possible to quantify in monetary terms the savings for the NCAs and companies<sup>213</sup>, it appears safe to say that the reduction in administrative burden is significant.
- Referrals under Article 22 have been more limited in number, totalling 10. The majority of those concern cases involving markets that were wider than national. The referrals saved 40 parallel investigations before NCAs. Thus, the benefits for NCAs, the merging parties and third parties are similar to those described in relation to referrals under Article 4(5).

(216) With regard to referrals from the Commission to Member States in the same period:

- The 105 referrals granted under Article 4(4) and Article 9 concerned markets which were national or narrower in scope. These referrals thus allowed for an allocation to Member States of transactions which had a clear national or narrower geographic focus. While this mechanism simply refers a transaction for review without reducing the number of parallel investigations, it makes it possible to allocate those cases to the more appropriate authority and follows the subsidiarity principle. This is supported by the fact that none of the referral requests under Article 4(4) were refused, and only 9 referral requests under Article 9 were refused. Thus more than 90% of the referral requests were accepted. Moreover, more than 80% of the referral requests were initiated by the merging parties, thus showing that companies find this mechanism useful.

(217) Fourth, as explained in Section 5.1.2.1, both the 2009 report to the Council and the 2014 white paper concluded that, overall, the referral mechanisms had worked well as a corrective tool to fine-tune the results of applying the turnover thresholds of the EU Merger Regulation.

(218) Fifth, while the Commission services had identified a limited number of modifications that could make the referral system more efficient, in view of the results of the

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<sup>213</sup> The Commission services do not have access to data related to costs of NCAs, nor they will obtain such data in the future. Therefore, the Commission services cannot monitor costs for NCAs.

Evaluation there does not appear to be a pressing need to introduce these changes. In particular, as identified in the 2014 white paper<sup>214</sup>, the current two-step procedure for Article 4(5) referrals<sup>215</sup> could be abolished. During the public consultation, such potential improvement was supported by the large majority of NCAs and other public bodies as well as of private stakeholders<sup>216</sup> (associations, companies, law firms, educational and research institutes). In practice, however, given that the Article 4(5) referrals are rarely opposed by any of the Member States (only one such case occurred in the period 2014-2020, out of 123 referral requests), the notifying parties usually start to collect the necessary information for a notification to the Commission already during the first step of the referral process, with the Commission and the notifying parties engaging in preliminary pre-notification discussions. As a consequence, the two-step process appears to lead to limited additional time. Similar considerations apply with respect to abolishing the two-step process in Article 4(4) referrals, as supported by a minority of NCAs and other national bodies. A further potential improvement identified in the 2014 white paper and supported by stakeholders in the Public Consultation<sup>217</sup> concerns adapting the test for Article 4(4) referrals so that firms are no longer required to argue that the transaction may ‘significantly affect competition in a market’, which could be deemed as constituting an element of self-incrimination. However, as the Commission’s frequent Article 4(4) referrals show, that provision appears to have limited dissuasive effects on the referrals in practice. Furthermore, a shortening of the time limits of Article 4(4) and 4(5) referrals, as proposed by certain private stakeholders, may endanger the effectiveness of the referrals by giving the competition authorities insufficient time to assess the requests. That said, the Commission services consider that there could be potential efficiency gains by clarifying and potentially streamlining the forms used for the referral requests.

- (219) On the basis of the above and the evidence collected during the Evaluation, the Commission services conclude that the current referral system has contributed to allocating the cases to the more appropriate authority, while achieving cost savings for both public and private stakeholders involved. The Commission services have identified limited room for improving the referral system’s efficiency.

### 5.2.3. *Simplification*

- (220) The Evaluation has assessed: (i) to what extent the burden incurred by the Commission and businesses, in particular in simplified cases, has been proportionate to the objectives of EU merger control, and to what extent the 2013 simplification package has contributed to the administrative efficiency of EU merger control procedures; and (ii) whether there is room for further reduction of this burden and for efficiency gains both for the Commission and for companies.

- (221) The Commission services’ findings in this regard are based mainly on the following sources of evidence discussed in the next sections: (i) the results of the Public

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<sup>214</sup> 2014 white paper, paragraph 61.

<sup>215</sup> Merging parties file first a reasoned submission, followed by the notification of the transaction.

<sup>216</sup> Public-sector stakeholders’ replies to questions 23-25 of the Public Consultation.

<sup>217</sup> Public stakeholders’ replies to questions 23-25 of the Public Consultation.

Consultation and feedback from meetings with stakeholders throughout the Evaluation; (ii) an approximation of some of the cost savings achieved, calculated based on the Commission's internal statistics; and (iii) the Commission's enforcement experience.

(A) Results of Public Consultation

- (222) Respondents to the Public Consultation (mostly private-sector stakeholders) indicated that the 2013 simplification package, and most particularly the expansion of cases reviewed under the simplified procedure, has led to a reduction in burdens incurred by businesses.
- (223) At the same time, a number of private-sector stakeholders<sup>218</sup> considered that costs and burdens incurred by businesses when notifying cases under the simplified procedure could still be reduced and that certain categories of cases are too burdensome in proportion to their limited effects on competition in the EEA<sup>219</sup>. First, as regards transactions involving extra-EEA joint ventures under paragraph 5(a) of the Notice on simplified procedure, a majority of private stakeholders perceived those notifications as particularly burdensome. At the same time, they generally opposed the possibility of excluding these transactions from the scope of the EU Merger Regulation as that could result in losing the benefit of the one-stop-shop review (cf. paragraph (184) above). Second, a number of private-sector stakeholders also considered that cases falling under paragraphs 5(b) and 5(d) of the Notice on simplified procedure were very unlikely to create competition concerns and that as a result the burdens imposed on merging parties by the mandatory notification of these transactions were not justified<sup>220</sup>. Third, as regards cases with overlaps falling under paragraph 5(c) of the Simplified Notice, the majority of private-sector stakeholders welcomed the expansion of cases falling under this category. However, some stakeholders observed that the simplification package had in turn introduced additional information requirements (cf. discussion in paragraphs (185) and (187), including the Commission's assessment of those claims).
- (224) Nevertheless, most stakeholders (both from the private and public sectors) did not generally call for a far-reaching reform of the current system or a legislative reform of the Merger Regulation (such as the introduction of a self-assessment system). Private-sector stakeholders instead generally favoured a reduction in the information requirements imposed in the simplified notification form or the introduction of a lighter information system. A few public-sector stakeholders equally proposed that the current

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<sup>218</sup> In its assessment of that feedback, the Commission services have taken into account that some of the statements may be driven by private-sector stakeholder interests, rather than by the common public interest in ensuring effective merger control enforcement.

<sup>219</sup> Private-sector stakeholders' replies to question 6 of the Public Consultation.

<sup>220</sup> Private-sector stakeholders' replies to question 6 of the Public Consultation. Concerning 'no overlap' cases (paragraph 5(b) of the Notice on simplified procedure) more specifically, some respondents indicated that only four cases in the history of EU merger control have given rise to competition problems and that all of them involved large companies with dominant positions, such that their transactions would inevitably have come to the Commission's attention even if they had not been notified to it). Two of these cases concerned potential competition (i.e. M.4746 – Deutsche Bahn/EWS (2007) and M.1853 – EDF/EnBW (2001)); one concerned conglomerate effects (i.e. M. 5384 – Intel/McAfee (2008)) the other concerned Article 2(4) spill-over effects (i.e. M.1327 – NC/CANAL+/CDPQ/Bank America (1998)).

notification mechanisms be further streamlined (e.g. through more frequent use of waivers and the streamlining, where appropriate, of requests for information).

(B) Approximation of (some of the) cost savings achieved

- (225) The results of the Evaluation suggest that the higher number of cases treated under the simplified procedure since 2014 has led to significant cost savings for the Commission and companies alike. However, due to limitations in the availability of data, such cost savings can only be approximated.
- (226) With regard to savings for the Commission, the data shows efficient prioritisation. The Commission devoted limited resources to unproblematic and low-risk cases (even if numerically they represent the vast majority of merger notifications), so that it could focus instead on reviewing cases that merit a detailed assessment. The working hours dedicated to the review of simplified cases in recent years have indeed represented a small percentage of the time and resources spent on the review of merger cases overall. Further, for the seven-year period 2014-2020, the Commission services estimate that it saved more than 5 500 working days due to the shift of additional cases from the normal to the simplified procedure.<sup>221</sup>
- (227) With regard to savings for the merging parties, the costs of an EU merger notification include notably those resulting from preparing, drafting and submitting an EU merger notification and from waiting for approval before implementing the transaction. These costs may vary significantly depending on the scope and size of the transaction, the number of markets involved or the complexity of the case. Due to those complexities, the Commission has only been able to use two rough proxies for the cost reductions:
- i. the average length of the notification documents: the information required to submit a notification under the simplified procedure is significantly less than that required under the normal procedure; the form for normal notifications contains 46 questions (with sub-questions) while the form for simplified notifications contains 25 questions (with sub-questions) (a difference of -46%) which are often markedly less complex than the questions under the normal procedure; and
  - ii. the average time needed to obtain a clearance decision: the waiting period until clearance entails costs for firms, notably in terms of financing costs and in terms of delaying the realisation of any benefits resulting from the operation; in the period 2013-2019, merging parties saved on average more than 25 working days (that is to say more than 5 calendar weeks) overall (including pre-notification and notification) in cases treated under the simplified procedure.
- (228) The expansion of the simplified procedure also entailed cost savings for third parties as they usually do not need to provide any information to the Commission in the context of

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<sup>221</sup> The Commission services have not calculated cost savings in monetary terms given the complexity of such exercise. First, considering the wide range of categories of staff intervening on the process, it would be very complicated to determine the average salary of the personnel. Second, it would be very difficult to attribute a part of fixed costs (office, IT equipment, office supplies, etc) and it is even questionable whether part of such fixed costs should be attributed or not.

a simplified review (but are of course able to do so if they wish). In contrast, during a normal merger investigation, the Commission regularly contacts third parties and requires asks them to respond to a written questionnaire and/or to attend conference calls, which may result in several hours or days of investment. The administrative costs for third parties are therefore generally close to zero under the simplified procedure.

(C) Conclusion

- (229) The Commission services conclude that the simplification package has reduced the administrative burdens on the Commission and companies, in particular due to the expansion of the scope of the simplified procedure. Although a precise quantification of the reduction of the burden has not been possible, different proxies suggest that it has been significant.
- (230) However, there may be room for further streamlining the merger review process, in particular for certain categories of simplified cases. Based on the results of the Evaluation, this could take place by including new, albeit potentially limited categories of cases under the simplified procedure (as discussed in Section 5.1.3), by streamlining and clarifying the assessment of jurisdiction and by reducing information requirements for certain cases.
- (231) In contrast, the results of the Evaluation indicate that there would be considerable complexities in achieving significant simplification through a review of the EU Merger Regulation without compromising its effectiveness or the efficiency of merger control procedures at EU level. In particular, exempting certain simplified cases from notification could create inefficiencies, in that it could eliminate the benefits of the one-stop-shop review for certain transactions. Moreover, it could also present risks for merger enforcement. A system of self-assessment could somewhat reduce those risks, but could nonetheless impact the system's overall effectiveness and likely reduce the scope for Member States to ask for a referral. The Commission notes in this respect that, for these reasons, amendment of the EU Merger Regulation did not receive generalised support from either public or private stakeholders<sup>222</sup>.

### 5.3. RELEVANCE

- (232) The Evaluation sought to assess to what extent the specific objectives pursued by the procedural and jurisdictional aspects of the EU merger control system are still relevant to achieve the general objective of EU merger control.

#### 5.3.1. *Jurisdictional thresholds*

- (233) The Evaluation assessed to what extent the simple, purely turnover-based thresholds of the EU Merger Regulation have succeeded in capturing market concentrations that may have an impact on competition in the internal market and to what extent their objectives of capturing sufficiently the relevant transactions and offering a simple jurisdictional mechanism remain relevant.

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<sup>222</sup> Replies to questions 8 and 14 of the Public Consultation.



- (234) The results of the Public Consultation, as described notably in Section 5.1.1.2, show that these turnover-based thresholds remain relevant. No respondent proposed replacing them and the debate focused on whether additional thresholds would be needed. Many respondents emphasised that the current turnover-based jurisdictional thresholds ensure predictability and transparency<sup>223</sup>.
- (235) The Evaluation also confirmed that it is internationally accepted that turnover-based thresholds provide clear, objective and easily administrable criteria for triggering merger notifications. They enable the Commission to target transactions involving parties above a certain economic size and with sufficient local nexus. In particular, the ICN Recommended Practices for Merger Notification and Review Procedures recommend turnover (or sales/revenue)-based thresholds as appropriate, objectively justifiable and, as a rule, readily accessible criteria for notification, which also capture the requirement on local nexus<sup>224</sup>. In 2016, an OECD paper estimated that of the 29 OECD members that had mandatory notification systems, 75% had adopted notification thresholds based exclusively on turnover or assets, with only 7% using transaction size or value<sup>225</sup>. Similarly, the vast majority of Member States have mandatory merger control systems based on turnover thresholds<sup>226</sup>.
- (236) The Commission services therefore conclude that turnover-based thresholds still pursue relevant objectives by aiming to measure competitive significance in terms of turnover and by offering a simple jurisdictional mechanism that allow businesses to self-assess whether they need to notify their transactions. Section 5.1.1 discusses the consequences of not setting additional thresholds (e.g. based on transaction value).

### 5.3.2. *Referral mechanisms*

- (237) The Evaluation sought to assess whether the specific objectives of the referral mechanisms to allocate jurisdiction to the most appropriate authority in a simple process remain relevant today.
- (238) As explained, EU merger control allows for a division of competence by granting exclusive jurisdiction either to the Commission or to the Member States<sup>227</sup>. In certain cases, however, firms may have legitimate reasons to request that a transaction be dealt with by a different authority from the one(s) initially competent to investigate it. These companies may wish to avoid multiple parallel national submissions. Conversely, they may consider that a particular NCA is better placed than the Commission to assess a case that specifically affects a separate market within a Member State. In turn, a Member State may have an interest in dealing with concentrations that produce an impact specifically on a separate market within its territory. However, a Member State

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<sup>223</sup> Replies to questions 14 to 16 of the Public Consultation.

<sup>224</sup> ICN Recommended Practices for Merger Notification and Review Procedures (2018).

<sup>225</sup> OECD Background Paper ‘Local Nexus and Jurisdictional Thresholds in Merger Control’ (14-15 June 2016), paragraph 69.

<sup>226</sup> Some Member States use other jurisdictional thresholds, such as those based on the level of market share (e.g. Spain and Portugal). As explained in paragraphs (68), and (118) above, in 2017 Austria and Germany began using transaction-value-based thresholds in their merger control systems.

<sup>227</sup> Recital 8 of the EU Merger Regulation. This element is at ‘the core of the Merger Regulation’ (Notice on Referrals, paragraph 11).

may judge that the Commission is best positioned to assess concentrations that affect markets extending beyond its territory or that potentially require remedies extending outside its jurisdiction. In view of such situations, the rules on referrals operate as a corrective mechanism to the ‘bright-line’ turnover thresholds of the EU Merger Regulation, in compliance with the principle of subsidiarity, so that the more appropriate authority or authorities can handle the case.

(239) These considerations remain relevant today. The Commission services did not obtain any evidence in the course of the Evaluation that the referral mechanisms have lost relevance or that their objectives have lost significance. By contrast, the overall body of evidence indicates that the referral mechanisms brought in a helpful degree of flexibility in allocating jurisdiction between the Commission and the Member States. Section 5.1.2.3 presents how these mechanisms have worked in practice in the period 2014–2020 and described, in particular, how referrals to the Commission have enabled EU merger control action to be taken at EU and Member State levels, prevented parallel investigations in numerous cases, avoided the risk of inconsistent outcomes, and have improved administrative efficiency. Furthermore, the evidence shows that referrals benefited merging parties in particular, which were the parties that triggered referrals in the overwhelming majority of cases (see paragraph (212) above).

### *5.3.3. Simplification*

(240) The Evaluation sought to assess to what extent the need to protect both competition and consumers allows for a simplified treatment of certain categories of typically unproblematic cases currently subject to EU merger control. It also sought to assess whether, against that background, the objective of reducing the burden for companies and for the Commission (in line with the 2013 simplification package) remains a relevant objective today.

(241) The Commission's experience in the application of the Merger Regulation indicates that only a small percentage of notified cases every year raise competition concerns (see paragraphs (46) to (48) above) and that it is possible, from the outset, to identify certain categories of cases that are unproblematic and can therefore be reviewed under a simplified procedure (see section (56)). This results in a lighter burden, speedier processes for businesses and in an effective use of Commission resources, in line with the Commission's overall priorities. As explained in Section 5.1.3, the measures taken by the 2013 simplification package to widen the scope of the categories of simplified cases produced positive results and has been welcomed by stakeholders. In addition, a number of safeguards are in place to ensure that the simplified procedure does not prevent the Commission from a sufficient review of transactions that merit a detailed market investigation.

(242) Against this background and taking into account both the Commission's commitment to cut red tape and ease the regulatory burden without impairing enforcement and the continued request from private-sector stakeholders to reduce the burden of merger control as much as possible, the Commission concludes that reducing the burden for companies and the Commission and focusing Commission resources on the significant merger cases remains a relevant objective today.

## 5.4. COHERENCE

(243) The Evaluation has examined to what extent the current procedural and jurisdictional aspects of EU merger control under scrutiny have been coherent with related EU action and policies as well as with international developments.

### 5.4.1. *Jurisdictional thresholds*

(244) The Evaluation has explored how well the current, purely turnover-based, jurisdictional system aligns with other objectives of the EU and its Member States.

(245) Turnover-based thresholds have been applicable in the EU merger control system for three decades. They apply indiscriminately to all sectors of the economy. As explained in Section 5.1.1, these thresholds, together with the referral system, have ensured that the Commission has reviewed a large number of transactions that could potentially affect competition in the internal market, in all economic sectors. In particular, the Commission has reviewed a number of significant transactions in the digital sphere (see e.g. paragraphs (114) to (117)), in line with the Commission priority to ensure that Europe is fit for the digital age.<sup>228</sup> Some transactions that could have potentially merited review at EU level, however, ultimately fell out of the Commission's jurisdiction, as explained above.

(246) Turnover-based thresholds are also coherent with the overall situation at the national level. Although two Member States have recently brought in additional notification thresholds based on transaction value, the overwhelming majority of Member States maintain pure turnover-based notification thresholds<sup>229</sup>.

### 5.4.2. *Referral mechanisms*

(247) Referrals, by contributing to ensure that cases are allocated in a sufficiently flexible manner and that the administrative review of concentrations takes place at the most appropriate level (EU or national, by one or more Member States), are in line with the principle of subsidiarity<sup>230</sup> (see recital 11 of the EU Merger Regulation). Furthermore, the current system allows Member States to veto the referral of cases to the Commission, where they deem it preferable to keep their competence, and thus fully respect national merger control systems. Section 5.1.2.3 sets out how these mechanisms have worked in practice in 2014–2020 and how referrals to the Commission have prevented parallel investigations in numerous cases, avoiding the risk of inconsistent outcomes, improving administrative efficiency and increasing consistency.

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<sup>228</sup> Ursula von der Leyen '[Political Guidelines for the Next European Commission 2019-2024](#)'. The 2014-2019 Commission also identified the Digital Single Market as one of its 10 priorities (see [Shaping the Digital Single Market](#)).

<sup>229</sup> By way of example, France has specifically analysed the option to bring in transaction-value thresholds but has ruled out this option (see [contribution by France](#) to the OECD roundtable on 'Start-ups, Killer Acquisitions and Merger Control' (11 June 2020), paragraphs 18-19). A few Member States have considered specific regimes for mergers of online platforms, but have so far not made these changes to their national merger control systems.

<sup>230</sup> This principle is 'about identifying the best level of governance to make and implement policies. The Union should do so only where it is necessary and where it delivers clear benefits over and above measures taken at national, regional or local levels'. Commission Communication, *The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking* – 23.10.2018, page 3.

### 5.4.3. Simplification

- (248) The Evaluation assessed to what extent the simplified review of certain categories of cases is in line with the Commission's broader commitment to cut red tape and burden on investment and with Member States' simplification policies.
- (249) The 2013 simplification package was a concrete example of the Commission's commitment to meet the goals of the Regulatory Fitness and Performance ('REFIT') programme<sup>231</sup>. The aim was to promote growth and competitiveness by reducing the regulatory burden on EU business and citizens. The results of the 2013 simplification package confirm that it has successfully contributed to easing the burden of merger rules and procedures for business and for the Commission, both in terms of increasing the number of simplified cases and streamlining information requirements and shortening procedures (see Section 5.1.3), while ensuring effective enforcement. The 2013 simplification package is therefore in line with the Commission's commitment to cut red tape for businesses and to make an efficient use of the Commission resources.
- (250) It is also in line with (and has often inspired) the overall tendency to gradually bring in simplified review procedures in the national merger systems of the EEA countries. Currently, 19 EEA Member States<sup>232</sup> have some sort of simplified treatment for unproblematic cases (either in the form of a separate procedure for simplified cases or informal waivers of information), 5 Member States have some sort of simplified notification form (but no simplified procedure),<sup>233</sup> while 1 Member State is currently considering bringing in a simplified procedure or further simplifying the process<sup>234</sup>.

### 5.5. EU ADDED VALUE

- (251) As set out in Section 2.1, the EU has exclusive competence to set the competition rules necessary for the functioning of the internal market and has made use of that competence by adopting the EU Merger Regulation, among other pieces of legislation. In line with the principle of conferral on which the EU Treaties are based<sup>235</sup>, Member States remain competent to set their national competition rules and to apply them to concentrations that do not fall under the scope of the EU Merger Regulation<sup>236</sup>.
- (252) All Member States but one (Luxembourg) have their own national merger control systems. In practice, the NCAs and the Commission cooperate closely in the interest of consistency, convergence and cooperation among EU merger jurisdictions. Against that background, the Evaluation assessed the extent to which the procedural and

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<sup>231</sup> COM(2013) 685 final: Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, Regulatory Fitness and Performance (REFIT): Results and Next Steps, available at <http://ec.europa.eu/refit>.

<sup>232</sup> Belgium, Croatia, Czechia, Denmark, Finland, France, Greece, Hungary, Ireland, Iceland, Latvia, Malta, Netherlands, Norway, Portugal, Romania, Slovakia, Spain, Sweden.

<sup>233</sup> Austria, Croatia, Estonia, Italy and Poland.

<sup>234</sup> Slovenia.

<sup>235</sup> Treaty on European Union, Article 5(1) and 5(2).

<sup>236</sup> EUMR, Article 21(3): 'No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

jurisdictional aspects of EU merger control under scrutiny have contributed to providing EU added value from EU merger control.

#### *5.5.1. Jurisdictional thresholds*

- (253) The Evaluation aimed to assess the extent to which the jurisdictional thresholds provided EU added value by ensuring that the EU Merger Regulation is applied to cases that may have an impact on competition in the EU internal market.
- (254) The issue of EU added value therefore is closely related to the effectiveness of the jurisdictional thresholds assessed in detail in Section 5.1.1. Therefore the results of the assessment in that section feed into the assessment of EU value added and confirm that the mechanisms under review have contributed to EU merger control providing added value at EU level, which otherwise could not be equally achieved by Member States taking action individually.

#### *5.5.2. Referral mechanisms*

- (255) The Evaluation aimed to assess how the referral mechanisms contributed to allocating cases between the Commission and NCAs in order to ensure that the EU Merger Regulation is applied to cases that may have an impact on competition in the EU internal market, in a manner consistent with the principle of subsidiarity.
- (256) This issue is closely related to the effectiveness of the referrals, assessed in detail in Section 5.1.2. The evidence shows that, overall, referrals have contributed to ensuring that the Commission handles the potentially more problematic transactions with a wider impact on the internal market, while NCAs focus on transactions that have an impact on specific Member States. Furthermore, referrals to the Commission have avoided a significant number of parallel investigations at national level and ensured a coherent approach to the same transaction.
- (257) These results could not have been equally achieved by Member States taking action individually, which confirms that the referral mechanisms delivered added value at EU level and helped protect competition on the internal market.

#### *5.5.3. Simplification*

- (258) The Evaluation examined to what extent the simplified review of certain categories of generally unproblematic and low-risk cases ensured that merging parties drew benefit from the one-stop-shop system provided by EU merger control while being subject to lower costs and without producing negative consequences on the protection of competition and consumers in the markets concerned.
- (259) The Evaluation confirms that the simplified procedure provides EU added value, further boosted by the 2013 simplification package.
- (260) In part, this issue is also closely linked to the question of whether the simplified procedure in its current form has been effective in reaching its specific objective. As set out in Section 5.1.3, the Evaluation has shown that the revised simplified procedure has contributed to streamlining the review at EU level, allowing the Commission to focus

more resources on the cases that merit a detailed examination, and to reduce the burden in notifying simplified and non-simplified cases to the Commission.

- (261) These findings were corroborated by specific feedback from stakeholders during the Public Consultation. Public-sector stakeholders generally agreed that the Commission's one-stop-shop review of transactions under the simplified procedure has been efficient, has reduced the administrative burden and avoided multiple and potentially diverging decisions by national competition authorities; in sum, that the simplified procedure generated EU added value<sup>237</sup>. The majority of private-sector stakeholders also agreed that the Commission's one-stop shop review of concentrations under the simplified procedure created added value for businesses and consumers and that it is a source of efficiencies as it removes the need for multiple reviews of transactions at national level, with potentially diverging outcomes. Respondents also noted that the simplification package generated added value for businesses by expanding the categories of cases that can be reviewed under the one-stop-shop system and the benefits of the simplified procedure<sup>238</sup>.
- (262) This position is also reflected in private-sector stakeholders' opposition expressed during the Public Consultation to exclude cases from the scope of the Merger Regulation altogether (and therefore also from the scope of the Commission's simplified procedure), as this would mean losing the benefit of the one-stop-shop mechanism (under the simplified procedure) and could result in potential merger notifications at national level. Private-sector stakeholders generally indicated that further streamlining was desirable, but the majority considered that the Commission's one-stop-shop review of non-EEA joint ventures under the simplified procedure had created added value<sup>239</sup>. Stakeholders preferred notification to the Commission under the simplified procedure than the alternative to submit – potentially multiple – national merger control notifications.

## **6. CONCLUSIONS**

- (263) The purpose of the Evaluation was to assess the functioning of selected aspects of EU merger control, focusing principally on two related sets of topical issues identified by stakeholders and by the Commission.
- (264) The first set of issues is whether the current framework for EU merger control has sufficiently allowed the Commission to review concentrations that may have a significant impact on effective competition on the internal market and, specifically, whether the purely turnover-based jurisdictional thresholds of the EU Merger

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<sup>237</sup> Public-sector stakeholders' replies to question 1 of the Public Consultation.

<sup>238</sup> Private-sector stakeholders' replies to question 1 of the Public Consultation.

<sup>239</sup> Private-sector stakeholders' replies to question 10 of the Public Consultation. This is in contrast to the positions expressed during the public consultation on the 2014 white paper where the overwhelming majority of respondents welcomed the proposal to exclude from the EU Merger Regulation joint ventures exclusively operating outside the EEA. In the Commission's view, this is due to the fact that this possibility was raised only briefly in the 2014 public consultation in the context of a general reflection on further simplification, while the current Evaluation has exhaustively assessed a number of options and different systems to further simplify the current system and carefully set out the advantages and disadvantages of each.

Regulation, complemented by the referral system, have been effective with regards notably to high-value acquisitions of firms with limited turnover that may, however, play (or in future play) a significant role on the market.

- (265) The second set of issues is whether recent initiatives to simplify the EU merger system have resulted in a significant reduction in the burden involved in merger proceedings and a more efficient use of Commission resources, without undermining effective merger control.
- (266) With regard to the first topic, the findings of the Evaluation indicate that, at this stage, the turnover-based jurisdictional thresholds of the EU Merger Regulation, complemented with the referral mechanisms, have generally proved effective in capturing significant transactions in the EU internal market. The lack of complementary transaction value-based thresholds has not in itself significantly impaired the effectiveness of the jurisdictional thresholds, as the transaction value may not always be sufficiently correlated with potential competitive significance. In addition, bringing in a value-based threshold would likely increase the costs of the system for the Commission and merging parties and would thus have to be carefully balanced against any expected added value.
- (267) In any case, the Evaluation has also shown that, under the current jurisdictional rules, a number of transactions that could potentially have an impact on competition in the internal market are not caught by the jurisdictional thresholds of the EU Merger Regulation. Although this issue has partially been mitigated by referrals from Member States, certain concentrations with a cross-border impact in the EU where the turnover was not indicative of the competitive significance of (some of) the merging companies were not reviewed by the Commission and, in some cases, by any Member State.
- (268) The Evaluation indicated that the Commission's current approach of discouraging referrals under Article 22 of the EU Merger Regulation where the concentration falls outside the national merger control thresholds of the referring Member State limits the effectiveness of these referrals as a corrective mechanism to the turnover-based thresholds. In practice, under this approach, only transactions that are notifiable in at least one Member State can be potentially referred under Article 22. Since this provision allows Member States to request the Commission to examine any concentration that does not have an EU dimension but that affects cross-border trade and threatens to significantly affect competition within the territory of the Member State(s) making the request (irrespective of whether the transaction is notifiable in the referring Member State), the current practice has resulted in the potential of the corrective mechanism under Article 22 not being fully realised, reducing its effectiveness. Accepting and encouraging a referral of relevant transactions would give flexibility to the Member States and the Commission to target concentrations that merit review at EU level, without imposing the notification of transactions that do not.
- (269) In any event, the Evaluation identified the need to continue to closely monitor business developments in this area, notably in sectors such as digital and pharma, and to monitor experience in other jurisdictions. Jurisdictional changes at national level are an opportunity to learn from other competition authorities and may also contribute to

easing the referral of cases to the Commission. Continued monitoring should also encompass the Commission's practice in handling referrals under Article 22 of the EU Merger Regulation.

- (270) In addition, overall, the evidence collected has borne out that the referral mechanisms of the EU Merger Regulation have generally served their objectives well in providing a one-stop-shop and in allocating cases to the best-placed authority, while avoiding a significant number of parallel investigations at national level and – as a result – reducing the burden on merging parties and the risk of conflicting outcomes in different Member States. This conclusion is without prejudice to the noted limitations due to the current Commission practice of not to allow referrals under Article 22 from Member States that do not have the jurisdiction to review the concentration.
- (271) In terms of simplification, the Evaluation found that the 2013 simplification package has been effective in increasing the application of the simplified procedure to unproblematic mergers and in reducing the burden both for business and for the Commission, while ensuring an effective enforcement of the merger rules. However, it also showed that there is still some, possibly limited, room to further simplify procedure and cut red tape, notably in handling some categories of cases that are generally not likely to raise competition concerns (for instance by modifying the market share thresholds for horizontal and/or vertical relationships or by introducing a flexibility clause if sufficient safeguards are in place to protect effective merger enforcement), and in the information required to notify a concentration. However there was not widespread support to amend the EU Merger Regulation for further simplification from either public-sector or private-sector stakeholders.
- (272) The Evaluation also showed that, though some improvements are possible, the procedural and jurisdictional aspects evaluated continue to pursue relevant objectives, have overall achieved their objectives efficiently in a way that is coherent with other EU policies and action and that they have provided EU added value.

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## **Annex 1**

### **Procedural information**

#### **1. Lead DG, Decide Planning/CWP references**

Lead DG: European Commission Directorate-General for Competition (DG COMP).

Decide Planning Reference<sup>240</sup>: PLAN/2017/COMP/003.

#### **2. Organisation and timing**

In line with the Better Regulation guidelines on evaluations<sup>241</sup>, an Inter-Service Steering Group (ISSG) was set up in July 2016.

The ISSG for the Evaluation comprised representatives from the following Commission departments<sup>242</sup>:

- DG for Communications Networks, Content and Technology (CNECT)
- DG for Economic and Financial Affairs (ECFIN)
- DG Employment, Social Affairs and Inclusion (EMPL)
- DG for Energy (ENER)
- DG for Environment (ENV)
- DG for Financial Stability, Financial Services and Capital Markets Union (FISMA)
- DG for Internal Market, Industry, Entrepreneurship and SMEs (GROW)
- DG for Justice and Consumers (JUST)
- DG for Mobility and Transport (MOVE)
- DG for Research and Innovation (RTD)
- DG for Trade (TRADE)
- Legal Service
- Secretariat-General.

The ISSG was consulted on the evaluation roadmap, the consultation strategy, the intervention logic and main policy options, the questionnaire for the Public Consultation, the summary report of the open Public Consultation, and the draft staff working document.

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<sup>240</sup> 'Decide Planning' is a database and management tool for the operational planning and monitoring of the main political initiatives to be adopted by the European Commission.

<sup>241</sup> [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en)

<sup>242</sup> Other DGs were contacted and invited but did not participate.

The ISSG met on 13 July 2016, 16 September 2016, 17 December 2019, 16 October 2020 and 5 February 2021. Through these meetings and written exchanges, the ISSG participated in the whole evaluation process culminating in the finalisation of this staff working document.

An evaluation roadmap summarising the design, purpose and scope of the Evaluation was published on 3 August 2016 on the Commission's Europa website<sup>243</sup>.

An open Public Consultation<sup>244</sup> ran from 7 October 2016 to 13 January 2017 (14 weeks).

The summary of replies to the Public Consultation was published in July 2017<sup>245</sup>.

### **3. Exceptions to the Better Regulation guidelines**

In June 2016, DG COMP and the Secretariat-General discussed the scope of the Evaluation. In view notably of the work conducted in 2013 on different aspects of EU merger control, as published in 2014, it was agreed that the Evaluation should focus on a number of procedural and jurisdictional aspects and not include the entirety and overall functioning of the EU Merger Regulation. The ISSG validated this approach.

### **4. Consultation of the Regulatory Scrutiny Board**

The Evaluation was selected for presentation to the Commission's Regulatory Scrutiny Board (RSB).

An upstream meeting with the RSB took place on 25 September 2019 to discuss the results of the consultation and ongoing work streams.

The RSB consultation took place on 20 January 2021. The RSB issued a positive opinion with comments.

The table below summarises the changes made to this staff working document in response to the RSB's main comments.

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<sup>243</sup> [https://ec.europa.eu/smart-regulation/roadmaps/docs/2017\\_comp\\_003\\_evaluation.pdf](https://ec.europa.eu/smart-regulation/roadmaps/docs/2017_comp_003_evaluation.pdf)

<sup>244</sup> [https://ec.europa.eu/competition/consultations/2016\\_merger\\_control/index\\_en.html](https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html)

<sup>245</sup> [https://ec.europa.eu/competition/consultations/2016\\_merger\\_control/summary\\_of\\_replies\\_en.pdf](https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf)

Main RSB considerations	Changes made to SWD
Comments under points B1 and C1: The report does not appropriately justify the limited scope of the exercise. The report should assess if the scope agreed five years ago at the start of the Evaluation is still up to date.	Additional explanations on the decision to limit the scope of the Evaluation were added in Sections 1.1, 1.2 and 1.3.
Comments under points B1 and C1: The report does not appropriately justify why it does not look also at related substantive issues. It should explain whether the separation between procedural and substantial aspects of merger control is appropriate to allow for a proper assessment of the efficiency and effectiveness of the framework. For example, why is there no need to review whether the horizontal and vertical market-share thresholds under the simplified procedure are still appropriate?	<p>Additional explanations on the scope of the Evaluation and the ongoing initiatives on substantive issues of merger control were added in Sections 1.1, 1.2 and 1.3.</p> <p>The question concerning the current market-share thresholds under the simplified procedure was covered in Section 5.1.3.2.</p>
Comments under points B1 and C2: The report contains forward-looking elements, which go beyond the aim of an evaluation. The report should identify weaknesses of the existing framework without proposing solutions, which go beyond the scope of an evaluation.	The forward-looking elements contained in the draft SWD were removed. Instead, where appropriate, the shortcomings or room for improvement identified in the Evaluation were further developed across Section 5.
Comment under point C3: The report should align its conclusions on the effectiveness of the threshold system (complemented by the referral system) with the presented evidence.	Section 5.1.1 was complemented with a section discussing the identified limitations of using referrals as a corrective mechanism for the turnover-based thresholds. Section 5.1.1.8 was expanded to further explain how the conclusions are in line with the overall body of evidence presented in Sections 5.1.1.2 to 5.1.1.7.
Comment under point C4: On efficiency, the report should better explain the functioning of the referral system, including the current application of Article 22.	Additional details on the functioning of the referral system, including the current application of Article 22, were added in Sections 3.3 and 5.1.1.5.

Comments under point C4: The report should analyse the combined effects of the substantial interpretation of the rules and the procedural aspects of referral rules in terms of the efficiency of the process for allowing the Commission to review cases which are substantially relevant and should fall under its assessment.	Additional explanations were added when assessing the effectiveness of the jurisdictional thresholds and the referral mechanisms in Sections 5.1.1 and 5.1.2.
Comments under points B2 and C3: The report does not assess whether coherence has been ensured in the acceptance of referral requests and to what extent there is an ensuing risk of uneven merger control in the EU.	An analysis of the coherence in the acceptance of referral requests and the risk of uneven merger control was added in Section 5.1.1.5.
Comments under points B3 and C5: The report does not sufficiently/should better quantify the cost savings for notifying business and competition authorities, resulting from the simplification measures and the referral mechanism.	Cost-saving quantifications for businesses and public authorities have been included in Sections 5.2.2 (referrals) and 5.2.3 (simplification).
Comments under point C5: The report should also be transparent about any limitations of quantification and their reasons. It should explain how such data gaps could be overcome in the future.	The report recognises the data availability limitations to calculate cost savings and use proxies to carry out the assessment. These proxies offer a good approximation to savings for businesses and public authorities and will remain available based on the current data collection by DG COMP.
Comments under points B4 and C6: The report does not explain why results of the Public Consultation conducted in 2016/2017 are still relevant. The report should better describe the sources of evidence that led to the conclusion that the Public Consultation results of 2016/2017 are still relevant	Section 4 was complemented to explain why the results of the Public Consultation are still sufficiently robust. Annex 5 was completed regarding the list of stakeholder meetings.

## 5. Evidence, sources and quality

The Evaluation drew on the internal expertise of the Commission, on an extensive Public Consultation of stakeholders (see Annexes 2 and 4) and on comprehensive research carried out internally (see Annex 3).

The project was also underpinned by several consultation activities, including multilateral meetings with Member States and EEA States and ad hoc meetings with stakeholders (see Annex 5). It also drew on additional sources of evidence, notably previous evaluations and other reports by the Commission, and additional reports and studies (see Annex 6).

## **Annex 2**

### **Stakeholder consultation (1) – Synopsis Report**

#### ***(1) Outline of the consultation strategy***

In the context of the Evaluation of procedural and jurisdictional aspects of EU merger control (the Evaluation), the Commission ran multiple consultation initiatives with the objective to collect information, data and knowledge on the areas under review and to underpin the analysis.

The Evaluation built upon work carried out in previous years. Specifically, in 2009 and from 2013 onwards, the Commission took stock and assessed the functioning of different aspects of EU merger control and identified potential areas for refinement, improvement and simplification. This work led to the adoption in 2014 of the white paper *Towards more effective EU merger control* (the ‘2014 white paper’) that contained several proposals on a possible revision of the EU Merger Regulation<sup>246</sup>. In parallel, in December 2013, the Commission adopted a package of measures aimed at simplifying procedures without amending the EU Merger Regulation<sup>247</sup> (the ‘2013 simplification package’). These consultation activities were designed to invite NCAs, public authorities and interested third parties to provide their feedback and experience on the given topics, as well as on the potential policy options.

#### **a. Stakeholders**

The main stakeholders identified were Member State authorities, businesses engaged in or affected by mergers and acquisitions (‘M&A’) activity, trade associations and civil society:

- national competition authorities and ministries;
- businesses, in particular (but not exclusively) in the digital and pharmaceutical sectors;

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<sup>246</sup> [White paper Towards more effective EU merger control](#) (COM/2014/0449 final). See as well the accompanying [staff working document](#) (SWD(2014) 221 final), [Impact Assessment](#) (SWD(2014) 217 final) and [Executive Summary of the Impact Assessment](#) (SWD(2014) 218 final). The adoption of the white paper had been preceded by a public consultation in 2013. In 2014, the Commission carried out a [consultation](#) on the white paper.

<sup>247</sup> The [2013 simplification package](#) included a reform of the Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 336, 14.12.2013, p. 1: the ‘[Merger Implementing Regulation](#)’) and a new Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6; the ‘[Notice on simplified procedure](#)’). The 2013 simplification package streamlined the forms required for notifying mergers or making pre-notification referral requests (i.e. Form CO, Short Form CO and Form RS, annexed to the Merger Implementing Regulation), reducing information requirements for both simplified and non-simplified cases.

- trade and professional associations representing businesses and the legal community;
- professionals dealing with M&A activities (e.g. law firms).

## **b. Methods of engagement**

The consultation strategy used the following methods to involve and interact with stakeholders:

- [Consultation](#) in August 2016 on the evaluation roadmap, available on the European Commission's public consultation portal;
- Public Consultation from 7 October 2016 to 13 January 2017 through a questionnaire open to interested stakeholders [available](#) on DG COMP's website;
- meetings and interviews with private-sector stakeholders (see Annex 5);
- meetings with Member State authorities (see Annex 5).

### ***(2) Methodology and tools used to process the data***

The Commission used a combination of questionnaires, interviews with stakeholders, public consultations and meetings and working groups with Member States, to ensure a transparent and comprehensive methodology to assess the data collected.

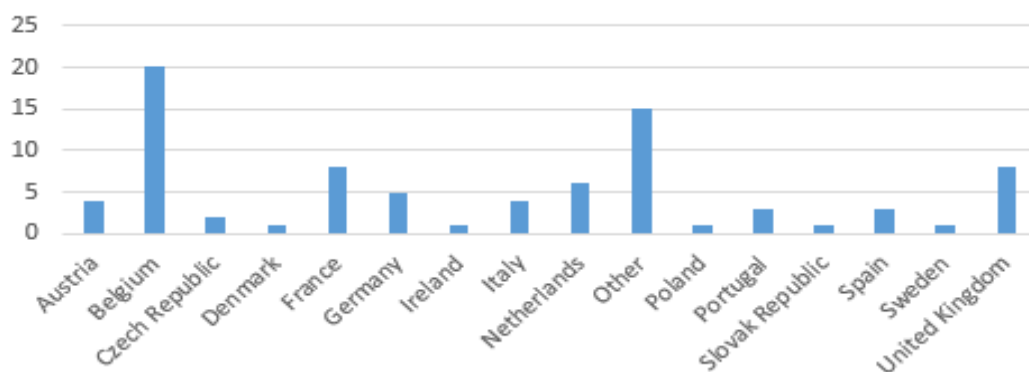
In particular, a specific public consultation was launched to give all stakeholders the opportunity to contribute to the Evaluation. In addition, DG COMP carried out an outreach campaign to elicit the views of stakeholders. The feedback from the Public Consultation and the interviews was assessed internally. The replies of the respondents to the Public Consultation and a summary of the replies were published in July 2017 on DG COMP's website.

### ***(3) Description of the results of the Public Consultation***

The Commission published a targeted questionnaire in English consisting of 29 questions, which was available from 7 October 2016 to 13 January 2017.

The Commission received responses from many stakeholders. Overall, over 90 public and private-sector stakeholders submitted their views (15 NCAs, 7 other public bodies, 31 associations, including industry and consumer associations, 21 companies, 19 law firms, 4 research institutes and 2 private individuals jointly).

The geographic representation of the respondents was rather balanced, although a significant proportion of responding trade associations and law firms were located in Belgium.



The following provides an executive summary of the main submissions and contributions to the consultation work streams of the Evaluation. It is structured in line with the topics in the Evaluation, namely (i) functioning of the jurisdictional thresholds of the EU Merger Regulation; (ii) simplification of EU merger control, and (iii) functioning of the referral system. The summary groups submissions by stakeholder groups or according to the views expressed on specific issues, as appropriate.

### *(2.1) Functioning of the EU Merger Regulation's jurisdictional thresholds*

The Consultation asked:

- (i) whether there was an enforcement gap concerning acquisitions of high-value targets with no or limited turnover;
- (ii) what type of transactions and industry sectors would be concerned by any such potential enforcement gap; and
- (iii) whether the current referral system combined with merger control at the level of Member States was sufficient to handle transactions without an EU dimension.

The Commission asked stakeholders for their views on potential complementary jurisdictional thresholds, including a jurisdictional threshold based on the value of a transaction.

A minority of respondents to the Public Consultation – including several NCAs and other public bodies and a few companies, associations and research institutes<sup>248</sup> – were of the view that there was an enforcement gap and were in favour of bringing in complementary jurisdictional thresholds based on the value of the transaction<sup>249</sup>. The digital sector was cited most frequently as an area where the EUMR may fail to catch all competitively significant cross-border transactions. Some NCAs also identified the pharmaceutical and

<sup>248</sup> The research institutes that perceived an enforcement gap in EU merger control did not propose bringing in a complementary jurisdictional threshold.

<sup>249</sup> One association proposed, as an alternative criterion, to expand the EUMR's jurisdiction by adding a notification requirement based on the number of consumers that are directly impacted by the merger.



biotechnology sectors as well as patent portfolio acquisitions. NCAs and other public bodies referred to a number of cases as evidence that there was an enforcement gap. They pointed out that if a transaction-value threshold were to be included in the EU Merger Regulation, it should be set at a sufficiently high level.

Conversely, the majority of public and private-sector stakeholders replying to the Public Consultation did not perceive any (significant) enforcement gap as regards high-value acquisitions of target companies that do not generate sufficient turnover to meet the jurisdictional thresholds of the EU Merger Regulation<sup>250</sup>. In addition, they considered that the referral mechanisms<sup>251</sup>, combined with national merger review systems in the Member States, are sufficient to ensure that cases without an EU dimension are reviewed at either national or European level.

Accordingly, the majority of respondents did not see any need to bring in complementary jurisdictional thresholds. The main arguments respondents raise against complementary thresholds can be summarised as follows:

- i. there is no or insufficient empirical evidence of an enforcement gap;
- ii. at the outset, the jurisdictional thresholds of EU merger control are not designed to capture all transactions with a cross-border dimension and the referral system is specifically designed to help allocate cases to the appropriate governance level;
- iii. the few cases of high-value acquisitions of low-turnover targets that do not meet the EU thresholds are typically subject to merger review at national level and could therefore be referred if appropriate (some respondents pointed out that the referral system could be made even more efficient<sup>252</sup>);
- iv. in the absence of cogent evidence of an enforcement gap, bringing in additional thresholds would be disproportionate and create unnecessary administrative burden and, as a consequence, have a chilling effect on innovation and investment in Europe;
- v. there is a risk of catching high volumes of false positive cases and/or spending time on consultations to clarify jurisdictional questions, which would negatively impact the Commission's resources and may detract resources from competitively significant cases; and

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<sup>250</sup> Cf. Article 1 of the EU Merger Regulation.

<sup>251</sup> Cf. Articles 4(5) and 22 of the EU Merger Regulation.

<sup>252</sup> A number of stakeholders urged the Commission to wait and analyse implementation of new laws bringing in value-based jurisdictional thresholds into some national merger control systems to draw lessons both on the existence of a jurisdictional gap and how best to address it. In this context, some respondents noted that national laws can usually be adapted more swiftly to address the unintended consequences of legislative changes than European laws.

- vi. the EU Merger Regulation is a role model for many non-EU merger control systems and thus other jurisdictions could follow the EU in modifying their merger systems in ways that may not comply with recommended practice by the International Competition Network.

More specifically, the main criticisms voiced by respondents on the idea to bring in a complementary threshold based on the value of the transaction were the following: (i) the purchase price is subjective and does not give any indication of the possible competitive significance of a transaction; (ii) the value of a transaction is difficult to determine in many constellations<sup>253</sup>; and (iii) a jurisdictional test based on the value of a transaction does not ensure sufficient local nexus with the EEA.

As regards the latter issue of how to ensure local nexus with the EEA in the event a complementary jurisdictional threshold based on the transaction value were to be brought into the EU Merger Regulation, most respondents considered that:

- i. a general clause (possibly supplemented by guidance that could be sector-specific) requiring activity or measurable competitive impact within the EEA would be too vague and would give rise to legal uncertainty, possibly leading to the notification of many transactions without a clear connection to the EEA;
- ii. it would be difficult to geographically allocate the transaction value (if such allocation were required as part of a deal-size test), especially for digital transactions;
- iii. a (local) market or supply share threshold to ensure local nexus would be challenging to apply to the digital sector (due to emerging product markets) and would not work for pharmaceutical pipeline products;
- iv. local turnover or assets may be suitable criteria to establish the necessary connection between a transaction and the EEA<sup>254</sup>.

Many respondents considered, moreover, that additional filters or a combination thereof would be needed in order to limit the number of potentially notifiable concentrations, if a complementary jurisdictional threshold were to be brought in.

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<sup>253</sup> Respondents identified, for instance, contractual earn-out provisions or conditional milestone payments, fluctuation of share prices between e.g. the announcement of a transaction and its closing and exchange rate fluctuations that can all significantly modify the value of the transaction.

<sup>254</sup> In this context, reference was made to the notification thresholds of the US merger control system. However, several respondents also took the view that the US system's local nexus provisions for foreign transactions (local turnover or assets) are characterised by complexities and should not necessarily serve as a blueprint.

## *(2.2) Simplification*

The Public Consultation requested feedback, first on the benefits of the simplified procedure at EU level and the impact of the 2013 simplification package and, secondly, on the scope to further simplify EU merger control, notably on: (i) whether there are categories of cases, in addition to those that currently fall under the Notice on simplified procedure that typically do not raise competition concerns and could therefore be handled under the simplified procedure; and on (ii) potential legislative options for further, wider-ranging simplification of the procedure to handle certain categories of non-problematic cases.

The Public Consultation identified four broad options for further simplification:

- (i) exempting certain categories of cases from the notification and standstill obligations;
- (ii) bringing in a light information system for selected categories of cases;
- (iii) setting up a self-assessment system with the possibility of a voluntary notification for selected categories of cases; and
- (iv) excluding extra-EEA joint ventures from the scope of application of the EU Merger Regulation (a proposal contained in the 2014 white paper).

For all options, the consultation inquired about the potential benefits (particularly how it reduces the burden for companies) and any associated risks (notably that potentially anticompetitive transactions may not be reviewed).

### *(a) NCAs and other public bodies*

Overall, 15 NCAs and 5 other public bodies submitted written contributions on aspects of simplification, notably on options for the design of a potential new system. Around half of these NCAs were in favour of amending the current legislative framework to further simplify the way that certain categories of simplified cases are handled. The other half of the NCAs did not support amendments to the current legislative framework, although a few proposed further streamlining the current notification system (e.g. as regards the use of waivers, requests for information, etc.).

Of the NCAs that expressed a favourable opinion on reforming the EU Merger Regulation, the preferred option to further simplify and streamline procedures would be to replace the current notification requirement under the simplified procedure<sup>255</sup> with a lighter information system for certain categories of simplified cases, in particular extra-EEA joint ventures<sup>256</sup> and operations bringing a change from joint to sole control<sup>257</sup>. A few NCAs also mentioned this possibility for mergers that do not give rise to horizontal

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<sup>255</sup> Short Form CO.

<sup>256</sup> Cf. Paragraph 5(a) of the Notice on simplified procedure.

<sup>257</sup> Cf. Paragraph 5(d) of the Notice on simplified procedure.

overlaps or vertical relations<sup>258</sup> ('non-overlap' mergers). However, for transactions with limited overlaps<sup>259</sup>, as a whole, NCAs called for caution and expressed a preference to keep the current notification system. Conversely, the option of bringing in an exemption system for certain categories of cases or excluding them completely from the scope of the EU Merger Regulation received very limited support from the NCAs. Only a small minority were in favour of excluding certain transactions (notably extra-EEA joint ventures) from the scope of the EU Merger Regulation altogether or would consider an exemption system, with high caution. Lastly, bringing in a self-assessment system seemed to be the least desirable option for NCAs, as only one NCA expressed some support, while highlighting the risk that some cases might escape scrutiny.

*(b) Private-sector stakeholders*

*(i) Overview*

The vast majority of private-sector stakeholders considered that the one-stop-shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers. The vast majority also considered that the simplified procedure has generally reduced the burden on companies (notably the merging parties) compared with the normal procedure. Overall, private-sector stakeholders welcomed the work carried out to simplify the system in the form of the 2013 simplification package and considered that it had led to a general reduction of burden in most categories of cases currently falling under the simplified procedure.

Notwithstanding this, the proposals given to further simplify the handling of certain categories of non-problematic cases attracted interest among private-sector stakeholders, in line with the positive feedback received in the Public Consultation on the 2014 white paper. The majority of private-sector stakeholders were in favour of further simplifying procedures, either by reforming the EU Merger Regulation or a through a less ambitious non-legislative streamlining of the functioning of the current simplified procedure.

*(ii) Scope for further simplification under the current system*

A number of private-sector stakeholders voiced concerns about the burdens that, in their view, still persist for companies when notifying transactions under the simplified procedure. Overall, most respondents welcomed the adoption of the 2013 simplification package as a step in the right direction. Some respondents indicated that the action taken to further simplify has not fully been translated into effects in practice, in particular for cases with a limited combined market share. In their view, certain information requirements in these cases – notably requirements to provide market information for all 'plausible' market definitions and to provide internal documents in certain cases<sup>260</sup> – are burdensome to comply with and may generate delays at the pre-notification stage. Private-sector stakeholders therefore called for a general reduction of requests for

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<sup>258</sup> Cf. Paragraph 5(b) of the Notice on simplified procedure.

<sup>259</sup> Cf. Paragraph 5(a) of the Notice on simplified procedure.

<sup>260</sup> Cf. Section 5(3) of the Short Form CO.

information, a more extensive and streamlined use of waivers and shorter pre-notification periods.

*(iii) Calls for further simplification of certain categories of simplified cases*

Overall, private-sector stakeholders supported the idea of amending the EU Merger Regulation to simplify the procedure applicable to most cases currently falling under the simplified procedure, in particular extra-EEA joint ventures, mergers that do not give rise to horizontal overlaps or vertical relations within the EEA and transactions involving a change from joint to sole control. Most stakeholders considered that the burden of the obligation to notify these cases (both in terms of costs and time) is not justified given that these cases are very unlikely to raise competition concerns in the EEA.

As regards the means to achieve further simplification for these cases, a majority of private-sector stakeholders expressed a preference for an exemption system whereby these transactions would not need to be notified to the Commission at all. A large number of private-sector stakeholders also supported the option of replacing the current notification obligations with a lighter information system (whereby the merging parties would provide only basic information on the transaction to the Commission), either as their preferred option or as an alternative to the exemption system. By contrast, private-sector stakeholders generally opposed the option of excluding cases from the scope of the EU Merger Regulation altogether, as this would mean losing the benefit of the one-stop-shop mechanism. A self-assessment system for certain categories of cases was not supported either, as this would undermine legal certainty for businesses and would increase the burden both for the notifying parties and for the Commission.

Conversely, private-sector stakeholders did not generally call for a radical reform of the current notification system for cases that give rise to a limited combined market share. However, the majority of responding private-sector stakeholders questioned the appropriateness of the information requirements imposed under the current Short Form CO, given that these transactions have a limited impact on competition in the EEA. As a result, private-sector stakeholders would favour bringing in a lighter information system in particular for this category of cases, instead of a radical reform of the current system.

Lastly, a few respondents also called for an expansion of the categories of cases falling under the current simplified procedure, for instance, by increasing the combined market-share thresholds for horizontal cases and/or for vertical cases, or by applying the simplified procedure to all cases with a very small increment.

*(2.3) Functioning of the case referral system*

In view of previous consultations on the functioning of the case referral system, the aim of the Public Consultation on this aspect was principally to verify whether the views expressed by stakeholders on the proposals made in the 2014 white paper had evolved in light of more recent experience with case referrals.

Those proposals included, notably:

- (1) rephrasing the relevant test for pre-notification referrals to Member States (i.e. that the concentration ‘may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market’), which are triggered by the notifying parties, in order to avoid the perceived ‘self-incrimination’ nature of such test<sup>261</sup>;
- (2) abolishing the two-step procedure in pre-notification referrals to the Commission, consisting of the submission, first, of a referral request (Form RS) and, second, of the formal notification<sup>262</sup> (Form CO); and
- (3) assigning jurisdiction for the entire EEA to the Commission where it accepts a post-notification referral from one or several Member States; in turn, if one or more competent Member States oppose the referral, the Commission would renounce jurisdiction for the entire EEA<sup>263</sup>.

*(a) NCAs and other public bodies*

Broadly speaking, the views of NCAs and other public bodies on the referral-related proposals made in the 2014 white paper have not changed. Many of the NCAs and other public bodies referred to their submissions on the white paper. The large majority supported the proposed reform of pre-notification referrals<sup>264</sup>. As regards post-notification referrals to the Commission<sup>265</sup>, overall they expressed support for the substantive proposals, although in some cases subject to comments or suggestions on some procedural aspects. Moreover, several NCAs and other public bodies reiterated their suggestions to reform post-notification referrals to Member States<sup>266</sup>. Some NCAs and other public bodies also reiterated their proposal to abolish the two-step procedure in pre-notification referrals to Member States<sup>267</sup>, so that the notifying parties would only have to file the notification at national level. One NCA proposed that the Commission modifies its current approach to referral requests under Article 22 of the EU Merger Regulation from a Member State that does not have jurisdiction over the transaction.

*(b) Private-sector stakeholders*

Private-sector stakeholders (associations, companies, law firms, education and research institutes) were generally in favour of amending pre-notification referrals as proposed in the 2014 white paper<sup>268</sup>, while advocating a further reduction of the applicable deadlines. Several respondents made a new proposal relating to pre-notification referrals to the

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<sup>261</sup> Cf. Article 4(4) of the EU Merger Regulation.

<sup>262</sup> Cf. Article 4(5) of the EU Merger Regulation.

<sup>263</sup> Cf. Article 22 of the EU Merger Regulation.

<sup>264</sup> Cf. Articles 4(4) and (5) of the EU Merger Regulation.

<sup>265</sup> Cf. Article 22 of the EU Merger Regulation.

<sup>266</sup> Cf. Article 9 of the EU Merger Regulation.

<sup>267</sup> Cf. Article 4(4) of the EU Merger Regulation.

<sup>268</sup> Cf. Article 4(4) and (5) of the EU Merger Regulation.

Commission<sup>269</sup>, suggesting that, when accepting these referrals, the Commission's jurisdiction should be limited to assessing worldwide or EEA-wide markets and, if the notified transaction concerns markets that are national or even smaller, to the territories of those Member States that would have jurisdiction over the transaction under their national merger control laws. Some stakeholders also requested reducing the required number of Member States competent to review a transaction for referral from currently three to two or even to just one Member State. For post-notification referrals to the Commission<sup>270</sup>, some private-sector stakeholders reiterated their request to repeal this mechanism as they were of the view that it is no longer necessary. If not repealed, they advocated that the Commission's jurisdiction should be limited to those Member States that are initially competent to review the case, if national or smaller markets are concerned. For post-notification referrals to the Commission<sup>271</sup>, private-sector stakeholders did not request removing or limiting the Commission's margin of discretion.

#### ***(4) Consultation activities outside of/ subsequent to the Public Consultation***

Throughout the Evaluation, and in particular after the Public Consultation, Commission services held meetings with a number of associations, sector representatives and companies who provided their views on the topics covered by the Evaluation. The Commission services also held meetings with public authorities, in particular with representatives of the NCAs in the context of the EU Merger Working Group and other European Competition Network ('ECN') forums, where these matters, including the submissions to the Public Consultation, were discussed.

These meetings largely confirmed the contributions and feedback received during the Public Consultation. Additional details of these discussions are provided below, organised by issue.

##### *(4.1) Jurisdictional thresholds: enforcement gap*

Several private-sector stakeholders continued to be sceptical about the existence of an enforcement gap (including individual firms, associations of competition lawyers and business organisations). One business organisation explained that their research into the existence of an enforcement gap had not supported such a finding: they pointed out that, except for Facebook/WhatsApp, they were not aware of any other transactions that could have escaped the review of the Commission or national competition authorities. Similarly, a professional association remarked that, in the context of the discussions on thresholds held with the German authorities, they had conducted specific research and had identified no gap (they had identified only three relevant cases that would have fallen under the scrutiny of Germany with the proposed thresholds). Another business association remarked that the transaction that gave rise to this new debate, Facebook/WhatsApp, would anyway have been reviewed by three national competition

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<sup>269</sup> Cf. Article 4(5) of the EU Merger Regulation.

<sup>270</sup> Cf. Article 22 of the EU Merger Regulation.

<sup>271</sup> Cf. Article 9 of the EU Merger Regulation.

authorities and indicated that, in their opinion, too many transactions are already captured with the current turnover-based criterion. Instead of extending the scope of the merger review, the Commission should aim at ‘better targeting’ it. A different business association noted that, specifically in the pharmaceutical sector, they did not see any enforcement gap of EU merger control.

Other private-sector stakeholders considered that, although an enforcement gap may exist, relevant missing cases are so rare that trying to remedy it would be disproportionate and would create an unnecessary burden.

Several NCAs also expressed doubt as to whether there is a significant enforcement gap. They commented, in particular, that if a transaction is not caught by the EU Merger Regulation, it is likely to be caught by national merger control systems. One NCA considered that merger control systems cannot aim to capture all relevant cases. Two NCAs, conversely, explained the measures taken to remedy what they perceived as a gap in their respective jurisdictional regimes, by bringing in complementary jurisdictional thresholds based on transaction value.

#### *(4.2) Jurisdictional thresholds: effectiveness and burden of deal-size thresholds*

A number of stakeholders (including individual firms, associations of competition lawyers and legal advisers and business organisations) considered that bringing in a new value-based threshold would give rise to a significant administrative burden on companies, to assess whether the transaction is notifiable or not, and yet would not bring significant additional cases to the scrutiny of the Commission. Although they generally appreciated the Commission’s concern regarding the need to evaluate deals that may have an impact on the internal market, they considered that ultimately, only very few relevant transactions would be caught by using additional criteria. Some stakeholders reported on their assessment of the new deal-size threshold brought into the German merger control system and made the point that the new threshold is likely to capture a limited number of interesting transactions. In their opinion, most additional notifications would concern cases that do not raise any competition problems. They advised the Commission services to perform a proportionality check before deciding whether an additional criterion is needed. One professional association noted that, if only very few relevant cases escape control, expanding the system to catch a few transactions would not be warranted, as it would unnecessarily subject many others to merger control. Several stakeholders discussed the difficulties in setting a value-based threshold at the right level. In the view of one business association, any new thresholds should be high enough to be workable and proportionate.

Some private-sector stakeholders (notably business associations) voiced the concern that requiring the notification of acquisitions of some small innovative companies may have negative repercussions on innovation, as, in some cases, these activities are developed in order for these companies to be acquired by larger players that can bring the fruit of R&D investment to the market. These very small companies may be hurt by long administrative procedures for merger control.



Several stakeholders (professional and business associations) noted that the Commission services should be very careful about designing new thresholds, since many Member States and/or jurisdictions around the world might want to replicate the measures taken by the Commission at European level.

On the public-sector stakeholders' side, some NCAs also underscored these difficulties. The NCAs that had brought in value-based thresholds shared their experiences and the feedback from their stakeholders. They also explained how they had set their thresholds and provided estimates on how many cases could be captured.

#### *(4.3) Jurisdictional thresholds: difficulties in setting the value of a transaction*

A number of stakeholders (including associations of competition lawyers, legal advisers and business organisations) highlighted the difficulties they saw in calculating the value of a transaction and the resulting uncertainty and additional burden this would create. They were of the view that the value would not always be easy to measure and the purchase price may vary over time (e.g. it may be linked to the final performances of a firm) and therefore not be stable at the time the transaction is proposed. The US experience on this issue (where there are guidelines on how to set the value of the transaction) was discussed to illustrate these difficulties.

The NCAs that had brought in value-based thresholds explained the methodology they use to set the value of the transactions, requiring a case-by-case assessment.

#### *(4.4) Jurisdictional thresholds: concept of 'local nexus'*

The issue of defining an appropriate 'local nexus' came up in numerous meetings with stakeholders. One firm emphasised both its importance and the difficulties in defining it for transactions where turnover is not a decisive factor. Two professional associations suggested that designing a domestic test may be decisive in ensuring that the right transactions are captured. A business association outlined that an uncertain local nexus might give rise to a high number of notifications, to prevent the risk of legal uncertainty, therefore guidance on this aspect would be necessary. Another business association was of the opinion that the biggest difficulty expected in using a transaction value-based threshold is in ascertaining an appropriate local nexus.

This topic was discussed with Member States' authorities at different stages. Here as well, the experience of the two countries that had recently started using value-based thresholds proved informative of the challenges in setting a local nexus and the different ways to address them.

#### *(4.5) Jurisdictional thresholds: making more effective use of referrals*

Some public and private-sector stakeholders observed that improving the effectiveness of the referral system may be an alternative to ensure that additional important transactions may eventually reach the Commission's scrutiny. It was suggested that it might be better to maintain the current jurisdictional provisions of the EU Merger Regulation but make

more frequent use of the referral system to ask Member States to refer the case. This may be more efficient than adding an imperfect additional criterion.

*(4.6) Simplification: option to bring in a system of self-assessment for certain categories of cases*

Several stakeholders (firms and professional and business associations) expressed concerns regarding the option to bring in a system of self-assessment for certain categories of cases. The main issues outlined were (i) reducing legal certainty; (ii) the problem of undoing closed transactions; (iii) the mechanics of the referral system in a voluntary system at EU level; and (iv) the fact that a self-assessment system can work for clear-cut criteria such as turnover thresholds but would be more problematic for more subjective criteria, such as potential harm to competition.

By contrast, arguments were made that voluntary notification systems work well in other jurisdictions, like in the UK. In any event, the merging parties could still notify the transaction if they wanted to have legal certainty. Some stakeholders mentioned that the success of this proposal would depend on setting a clear timeframe for the Commission to take action on the transaction. Moreover, a voluntary notification system would have the advantage of speeding up the process compared with the current mandatory EU notification system.

*(4.7) Simplification: option to exclude extra-EEA joint ventures from the scope of the Merger Regulation and to bring in a block exemption mechanism for certain categories of transactions*

A number of firms repeatedly complained about the requirement to notify joint ventures that have no impact in the EEA. Several private-sector stakeholders (firms and professional and business associations) welcomed the option of further streamlining the review of extra-EEA joint ventures. However, as regards the option to exclude these transactions completely from the scope of the Merger Regulation, they pointed out the risk that these transactions may fall under different national regimes and therefore trigger multiple notifications in different Member States, which would mean losing the benefit of the one-stop-shop review at EU level of these transactions. The point was made that if extra-EEA joint ventures were excluded from the EU Merger Regulation's scope, Member States should follow this example and remove these categories of cases from their national notification requirements to avoid the risk of multiple national notifications.

The Commission services discussed the topic of notification of extra-EEA joint ventures with NCAs in several meetings of the EU Merger Working Group. Some NCAs inquired whether there was a risk of affecting the one-stop-shop principle if extra-EEA joint ventures were excluded from the scope of the EU Merger Regulation. NCAs updated the Commission of the rules in their respective jurisdictions on notification of joint ventures without activities in their territories. One NCA was explicitly in favour of exempting extra-EEA joint ventures from the scope of application of the EU Merger Regulation, since this change at EU level would make it easier to make a similar proposal to change

its national legislation. By contrast, some NCAs expressed reservations about fully excluding extra-EEA joint ventures from the scope of application of the EU Merger Regulation.

Some private-sector stakeholders commented on the option to bring in a block exemption mechanism for certain categories of cases, including extra-EEA joint ventures and other types of very simple cases. It was generally considered, however, that the success of such a mechanism would depend on how the exemptions were designed. One association suggested that a block exemption mechanism could be combined with a self-assessment system. In general, Member State authorities were not in favour of a system of block exemptions, notably since it could undermine merger enforcement.

*(4.8) Simplification: option to bring in a light information system for certain categories of cases*

Several private-sector stakeholders (notably firms and business associations) observed that the notification form ('Form CO') is burdensome and formalistic and were of the view that the notification process could be streamlined. A number of them made the point that a lighter notification regime with a simpler Form CO would be appropriate: it would then be for the Commission to require a more comprehensive Form CO where necessary. Another idea expressed was to have a short information notice instead of a Short Form CO for types of cases that typically do not raise competition concerns, for example non-overlap cases. A reform of the EU Merger Regulation to bring in a light information system, it was suggested, could identify some categories of 'super-simplified' cases, for which an even lighter information requirement than the current simplified procedure would be warranted. It was suggested that obvious candidates for such procedure could be cases currently falling under point 5 a) and b) of the Simplified Notice, where it is easy to conclude that no competition concerns may arise. Cases falling under point 5d) (joint to sole control) could perhaps also be part of it although it was acknowledged that competition issues may arise in some of these cases. A business association noted that it would still be possible to revert to the full notification procedure in these cases.

At several meetings of the EU Merger Working Group, NCAs discussed whether a light information requirement could be modelled on the 2014 white paper proposals for the control of minority shareholdings. One NCA explicitly expressed concerns in relation to that proposal. Conversely, several NCAs preferred the light information system as a way to simplify merger proceedings, e.g. an exemption system, since the former would constitute a less radical change to the current system. However participants acknowledged that it also had less potential to ease the burden. Several NCAs considered that a tick-box solution might be interesting to streamline notification requirements and enquired about the practicalities.

*(4.9) Simplification: market-share thresholds in the Simplified Notice*

Some private-sector stakeholders (notably firms and professional associations) suggested increasing the market shares under point 5c) of the Simplified Notice from 20% to 25%

for horizontal overlaps, to ensure consistency between the Simplified Notice and the Horizontal Merger Guidelines.

This issue was also discussed in several meetings of the EU Merger Working Group. Several NCAs enquired about the anticipated effects of this measure. One NCA explained that, during its own review in its jurisdiction, it had found that some cases within the range of 20-30% had been problematic and needed to be investigated comprehensively. This had caused it to abandon the idea of increasing the thresholds.

*(4.10) Simplification: remaining burdens identified by stakeholders*

Several private-sector stakeholders (including firms and professional and business associations) confirmed that the 2013 simplification package had resulted in additional cases falling under the simplified procedure as a result of the increase of the market-share thresholds in paragraphs 5(c) and the new mechanism in paragraph 6. Some observed, however, that some burdens still remain when notifying cases under the simplified procedure. Specifically, they referred to the requirement to provide market-share data for all plausible markets in cases where the parties' activities overlap. They indicated that the need to identify all plausible markets was often burdensome and time-consuming, both for the parties of a proposed transaction and for the Commission, particularly where there are no clear precedents. They pointed out that the parties are not always able to provide the market share for each market and that this requirement may be excessive in the simplified procedure. Some stakeholders suggested that the Commission defines more frequently geographic markets in its decisions, but acknowledged that this may come with additional information requirements in simple cases. A firm suggested that the Commission should not require national market shares if from the outset it is not likely that markets concerned are less than EEA-wide or global. A business association proposed that the Commission focus its assessment on the most relevant potential vertical relationships, not on all ones.

Several private-sector stakeholders (notably professional and business associations) also noted the need to provide internal documents under Section 5(3) of Short Form CO in transactions where the parties' activities overlap. A few firms outlined that the burden for parties seems to have increased rather than decreased and noted that the number of internal documents requested seems to vary in different cases. Some considered that the request for a large number of internal documents is relevant for complex cases under the normal procedure but not for simplified cases. However, one firm proposed sending more documents to the Commission upfront, in particular those typically required for an HSR filing in the US.

Several private-sector stakeholders (including professional and business associations) observed that processing jurisdictional issues sometimes extends the length of the pre-notification phase in simplified cases. One association noted that the Commission's Best Practices on merger procedures have not been updated since 2004 and invited DG COMP to consider issuing an update.

The issue of electronic notifications was discussed with private-sector stakeholders, which were generally in favour of the idea. It was also discussed with NCAs, a number of which shared their experiences in establishing these systems in their jurisdictions. Others plan to do so in the future.

Lastly, the administrative costs of notifications were discussed with private-sector stakeholders. One professional association considered that the costs associated with a simplified case would generally likely to be less than half the cost associated with a normal phase-one procedure. The Commission's requests for information may increase the associated costs considerably. One firm indicated that, when comparing the European and the US systems in terms of the most time-consuming activities involved in notifying a merger transaction, notifying a merger in the EU involves a great amount of time spent on defining the plausible markets while, when notifying a merger in the US system, the most time-consuming activity is searching for internal documents.

#### *(4.11) Referrals*

Private-sector stakeholders, when commenting on the referral system, often stressed the benefit of the one-stop shop system, which is considered to work well. The fact that a transaction may be reviewed at European level is strongly perceived as a major advantage, relieving undertakings from the burden of having to notify the transaction and having to undergo assessment by multiple NCAs. Some observed that an easier and more accessible referral system would be optimal, along with shorter delays. Some wondered whether the referral mechanism of Article 22 was still necessary given that almost all Member States have their own domestic merger control rules.

The Commission services discussed the topic of referrals with NCAs, in several meetings of the EU Merger Working Group, and of the ECN Meeting of Directors-General for Competition. These discussions included the Commission's current approach to referrals by Member States that do not have jurisdiction over the transaction, notably whether this approach has resulted in cases not being reviewed.

#### *(5) Use of the information received and conclusions*

The results of the targeted consultations, meetings and interviews allowed the Commission services to collect a very significant number of views and opinions on the Evaluation. The information and evidence received was processed internally, analysed and critically assessed. It made a significant contribution to the qualitative assessment of the issues under evaluation.

### **Annex 3**

#### **Methods and analytical models**

##### *Description of the methods and approaches used during the Evaluation*

As part of the Evaluation of the jurisdictional aspects of EU merger control, the Commission services carried out comprehensive research to assess the possible existence of an enforcement gap of EU merger control due to the functioning of the jurisdictional thresholds set out in Article 1 of the Merger Regulation. To that end, the Commission services successively researched and analysed transactions made in each of the years 2015, 2016, 2017, 2018 and 2019 (and, where relevant, earlier).

In particular, the Commission services reviewed the transactions recorded in Bloomberg's financial database 'deal list'. As an initial proxy to identify high-value acquisitions, the Commission services focused on the transactions whose recorded value exceeded the equivalent of EUR 1 billion, but conducted additional examinations at different value thresholds (principally, the equivalent of EUR 5 billion), categorising them by economic sectors. In addition to the transactions recorded in the Bloomberg database, the Commission services conducted additional research to identify other transactions relevant for the purpose of this review.

The first step was verifying whether the high-value transactions identified had been reviewed or not by the Commission under the EU Merger Regulation. The Commission staff then calculated average review rates at EU level according to the value of the transaction and industry sector. It focused on transactions in the communications and technology sector (as a proxy for the digital sector) and pharmaceutical industries.

The second step was identifying concentrations that are characterised by a high ratio between the transaction value and the worldwide turnover of the target, as this represents cases where the consideration paid is not directly driven by the current economic activity of the acquired firm.<sup>272</sup> This enabled the Commission services to calculate review rates for those transactions and compare them with the average review rates across all industries.

The third step was a more qualitative assessment of high-value transactions with a high ratio between the transaction value and the worldwide turnover of the target in several industry sectors that did not fall under EU merger control. The aim was to ascertain whether they would potentially qualify as significant structural changes with an impact

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<sup>272</sup> Those high-value / low-turnover transactions are at the heart of the debate on the effectiveness of turnover-based jurisdictional thresholds of the EU Merger Regulation.

on the market beyond the national borders of any one Member State. These are the types of cases that the EU Merger Regulation aims to capture.

The fourth step was extending the Commission services' qualitative assessment of all high-value acquisitions to firms operating in the advertising, internet, media, biotechnology and pharmaceutical sectors, regardless of the prevailing ratio between deal size and turnover.

All transactions identified in the third and fourth steps were filtered to see whether they appeared to have a local nexus with the EEA and a cross-border dimension and so would be considered relevant for EU review. As part of this work, based on the available public information, the Commission services sought to distinguish between transactions that would clearly not raise competition issues ('non-problematic cases' that would probably fall under the simplified procedure) and mergers with potentially significant overlaps or vertical/conglomerate relationships that could warrant review by the Commission ('overlap cases' likely to fall under the normal procedure).

For 2019, the scope of the analysis was extended to assess how many transactions above EUR 1 billion, regardless of the transaction value-to-turnover ratio and industry sector, had a local nexus to the EEA. The quantitative analysis described above in steps one and two was repeated for all transactions above EUR 1 billion and for the subset of transactions above EUR 1 billion and EUR 5 billion that had a local nexus to the EEA.

The fifth step was for the Commission services to verify, for all high-value/low-turnover transactions identified and that escaped review under the EU Merger Regulation, whether they had been examined by NCAs under their national merger control systems (and, if so, the outcome of any national reviews).

As part of this work, the Commission services also identified relevant transactions for which it did not have original jurisdiction but were ultimately reviewed by it, following a referral from Member State authorities under Articles 4(5) and 22 of the EU Merger Regulation.

### *Evaluation matrix*

The Commission services faced several limitations and constraints when carrying out this research. First, using an external database, the research had to depend upon the accuracy and categorisation of transactions by this database. In particular, the Commission services used the information on the target industry group/sector provided by Bloomberg in order to categorise transactions according to industry sector. It also included in the research all transactions above EUR 1 billion recorded in the Bloomberg database, including those categorised as proposed or withdrawn. Although some of those transactions might not have been ever completed and in some cases might have been just market rumours, others have been reviewed by the Commission under the EU Merger Regulation. Including in the list transactions categorised as 'proposed' meant that a few

duplicates of the same transaction with a different interested buyer were listed in the database. In such cases, adaptations to the data were required to avoid double counting.

Secondly, given the high overall number of high-value transactions recorded in the Bloomberg database, it was not possible to review all from a qualitative perspective. As explained in the description of the methodology above, the review therefore limited the more qualitative review to transactions corresponding to specific criteria, which were considered the most relevant in the context of the recent debate, namely high-value/low-turnover transactions regardless of the industry sector concerned and high-value transactions in the digital and pharmaceutical industries.

Thirdly, by its very nature, the more qualitative assessment was rough and approximate given the lack of reliable and sufficiently detailed information which would enable the Commission services to determine with some degree of certainty the effect of transactions on EEA markets ('local nexus'), their cross-border dimension, indeed their impact on competition. The information typically required to assess those aspects with greater certainty is not available in the public domain and only becomes accessible to the Commission in the course of its merger control procedure. A number of transactions identified as non-problematic to competition were reviewed and cleared by NCAs or non-EU competition authorities such as the US authorities. Although this could provide useful pointers, the outcome of such review was not necessarily an indication that a potential review under EU merger control would have led to the same result, given the different legal frameworks, but also different market circumstances in the EU as a whole and its individual Member States or non-EU countries.

The research was carried out over several years and involved large volumes of data. To check consistency between the different members of the research team, results were randomly reviewed by a second researcher and, in complex cases, discussed by several researchers in the team.

Identifying the number of transactions with a local nexus with the EEA presented specific challenges, since the EU Merger Regulation currently determines this issue on the basis of the geographic allocation of the turnover of the undertakings concerned. Since this criterion, by definition, could not be applied to concentrations which do not meet these thresholds, the research used other elements to assess whether a transaction had a sufficient link to the EEA. For the purpose of that work, a wide concept of local nexus was applied, encompassing not only current commercial activities but also activities that in the future could generate substantial sales in the EEA (for example, pharmaceutical product development).

Given the unavoidable uncertainties in the analytical results, the research treated the results as informative and indicative of the general trends, but not necessarily conclusive. However, in a number of cases the Commission could rely on the reviews of these transactions conducted by NCAs or agencies in other jurisdictions (e.g. the US Federal Trade Commission and Department of Justice). Moreover, the Commission services



conducted comprehensive research and examined publicly available information from multiple sources to compare and cross-check the evidence.

#### **Annex 4**

##### **Stakeholder consultation (2) – List of submissions received**

###### *(1) National competition authorities*

- Austrian Federal Competition Authority (AT)
- Office for the Protection of Competition (CZ)
- Bundeskartellamt (DE)
- Danish Competition and Consumer Authority (DK)
- Comisión Nacional de los Mercados y la Competencia (ES)
- Autorité de la concurrence (FR)
- Hungarian Competition Authority (HU)
- Irish Competition Authority (IE)
- Autorità Garante della Concorrenza e del Mercato (AGCM) (IT)
- Dutch Competition Authority (ACM) (NL)
- Urząd Ochrony Konkurencji i Konsumentów – UOKiK (Office for Competition and Consumer Protection) (PL)
- Autoridade da Concorrência Portuguesa (PT)
- Swedish Competition Authority (SE)
- Antimonopoly Office of the Slovak Republic (SK)

###### *(2) Other government authorities*

- Bundesministerium für Wirtschaft und Energie (DE)
- Catalan Competition Authority (ES)
- Czech National Bank (CZ)
- Dutch Ministry of Economic Affairs (NL)
- Federal Ministry of Science, Research and Economy (AT)
- Norwegian Government – Ministry of Trade Industry and Fisheries (NO)
- Monopolkommission (DE)
- Permanent Representation of France (FR)

- UK Government – Department for Business, Energy & Industrial Strategy (UK)

### *(3) Associations*

- AEDC – Asociación Española para la Defensa de la Competencia (ES)
- AFEP – French Association of Large Companies / Association française des entreprises privées (FR)
- American Bar Association Sections of International Law and Antitrust Law (US)
- American Chamber of Commerce to the EU (US)
- Association des Avocats pratiquant le Droit de la Concurrence (FR)
- Application Developers Alliance (\*BRX)
- BDI – Federation of German Industries (DE)
- BEUC – The European Consumers Organisation (\*BRX)
- British Property Federation (UK)
- Bundesrechtsanwaltskammer (German Federal Bar – BRAK) (DE)
- Business Europe (\*BRX)
- Cercle de l'Industrie (FR)
- CLLS – City of London Law Society Competition Law Committee (UK)
- Computer and Communications Industry Association (CCIA) (US)
- Confindustria Radio Televisioni (IT)
- Digital Europe (\*BRX)
- ECIS – European Committee for Interoperable Systems (\*BRX)
- ECLF – European Competition Lawyers Forum (\*BRX)
- EFPIA – European Federation of Pharmaceutical Industries and Associations (\*BRX)
- ETNO – European Telecommunications Network Operators' Association (\*BRX)
- FEB – Fédération des entreprises de Belgique (BE)
- GSMA (\*BRX)
- ICC – International Chamber of Commerce (\*BRX)
- ICLA – Association of in-house competition lawyers (UK)
- IMPALA – Independent Music Companies Association (\*BRX)

- INREV – European Association of Investors in Non-Listed Real Estate Vehicles (\*BRX)
- International Bar Association (IBA) – Antitrust Committee (\*BRX)
- Invest Europe (\*BRX)
- Investment Property Forum (UK)
- Merger Streamlining Group (\*BRX)
- The UK Competition Law Association (UK)

*(4) Companies*

- Abbvie Biopharmaceuticals (FR)
- Abertis Infraestructuras S.A. (ES)
- Adobe, Cisco and Oracle (US)
- APG Asset Management NV (NL)
- CPPIB – AIMCO – OMERS – PSPIB – bcIMC – OTPP - CPDQ (CA)
- Cisco Systems Inc. (US)
- Deutsche Telekom (DE)
- Facebook (US)
- Enel Spa (IT)
- IBM (US)
- Intesa Sanpaolo SpA (IT)
- Mondi AG (AT)
- Microsoft (US)
- NN Group (NL)
- Novartis AG (CH)
- OMV Aktiengesellschaft (AT)
- Orange SA (FR)
- Philips International B.V. (NL)
- Telefonica SA (ES)
- Total SA (FR)
- VimpelCom Amsterdam B.V. (NL)

*(5) Law firms*

- Abreu – Associados, Sociedade de Advogados SP RL (Abreu Advogados) (PT)
- Allen & Overy LLP (\*BRX)
- Baker McKenzie (\*BRX)
- Berwin Leighton Paisner LLP (UK)
- Best Friends group of law firms (BonelliErede, Bredin Prat, De Brauw, Hengeler Mueller, Slaughter And May and Uriamenendez) (\*BRX)
- Cleary Gottlieb Steen & Hamilton LLP (\*BRX)
- Clifford Chance LLP (\*BRX)
- Dickson Minto W.S. (UK)
- Freshfields Bruckhaus Deringer LLP (\*BRX)
- Herbert Smith Freehills LLP (\*BRX)
- Hogan Lovells International LLP (\*BRX)
- Jones Day (\*BRX)
- Linklaters LLP (\*BRX)
- LK Shields Solicitors (\*BRX)
- Norton Rose Fulbright LLP (\*BRX)
- Orrick, Herrington & Sutcliffe LLP (\*BRX)
- Simmons & Simmons LLP (\*BRX)
- White & Case LLP (\*BRX)
- Latham & Watkins (\*BRX)

*(6) Education and research institutes*

- AFEC – Association Française d’Etudes de la Concurrence (FR)
- British Institute of International and Comparative Law (UK)
- Centre for Competition Policy – University of East Anglia (UK)
- Université de Rouen (FR)

*(7) Individuals*

- Aleksandra Boutin and Xavier Boutin (BE)

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The submissions (where appropriate, in a non-confidential version) can be found [here](#)

Three anonymous submission were also received

Legend: (\*BRX) = International/European entity with an office in Brussels

## **Annex 5**

### **Stakeholder consultation (3) – ad hoc meetings with stakeholders**

AFEP (French Association of Large Companies)	20 March 2017
Alphabet	20 June 2019
American chamber of commerce to the European Union (Amcham)	28 November 2016
Application Developers Alliance	5 January 2017
BASF	8 July 2020
Bayer	8 July 2020
Bosch	8 July 2020
BusinessEurope	30 January 2017
Brussels Matters	24 November 2016
Canada Pension Plan Investment Board (CPPIB)	9 January 2017
CISCO	22 June 2017
Computer & Communications industry association (CCIA)	14 December 2016
Digital Europe	12 January 2017
ECN Director-Generals	28 June 2016, 17 November 2016, 6 November 2020
EU Merger Working Group (National Competition Authorities of EU Member States and of EFTA Member States and EFTA Surveillance Authority)	17 June 2016, 12 October 2016, 9 March 2017, 16 September 2020, 15 December 2020
European Competition Lawyers Forum (ECLF)	9 December 2016, 7 December 2020
European Consumer Organisation (BEUC)	25 January 2017
European Federation of Pharmaceutical Industries and Associations (EFPIA)	13 December 2016

European Round Table of Industrialists (ERT)	15 November 2016, 1 July 2020, 11 November 2020
In-House Competition Lawyers Association (ICLA)	6 December 2016
International Bar Association (IBA)	9 December 2016, 31 May 2018
International Chamber of Commerce (ICC)	1 February 2017
Invest Europe	20 December 2016
Siemens	23 May 2018, 22 January 2020, 8 July 2020
Studienvereinigung Kartellrecht	23 November 2016

## **Annex 6**

### **Sources of evidence**

#### *(1) Enforcement under the EU Merger Regulation*

- Detailed information on all merger [cases](#) and [statistics](#) are available on DG COMP's website
- DG COMP's internal databases and case application tools

#### *(2) Previous evaluations and other reports by the Commission*

- Communication [EU-China – A strategic outlook](#) (2019)
- Commission Communication, The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking (2018)
- A review of merger decisions in the EU: What can we learn from ex-post evaluations? (2015)
- White paper [Towards more effective EU merger control](#) (2014)
- [Commission staff working document](#) accompanying the white paper *Towards more effective EU merger control* (2014)
- [Impact assessment](#) accompanying the white paper *Towards more effective EU merger control* (2014); and the accompanying and [Executive Summary of the Impact Assessment](#) (2014).
- Commission staff working document [Towards improving EU merger control](#) (2013)
- Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, Regulatory Fitness and Performance (REFIT): Results and Next Steps (2013)
- [Report](#) on the functioning of Regulation No 139/2004 (2009)
- [Commission Staff working paper](#) accompanying the Communication from the Commission to the Council Report on the functioning of Regulation No 139/2004



(3) *Feedback received in response to public consultations*

- [Replies](#) to the call for contributions from stakeholders involved in or affected by the digitisation of the economy (2018)
- [Replies](#) to the Public Consultation of the Evaluation (2017) (see more information in Annex [3])
- Replies to the Public Consultation on the white paper *Towards more effective EU merger control* (2014)
- Replies to the Public Consultation *Towards more effective EU merger control* (2013)

(4) *Ad hoc meetings with stakeholders*

- Information and exchanges of views in meetings between Commission departments, public authorities and stakeholder groups, including national competition authorities, national ministries and other government bodies, industry and business organisations, consumer associations, associations of professionals in EU competition law and policy and firms: see more information in Annex [5].

(5) *Reports and papers*

- *Common Ownership, Market Power and Innovation*, X VIVES, International Journal of Industrial Organization, Vol. 70 (2020)
- [Competition Policy and Industrial Policy: for a Reform of European Law](#), a report by Foundation Robert Schuman (2020)
- [Joint](#) letter to Executive Vice-President Vestager, by the Ministries of Economic Development of France, Germany, Poland and Italy (2 February 2020)
- *Killer Acquisitions*, Cunningham, Colleen and Ederer, Florian and Ma, Song, (April 19, 2020)
- [Letter](#) by the Swedish Minister of Economic Affairs, on behalf of its counterparts in eight Member States (March 2020)
- [Resolution](#) on the modernisation of EU competition policy, by the French Senate (2020)

- [\*Start-ups, Killer Acquisitions and Merger Control\*, OECD Background Note \(2020\)](#)
- *Start-ups, Killer Acquisitions and Merger Control*, [contribution by France](#) to the OECD roundtable (2020)
- [\*A New Competition Framework for the Digital Economy\*](#) (2019)
- [\*Competition and Trade: which policies for the EU?\*, by the French Council of Economic Analysis \(2019\)](#)
- [\*Competition policy and EU strategic interests\*](#), joint report by the General Inspection of Finances and the General Council for the Economy (2019)
- [\*Competition policy for the digital era\*](#), J. CRÉMER, Y-A DE MONTJOYE and H. SCHWEITZER (4 April 2019)
- *Digital Platforms Inquiry*, [Final Report](#), Australian Competition & Consumer Commission (ACCC) (2019)
- *EU Competition Law Facing the Challenges of Globalization*, report of the EU Affairs Committee of the French Parliament (2019)
- [\*EU Industrial Policy after Siemens-Alstom\*](#), report by the European Political Strategy Centre (EPSC) (2019)
- [\*Ex-post Assessment of Merger Control Decisions in Digital Markets\*](#), Lear (2019)
- [\*Franco-German Manifesto for a European industrial policy fit for the 21st century\*](#), by the German Federal Ministry for Economic Affairs and Energy and the French Ministry for Economy and Finances (2019)
- [\*Improving EU Competition and State Aid Policy\*](#), papers by the business associations Business Europe (2019)
- *Increasing Market Power and Merger Control*, T. Valletti and H. Zenger (2019)
- *Industry Concentration in Europe and North America*, OECD Productivity Working Papers (2019)
- [\*Modernising EU Competition Policy\*](#), a paper by German and French ministries, together with Poland's Ministry of Entrepreneurship and Technology (2019)

- [\*Position paper on national and European champions in merger control\*](#), by the Austrian Federal Competition Authority (2019)
- *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act* Wollmann, Thomas G.(AER: Insights 2019, 1(1): 77–94)
- [\*Unlocking Digital Competition\*](#), Digital Competition Expert Panel chaired by Professor Furman (2019)
- [\*The Nordic Competition Authorities support a strict merger control regime\*](#), an [article](#) by the Nordic Competition Authorities (2019)
- *ICN Recommended Practices for Merger Notification and Review Procedures* (2018)
- [\*Joint Statement\*](#) adopted at the 6<sup>TH</sup> Ministerial Meeting of the *Friends of Industry* in Paris by representatives of 18 EU governments (2018)
- *Reviving Merger Control, a Comprehensive Plan for Reforming Policy and Practice*, J. Kwoka (2018)
- *The Rise of Market Power and the Macroeconomic Implications*, J. De Loecker, J. Eeckhout, and G. Unger: (2018)
- *Horizontal Shareholding*, E. Elhauge, Harvard Law Review, Vol. 129, No. 5 (2016)
- *Local Nexus and Jurisdictional Thresholds in Merger Control*, OECD Background Paper (2016)
- [\*Challenges for Competition Policy in a Digitalised Economy\*](#), Study prepared for the European Parliament's ECON Committee (IP/A/ECON/2014-12) (2015)
- [\*Competition policy: The challenge of digital markets\*](#), Special Report No 68 by the German Monopolies Commission (2015)
- [\*Online Platforms and the Digital Single Market\*](#), The United Kingdom's House of Lords, Select Committee on European Union (2015)
- [\*Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen\*](#), German Federal Ministry for the Economy and Energy

(6) *External databases and additional sources of evidence*

- Bloomberg
- Desk research
- *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), Austria, and Germany (2018)*