Expert Paper

ERT response to EC on reforms to merger control process (Simplified Procedure)

June 2022

1. Introduction

1.1. The Competition Policy Working Group of the European Round Table for Industry ("**ERT**") welcomes the European Commission's continued engagement with stakeholders on revisions to certain procedural aspects of EU merger control.

1.2. As noted in ERT's submission to the European Commission (the "**EC**") dated 18 June 2021 (the "**Expert Paper**"),[1] it is positive that steps are being proposed to reduce the burden that the EC's merger control processes create, particularly in light of the leading role the EC has among competition agencies worldwide. While simplifying and streamlining notification processes is painstaking, it is often a thankless task. ERT truly appreciates DG COMP's efforts in this regard and encourages DG COMP to examine how such an approach could also be applied to 'normal' merger control processes in due course.

1.3. ERT considers below the EC's proposed reforms, focusing in particular on: (i) eligibility for the simplified procedure, (ii) burdens arising from use of the simplified and non-simplified procedures; (iii) requests for pre-notification referral; and (iv) reforms to the substantive assessment.

1.4. ERT largely welcomes the EC's proposed reforms, but it believes that certain reforms could go further and/or that further clarity is required in relation to certain reforms – this is addressed in further detail below.

2. Eligibility for the simplified procedure

Expansion of categories of cases eligible for simplified procedure

2.1. As regards eligibility for the simplified procedure, ERT welcomes the introduction of a 'flexibility' clause and two new categories of concentration eligible for the simplified procedure – ERT notes that the flexibility clause in particular should serve to bring within the scope of the simplified procedure transactions that would otherwise have been subject to review via the non-simplified procedure (and believes that case teams should be encouraged to make use of the flexibility clause where appropriate).

2.2. However, ERT considers that, in addition to the measures outlined above, further provision should be made for 'holistic' review of cases that do not meet the thresholds for the simplified procedure. In such cases, ERT considers that it should be possible for notifying parties to present arguments to the EC as to why the transaction should be reviewed under the simplified procedure, notwithstanding that it does not meet the applicable thresholds.

2.3. ERT believes that this could be dealt with as part of the pre-notification phase, and that such a measure would give the EC greater flexibility in deciding whether transactions should be reviewed under the simplified procedure at an early stage in the process.

2.4. As an additional measure, ERT believes that the thresholds for qualifying for the simplified procedure should be raised as the current thresholds are unduly narrow in terms of the transactions to which they apply (see further ERT's response to Question 1.4 of the EC's 'Questionnaire on Revision of certain procedural aspects of EU merger control' dated 18 June 2021 (the '**Questionnaire**')).[2]

Safeguards and exclusions

2.5. While ERT welcomes guidance provided in the draft revised Notice on the Simplified Procedure as to the types of transaction that may be excluded from the simplified procedure because they fall within the safeguards and exclusions listed in Section 11 of the draft revised Short Form CO, ERT believes that: (i) the list as drafted remains broad and (ii) further clarity is required on the scope of potential safeguards and exclusions (and related questions, such as whether

1 Please see Annex 1.

2 The Questionnaire is provided as Annex 2 to this paper.

responding 'Yes' to one or more items on the list is likely to be taken as indicative that the transaction is not suitable for the simplified procedure). In particular:

(A) "*The parties own or control important technological financial or competitively valuable assets, such as raw materials, intellectual property rights, patents, data or infrastructure*." ERT considers that criteria such as 'important' and 'valuable' are (without further elucidation) vague and subjective and, as such, that the EC should provide further clarity around the type(s) of assets which may be considered 'important' or "valuable" in this context.

(B) *"The parties have a significant user base and / or commercially valuable data inventories."* ERT considers that 'significant' and 'commercially valuable' are similarly vague and subjective, and that the definition of 'user base' and 'data inventories' should also be clarified. In the absence of such clarification, ERT believes that it is likely to be difficult for notifying parties to determine whether this criterion applies (but notes that it could in theory apply to many notifying parties).

(C) The same comments as above apply to *"[…] capacity and production", "[T]he parties are important innovators in the overlapping markets"* and *"[T]he parties have brought to the market an important pipeline product within the last 5 years"* (terms which ERT believes would benefit from further clarification are underlined). As regards pipeline products, ERT further notes that it is not clear whether this question is relevant to the EC's assessment of transactions outside the pharma and other pipeline-based industries. ERT would welcome clarity on this point.

(D) *"The concentration will allow the merged entity to gain access to commercially sensitive information regarding the upstream activities of rivals."* ERT considers that this may be difficult for the notifying parties to confirm when completing the Short Form CO, as in practice it requires notifying parties to consider the types of information they collect and whether this could be used for anti-competitive purposes. ERT considers that this is an excessively burdensome requirement in the context of completing the Short Form CO. ERT further notes that, in any event, parties are obliged under Article 101 TFEU to put in place appropriate safeguards to prevent anti-competitive information exchange.

2.6. ERT considers that if these provisions are maintained in their current form, many transactions risk being ineligible for a simplified procedure even if other requirements for eligibility are met.

2.7. In addition to providing further clarity on the above, ERT believes that the EC should make provision for notifying parties to provide a textual response (instead of indicating 'Yes' or 'No' only) and to qualify 'Yes'/'No' responses where appropriate when completing Section 11 of the Short Form CO.

Reverting from simplified to non-simplified procedure

2.8. ERT notes that a change from joint to sole control may exceptionally be reviewed under the non-simplified procedure in circumstances where neither the EC nor the relevant NCAs have reviewed the prior acquisition of joint control of the joint venture in question. ERT believes that this exception should be removed, as the absence of a prior review should not be taken as indicative that the transaction is likely to impact competition in such a way as to merit review under the non-simplified procedure.

2.9. ERT thinks it is a welcome change for the EC to have discretion over whether to revert to the non-simplified procedure in circumstances where a third party expresses 'substantiated competition concerns' about the transaction (having previously been obliged to revert to the non-simplified procedure in such circumstances).[3]

2.10. This is in keeping with the EC's apparent practice on this (despite the language of the Notice on Simplified Procedure).

3 ERT notes that the language in point 22 of the draft revised Notice on the Simplified Procedure (" […] the Commission will revert to the normal procedure") may need to be revised to align with point 5(14) of the draft revised Short Form CO (" […] the Commission may require full, or where appropriate, partial, notification under the Form CO. This may be the case […]".

However, ERT considers that the definition of 'substantiated competition concerns' would benefit from further clarification, with a view to ensuring that only concerns which could plausibly result in harm to competition should be taken as indicative that it is necessary for the EC to adopt the non-simplified procedure. ERT notes that this would also be a welcome clarification for third parties, who would benefit from knowing what information they need to provide (particularly given the narrow window for providing this information).

3. Reforms to streamline the simplified and non-simplified procedures

3.1. While ERT welcomes the measures outlined above as regards expanding the category of cases eligible for the simplified procedure,[4] ERT considers that there remains scope for the EC to further reduce administrative (and other) burdens arising from use of the simplified and non-simplified procedures. ERT outlines below areas which it believes would benefit from further reform and sets out proposals for reform where applicable.

*Requests for information ('**RFIs**')*

3.2. As noted in the Expert Paper, notifying parties often invest disproportionate amounts of time and resources in responding to RFIs from the EC. In many cases, ERT members have found the scope of RFIs to be excessively broad, resulting in a burdensome – and costly – process to gather the information requested.[5]

3.3. ERT considers that RFIs should be targeted and proportionate, and should focus on the issue(s) that are critical to the EC's assessment of the transaction. ERT recognises that this may evolve over the course of the EC's assessment, but considers that the EC should ensure that it has sufficiently refined its analysis using available information before issuing further RFIs. ERT considers that this could also be achieved by the EC engaging with the notifying parties to discuss the scope of RFIs before formally issuing the RFI – this would enable the EC to eliminate or anyway reduce potentially superfluous requests.

3.4. As regards document requests specifically, ERT notes that requests which are broad in scope may require the notifying parties to instruct forensic experts to manage their document collection processes. This is typically the case where (for example) the notifying parties are required to provide detailed information on the provenance of data; file types, etc. and / or the notifying parties are required to convert documents into a particular file type before they are submitted to the EC. ERT considers that in such circumstances, provision should be made for documents to be submitted in their original format to the EC.

3.5. ERT further considers that the time period for documents requested by the EC in RFIs is sometimes excessive (for example where the EC requests documents over a five year timeframe), and notes that this may result in the notifying parties producing documents that are outdated and therefore unlikely to have a meaningful impact on the EC's assessment. ERT believes that it would be preferable to limit document requests to a narrower timeframe.[6] ERT considers that (unless the particular circumstances of the transaction suggest otherwise) one year would be more appropriate.

3.6. ERT believes that the EC should in any event be willing to engage with notifying parties to narrow the scope of document requests where they appear to be yielding a large number of irrelevant documents

4 ERT also welcomes guidance provided in the draft revised Notice on the Simplified Procedure in relation to the "super-simplified" procedure.

5 The number of documents produced by ERT members to the EC has exceeded 500,000 in several cases.

6 As noted in ERT's response to the Questionnaire, ERT also believes that the EC's document production system should be updated to accommodate submissions in complex cases – ERT considers that the current size limits of 4GB per submission, 500 documents per submission and 100MB per document are not sufficient for this purpose.

(whether due to the timeframe or search terms[7] involved).

3.7. More broadly, ERT considers that the publication by the EC of guidance on the collection and treatment of internal documents in merger investigations would help to achieve greater clarity and certainty in connection with document requests. ERT would also welcome guidance on the application of legal professional privilege and the assessment of privacy claims in the context of document requests, as ERT members have experienced inconsistencies in the EC's approach across different merger investigations.

Streamlining the review of simplified cases

3.8. As noted in ERT's response to the Questionnaire,[8] ERT considers that the Short Form CO should be streamlined and certain information requests could be excluded from the Short Form CO without materially impacting the EC's assessment.

3.9. ERT welcomes the implementation of certain reforms in the draft revised Short Form CO. For example, Sections 1–3 are now largely 'tick-box' (save where information is required in relation to the notifying parties' turnover and/or products concerned). However, ERT believes that scope remains for further reforms. These include:

(A) **Data on plausible markets:** ERT considers that it is excessively burdensome for notifying parties to be required to provide data on all plausible markets. As noted in ERT's response to the Questionnaire, ERT believes that materiality thresholds should be applied, such that notifying parties are only required to address plausible markets in pre-notification discussions with the EC and the Short Form CO where certain turnover and market share thresholds are met.[9]

(B) **Market share tables:** ERT considers that provision should be made for the notifying parties to provide shares by volume or value (and not both) if: (i) there is no significant discrepancy between the two or (ii) shares by either metric are not a sensible metric for the relevant industry. ERT further notes that, instead of providing data for three years, it should be possible for notifying parties to provide shares for Year X-1 and confirm that shares would not be materially different for Years X-2 and X-3.

(C) **Information on pipeline products:** ERT notes that 'pipeline product' is a well-established concept in the context of the pharma industry. However, it is not clear how the EC defines 'pipeline products' in the context of other industries. ERT considers that this is particularly critical in circumstances where many notifying parties will be innovating with a view to launching new products and / or improving existing products. To ensure that the requirement to provide data for pipeline products does not become overly burdensome, ERT believes that the EC should provide further clarity on the definition of 'pipeline product' – and that 'pipeline product' should be defined in such a way as to capture only products that are likely to be material to the EC's assessment.

(D) **Competitor contact details:** ERT notes that gathering contact details in the format required by the EC can be a burdensome exercise, and believes that notifying parties should not be required to provide competitor contact details for markets in which competition concerns are unlikely to arise, for example where certain market share thresholds are not exceeded.

3.10. As regards the EC's procedure for reviewing simplified cases:

(A) **Time limits:** ERT considers that the EC should set a stricter time limit for reversion to the non-simplified procedure (in circumstances where this is required)

7 ERT Members have encountered cases where the use of overly broad search terms has led to lengthy and complex document reviews that do not yield a significant number of relevant documents.

8 Please see ERT's response to Question 2.2 of the Questionnaire.

9 Please see ERT's response to Question 2.2 of the Questionnaire.

– ERT believes that the current approach (under which the EC may revert to the non-simplified procedure at any time during the 25 working day review period) introduces uncertainty into the process and may result in significant prolongation of the timeline for approval. ERT considers that 10-15 working days may be a suitable time limit.

(B) **Timeline for pre-notification:** ERT considers that pre-notification should be streamlined to ensure that: (i) RFIs are targeted at establishing whether cases qualify for the simplified procedure; and (ii) parties are able to formally notify as soon as the EC is satisfied this is the case.

(C) **Timeline for approval of transactions:** to expedite approval of transactions subject to the simplified procedure, ERT believes that the EC should formalise its current approach of cases under the simplified procedure being decided within 16-18 working days of formal notification as this will enable parties to plan their transaction timetables more accurately and effectively.

Streamlining the review of non-simplified cases

3.11. ERT welcomes the implementation of certain reforms in the draft revised Form CO, including the removal of certain information requirements from Sections 9 and 10 of the draft revised Form CO (formerly Section 8 of the Form CO) – i.e. in relation to 'Cooperative Agreements', 'Trade between Member States and imports from outside the EEA' and 'Trade associations'. However, ERT believes that scope remains for further reforms to the draft revised Form CO. In particular:

(A) **Threshold for affected markets:** as noted in ERT's response to the Questionnaire, ERT considers that the threshold for horizontally affected markets should be raised from 20% to 30%, and related information requests should only apply to markets where the revised threshold is met.

(B) **Waiver requests:** while ERT appreciates that it may in certain cases become necessary for the EC to request information that was previously excluded under a waiver, ERT considers that the EC should in all cases provide a justification for doing so, as this is likely to create an additional burden on the notifying parties from an information gathering perspective.

(C) **Sections 9 and 10 of draft revised Form CO:** as noted above, ERT welcomes the removal of certain information requirements from Sections 9 and 10 of the draft revised Form CO. However, ERT believes that the administrative burden on notifying parties could be reduced further by making Sections 9 and 10 of the draft revised Form CO 'opt in', such that notifying parties would work with the EC in the pre-notification phase to identify sub-sections that should be completed, but otherwise would not complete these sections.

(D) **Description of quantitative economic data collected by the undertakings concerned:** ERT notes that this is now required in all cases for the Form CO to be deemed complete. However, ERT considers that many cases do not require quantitative econometric analysis and, even if the description provided can in principle be brief, it will often be complex and burdensome for notifying parties to identify all categories of potentially relevant data. ERT further notes that it is unclear what constitutes 'quantitative economic data' in this context, and that the complexity of preparing a response is likely to increase significantly. In light of this, ERT considers that the EC should revert to the approach taken previously (i.e. not requiring such a description to be provided in every case for the Form CO to be deemed complete).

(E) ERT's comments in relation to information on pipeline products and market share tables (see paragraph 3.9 C above) apply equally to the draft revised Form CO where applicable.

4. Requests for referrals under Article 4(4) and 4(5) of the Implementing Regulation

4.1. As regards requests for referrals under Article 4(4) and 4(5) of the Implementing Regulation, ERT considers that three further reforms would be hugely beneficial to businesses:

(A) The Form RS should be replaced by a free form paper in which the notifying parties explain to the EC why the transaction is suitable for referral under Article 4(4) or Article 4(5) of the Implementing Regulation (although ERT believes that this should be supplemented by guidance from the EC as to what notifying parties should include in such a paper to demonstrate that the requirements for referral are met).[10]

(B) In the alternative, ERT considers that the amount of information required for a Form RS to be deemed complete should be reduced. At present, preparation of a Form RS entails an information gathering exercise that is costly and time consuming for the notifying parties, and which leads to delays in the overall timeline for obtaining approval. ERT notes that the contents of the revised draft Form RS (and its predecessor) overlap significantly with the contents of the Form CO, and that this requires the notifying parties to provide information that may not in practice be relevant to the EC's decision on the referral request.

(C) ERT further considers that stricter time limits should apply to communications between the EC and NCAs in relation to requests for referrals. ERT believes that 10 working days would be an appropriate alternative timeframe in this context.

5. Reforms to the substantive assessment

5.1. ERT believes that, in addition to reviewing the procedural aspects of the merger control process, it is vital in the current climate that the EC evaluates its approach to the substantive assessment, particularly with regard to efficiencies and investment incentives.

5.2. The prospect for consolidation to have a positive impact on efficiencies and investment incentives – and therefore overall consumer welfare – should be factored into the EC's assessment alongside factors that currently form the focus of the EC's review (such as short term pricing effects). ERT believes that it is important for the EC to consider the sustainability of industries as part of its assessment. This is particularly true of markets/industries with large fixed costs, where players need to be able to recover their costs from a sufficiently large customer base to justify the significant levels of upfront investment required.

5.3. ERT considers that the EC's assessment should therefore:

(A) Acknowledge the role of minimum viable scale in markets with high fixed costs on investment incentives. ERT believes that (artificially) persisting with sub-optimal market structures is likely to constrain the ability of smaller players to invest and therefore compete effectively.

(B) Place less weight on short term pricing effects and more weight on non-price related consumer and efficiency benefits, such as innovation and quality, which can be achieved through (for example) increased rivalry in investment (while appreciating that rivalry is not just a factor of total number of players).

(C) Consider the competitive effects of a transaction over a number of years in order to ascertain its impact on (for example) investment that may not occur in the immediate short term. At present, ERT considers that the EC does not look at a sufficiently long timeframe when considering efficiencies that may arise from a merger. Consequently, ERT believes that broader consideration of long-term dynamic efficiencies is necessary (and that the standard of proof for demonstrating such efficiencies should not be unduly high[11]). ERT considers that this will be particularly important in strategic markets/ industries that are essential to European sovereignty and security.

10 See further ERT's response to Question 3.13 of the Questionnaire.

11 See further paragraphs 11.1 – 11.4 of the Expert Paper.

Annexes

ERT

Expert Paper

EU Merger Control

Reform and Renewal in the Post-Pandemic World

June 2021

Introduction

The Working Group on Competition Policy of the European Round Table for Industry (ERT), representing many of Europe's leading businesses, welcomes the EC's consultation on revisions to certain procedural aspects of EU merger control. As a leading competition authority, the European Commission (EC) is an important global role model, and it is positive that steps are being proposed to reduce the burden that the EC's merger control processes create.

However, there are multiple aspects of EU merger control rules and procedures not covered in the consultation that nevertheless urgently need reform. EU merger control policy will need to evolve to help support European recovery from COVID-19 and competitiveness more broadly – acting as a key tool to create a global level playing field at a time of unprecedented change.

In this paper, ERT examines EU merger control policy more broadly to highlight the most significant current issues and to suggest reforms. Many of the points made here build upon previous Expert Papers and reports submitted to the EC by ERT.[1]

1 These papers include the following: *"European Round Table's comments on the Fletcher/Lyons study published by DG COMP on the definition of geographic market (the "Study")"* (2016); "ERT position paper on the EU and non-EU merger control regimes" (2017); *"ERT companies' experiences in China: Lack of level playing field"* (2018); *"Comments on DG COMP's Best Practice on requests for internal documents under EUMR"* (2018); *"ERT Position: European Champions will be key to Europe's future relevance and prosperity. How can the EUMR be applied to avoid preventing their success?"* (2019); *"Competing at Scale: EU Competition Policy fit for the Global Stage"* (2019); *"ERT Response to the Market Definition Notice review"* (2020); and *"ERT Response to the Consultation on the New Competition Tool"* (2020). The ERT Expert Papers are available on: https://ert.eu/focus-areas/competition-policy/

1. Executive Summary

1.1. Overall, EU merger control policy and enforcement serves Europe well, and has evolved through the years to deliver strong and fair competition within a changing internal market. However, there are some key areas where EU merger control is no longer fit for purpose, and is in need of reform to meet modern challenges. This need for reform is particularly acute due to the leading role the EC has amongst competition agencies worldwide. Any established EC practice may eventually be adopted by other authorities, and so extra care must be taken to ensure EC processes are fit for purpose.

1.2. The key reforms that ERT proposes are as follows:

(A) Reforms to streamline the simplified and non-simplified merger review processes

(i) *Ensure that information requests to notifying parties are proportionate.* Current internal document requests in particular are often excessive and disproportionately burdensome on companies. The EC should focus more on what is essential. Parties must be able to exclude both privileged materials and information not relevant to the deal from documents provided to the EC. Documents should then be reviewed in context, without single phrases being taken out of context, and evaluated in the round.

(ii) *Ensure quicker and more predictable timetables.* The EC must endeavour to speed up review processes (formal and informal), which are often too long, particularly in simple cases. Key reforms would include agreeing target timetables with the parties at the outset of pre-notification to ensure that it is used productively, avoiding unjustifiably extended pre-notification and stop-the-clocks, and ensuring merger review can continue over holiday periods.

(iii) *Take a more flexible approach to market testing.* The EC's current approach to market testing is burdensome and inefficient for third party respondents, and may result in misleading impressions of the market. A key reform would be to move, where desirable for third parties, to a model of setting up calls with third parties during market testing, and asking relevant parties to sign-off on call notes. The calls would then replace written questionnaires. Third parties should anyway be free not to answer (parts of) questionnaires where views are neutral (other than targeted data requests that the EC deems necessary for its review). 'Leading' questions should also be avoided.

(B) Reforms to improve administrative processes

(i) *Empower case teams to take a flexible, pragmatic approach to the investigation.* Case teams should be encouraged and empowered by the hierarchy to waive aspects of the EC process in appropriate cases – in particular where no competition concerns arise and there are no third party complaints.

(ii) *Rolling access to file for merging parties.* The EC should allow merging parties to review evidence from the market on a rolling basis to avoid misunderstandings and increase efficiency, rather than waiting until later in the process for this.

(iii) *In complex cases introduce new checks and balances to ensure a fair decision process.* Whilst encouraging flexibility, the EC should also introduce greater controls on case teams when it comes to taking merger control decisions. One way this could be achieved is by introducing in complex cases internal review in front of a decision maker and allowing the merging parties to make submissions to that decision maker, before a decision is taken. Currently the checks and controls are not transparent and accessible for merging parties.

(iv) *Improve Case Search on Europa.eu*. The EC's online case resources are greatly appreciated by merging parties, but they can also be improved. A simple improvement would be to introduce a 'key word search' function on Case Search.

(C) Reforms to the substantive assessment

(i) *Update the approach to market definition so it is fit for the modern world*. The EC should take a more dynamic approach to market definition, and recognise that markets are increasingly global, or at least regional (i.e. beyond Member State borders).

(ii) *Ensure the competitive assessment is a realistic, forward-looking process*. The EC needs to update its approach to the competitive assessment to ensure that merger review is sufficiently forward-looking. Counterfactuals must consider how the market will evolve taking into account the relevant factors, rather than assuming that factors will remain as they have been in the past. For instance, in today's digital age, digital platforms frequently enter into traditional markets, changing how these markets operate in the process. This is similarly important post-COVID when it will be essential for the EC to reflect on how the pandemic has permanently changed the competitive landscape in many industries. The EC should also re-consider the time periods over which it is willing to factor-in potential entry – it is typically far too short and fails to reflect market realities.

(iii) *Adopt a new approach to efficiencies*. The EC needs to revise its approach to price and non-price related efficiencies. The EC should accurately capture innovation and significant non-price consumer benefits (including sustainability aspects) arising from mergers. Where it is not satisfied that an efficiency is real, the EC should explain in detail why a particular efficiency has been dismissed. The EC should also be more pragmatic and realistic about counterfactuals, rather than appearing to search for supposed alternative deals or deal structures that could theoretically deliver similar efficiencies, thereby enabling them to dismiss efficiencies on the basis that they are not merger specific.

(iv) *Consider whether behavioural changes would fix competition concerns*. The EC should not assume that divestments are the only suitable remedy to competition concerns.

(v) *Adjust approach to the SIEC test*. ERT urges the EC to apply the reasoning of the General Court in *CK Telecoms UK Investments Ltd v European Commission* when applying the SIEC test.

(D) Reforms to jurisdiction

(i) *Clarify the new Article 22 policy*. ERT notes that the EC did not consult on the recent change it made to the application of Article 22. It is imperative that the EC pause and consult with the market on this change before it is implemented further, as the new policy, as it currently stands, would remove a key strength of the EUMR, i.e. the legal certainty created by the jurisdictional turnover tests. Failing that, the EC should confine its new merger policy on reviewing acquisitions even when they fall below both EU and Member State merger control thresholds to exceptional cases such as digital gatekeepers. This should be clearly specified in guidance, which should be adopted only after full market consultation.

(ii) *Exempt mergers with no EEA nexus from review*. The EC is one of the few regulators in the world that reviews the formation of joint ventures with no domestic (EEA) nexus. This results in unnecessary reviews of and delays to such mergers. The formation of such joint ventures should be exempt from EU merger control, or at the least should be subject to a more rapid 'super simplified' review and clearance process.

1.3. ERT would like to emphasise their appreciation of the EC's commitment to dialogue with merging parties and the wider market. ERT Members appreciate the willingness of EC teams to accommodate calls on live merger control matters, and in general find the willingness of the EC to engage with the parties to be a major advantage of the EC merger control process. The typical willingness of the EC to consult with the market on proposed reforms is also to be applauded. In the spirit of that open dialogue, detail on the issues and proposed reforms to EU merger control identified by ERT are set out in the following paragraphs.

PART A: REFORMS TO STREAMLINE THE MERGER CONTROL PROCESS

2. Internal document requests

2.1. Companies often invest disproportionate amounts of time and resources responding to internal document requests from the EC during merger reviews. The nature of the requests vary, but the burden of responding can rapidly become extremely onerous – e.g. the preparation of organisational charts, document retention policies and similar materials for a large company is hugely resource-intensive and time consuming. Many materials requested by the EC are not relevant to the merger, rendering this burdensome exercise excessive and disproportionate. Indeed, many materials will have such low relevance that they are not in fact reviewed by the EC.

2.2. ERT Members have had concerning experiences with the EC gathering a disproportionate amount of irrelevant data during document review processes. The EC has on occasion then resisted privilege claims where the subject matter is not related to the investigation at hand, and more generally refused the merging parties conducting a relevancy review before submitting materials to the EC. There is no justification for requesting information that is not even connected with the subject matter of the merger, or materials that are in draft (which cannot, by definition, be said to represent settled company policy). As a matter of good administration it should be uncontroversial that both irrelevant and/or privileged materials should always be excluded from review. ERT Members urge the EC to recognise the disproportionate burden that internal document requests can create for merging parties.

2.3. Furthermore, ERT Members are particularly concerned where – as a result of the document review – single phrases are taken out of context from within an internal document to support a point being made by the EC. When considering the weight to give to statements in internal documents, the EC should pay attention to the nature, purpose and source of a given document, and check this understanding with the parties. It is also crucial that the EC evaluates all the evidence (both inculpatory and exculpatory) and comes to a conclusion on the balance of evidence, rather than reaching a conclusion and then cherry-picking the inculpatory evidence that supports it.

2.4. Issues also arise when it comes to the data types the EC requests. Typically the EC requires merging parties to not only hand over data, but also to change its format and analyse it for the EC. This has given rise to a burdensome and costly private industry of IT forensic specialists and economists who amend the data of the parties to put it into the format requested by the EC. As well as being disproportionately burdensome, this approach risks the EC drawing conclusions that do not reflect the reality of the underlying data. ERT urges the EC to move away from this practice, and instead examine data in the format it is actually produced by the merging parties. Only in truly exceptional cases should the EC ask merging parties to produce entirely new data, or to present data in a new format.

2.5. ERT Members emphasise that, from the perspective of merging parties, the EC's approach can sometimes represent the 'worst of all worlds' where it issues an excessively

burdensome internal document request in addition to the lengthy and detailed written submissions containing substantive analysis and advocacy in the Form CO. This contrasts with other merger control regimes like the US, which might require many internal documents but do not also require lengthy substantive submissions. This contributes to EC merger control increasingly being seen as the most burdensome of the international merger control processes.

2.6. Several key reforms would address these concerns:

(A) The EC should rationalise and adjust the goals of the document request exercise, acknowledging the (potentially limited) relevance of internal documents and avoiding requesting them when that is the case or limiting the scope of such requests. While internal documents may at times provide useful evidence, other more robust sources are likely to be available (and oftentimes more easily accessible). The EC's default position should move away from large scale document requests and become more targeted.

(B) Where internal documents are requested, the parties should be able to focus on what is essential with reference to whether or not materials are relevant to the merger. They must be able to exclude information not relevant to the merger. The EC should not rely on indiscriminate forensic 'imaging' of staff documents. Overly broad requests slow down the process and can confuse the issue by overwhelming the case team with information.

(C) Merging parties should not be required to provide privileged materials to the EC, including where the privileged material does not relate to the merger in question. The EC should be more flexible in understanding that privileged material extends to in-house counsel communications, communications with economists, common interest privilege materials and materials produced by legal counsel based outside of the EEA.

(D) The EC should take account of the following factors when giving weight to comments within an internal document:

(i) The role, seniority, and decision making power in the company's name held by the author;

(ii) The date of the document and the market context and commercial strategy at that time;

(iii) The purpose for which the document was created (e.g. whether the author is advocating for a particular outcome within the company or whether a strategy was adopted by a decision making body);

(iv) The fact that statements in emails and draft documents which have not yet been approved or finalised could be personal employee reflections rather than the views of the relevant company;

(v) Whether the document is consistent with other internal documents produced by and evidence relating to the merging party (and then weight the document accordingly); and

(vi) The merging parties' view of the document.

2.7. Where the EC has doubts over whether all relevant materials have been provided, it should consider options aside from requesting more documents.

2.8. These reforms would reduce the currently excessive and disproportionate burden that internal document requests create for merging parties, and reduce the risk of misunderstandings over the meaning of documents.

3. Review timetables

3.1. At present, despite the statutory timings within the EU Merger Regulation,[2] the EU merger control process can be excessively long and involve unnecessary time delays to the closing of transactions. One of the key causes of these delays can be excessive use of 'stop the clock' RFIs. In addition, in certain cases there can be delays where the pre-notification period is unnecessarily long or resulting from consultation with other DGs – such delays should be unheard of with better coordination and forward planning between and within DGs.

3.2. ERT Members feel that the finalisation of the EU merger control process is, in the majority of cases, the determining factor for the timeline between signing and closing of transactions, delaying the consummation of transactions with all the negative economic effects that entails for the businesses concerned. Some ERT Members are finding that this is a real competitive disadvantage for large European players when competing in M&A transactions.

The pre-notification phase

3.3. Pre-notification is a positive aspect of the EC's merger control procedure, particularly for complex cases. It can usefully flush out substantive issues early on, giving both the parties and the EC the time they need to consider and address those issues.

3.4. However, in several cases, particularly the more straightforward ones, pre-notification can introduce needless uncertainty and delays into the overall merger review timeline. While three or four month pre-notification periods can be necessary and helpful in complex cases, several ERT Members are concerned that pre-notification phases of such length are also common in cases where the period is unnecessary (e.g. Phase 1 non-remedy cases). Several ERT Members are particularly concerned by the use of pre-notification to make information requests or to have discussions that could be adequately addressed in the formal review process. Pre-notification can be particularly excessive under the Simplified Procedure – by shifting the burden of completing a Short Form CO to the EC's satisfaction to the pre-notification stage, many of the procedural efficiencies that the Simplified Procedure is intended to give are reduced.[3]

3.5. The following key reforms would address these concerns:

(i) For straightforward cases, the EC case team should engage with the notifying parties at the start of pre-notification to set a non-binding timeline for pre-notification that the EC aims to sticks to, and agree the scope of pre-notification. To their credit, many case teams already adopt this practice, and ERT hopes that this practice can become universal. For the simplified procedure cases, it should be considered to have no pre-notification period.

(ii) Pre-notification should be used to discuss areas that are of real interest to the EC from a substantive competition perspective, and data the parties are able to provide on such areas with a view to addressing real issues early. That does not mean that the EC should delay its formal review until it has exhaustively considered every possible market or sub-market, where it is evident that these are unlikely to give rise to substantive competition concerns.

(iii) The EC should better utilise pre-notification to reach out to the market and get views from third parties early on. Whilst some cases teams are willing to adopt this practice, this should be standard for all but the very simplest of pre-notification periods so that pre-notification does in fact enable the EC to give merging parties clear guidance on the direction of travel of the case.

2 Council Regulation (EC) No 139/2004 of 20 January 2004, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN

3 In addition, the ERT notes that the time and effort required to prepare a Short Form CO is often equivalent to the time taken to prepare a full Form CO as merging parties are required to provide data on all plausible affected markets.

Excessive use of 'stop the clock' RFIs

3.6. ERT Members feel in some cases that the EC is too willing to unnecessarily 'stop the clock' whilst burdensome RFIs are responded to, further lengthening timelines. The EC should take time to consider the most efficient way of gathering the information it requires, only resorting to burdensome RFIs that 'stop the clock' where it has exhausted less time consuming routes to gather information.

3.7. One reform that would materially reduce the time lost to 'stop the clock' RFIs would be to make meetings and calls with the merging parties the norm, rather than a demand for narrative responses. The EC could then follow up with notes of the call for the parties to comment on. Some case teams are already relatively open to meetings and calls and this is very much appreciated by ERT Members, who would like to see it become a universally adopted practice.

EC 'blackout' during holiday periods

3.8. Some ERT Members are concerned over the impact on deal timetables of the EC's practices around summer holiday periods. Whilst it is recognised that activities within Europe slow around the holiday periods, some ERT Members' experiences are that it is common for the EC to pressure parties not to make merger filings during summer holiday periods (July and August) and Christmas (December).

3.9. This approach negatively impacts the reputation of the EC and European Union more generally. The EC's justification for these delays is often that there is a lack of responsiveness from third parties to EC questionnaires over the holiday periods. However, for the summer period this assumption is unfounded – it is no longer the case that businesses effectively shut down over the summer holidays.

3.10. Accordingly, the EC's general approach should be to allow normal commercial activity to continue within Europe during July and August by continuing to accept merger filings and run market investigations.

4. Market testing & third party outreach[4]

4.1. ERT Members are concerned that the EC's approach to market testing is excessively burdensome. Third party questionnaires are too lengthy and jargon-heavy, and quite often up to 200 questions are included in questionnaires. Whilst ERT recognises the EC's willingness to be flexible with timelines for third party responses, there is still a strong feeling that the questionnaires can be far too onerous and insufficient time is offered to third party respondents given the lack of a dedicated deal team within third parties to work on the response. The EC also has a habit of taking a 'scatter gun' approach within questionnaires rather than focusing on core issues relevant to the third party. ERT Members also have concerns over the EC's approach of addressing questions to different parts of the business rather than addressing questions to a logical single contact point (such as the legal team) – though this issue has improved significantly since the EC adopted its contacts register.

4.2. As well as being burdensome due to the length of questionnaires, the EC often requests that materials be provided to it in a fashion that may not reflect how those materials are stored. The time and effort consumed whilst reformatting materials into the format requested can be costly and disproportionate. There are also concerns about the lack of coordination within the EC on third party questionnaires – ERT Members have experienced receiving three separate questionnaires within a five day period, with overlapping and at times contradictory requests.

4.3. As well as being burdensome, ERT Members are concerned that the EC's approach may result in a misleading impression of the market. Questionnaires often contain 'leading' questions that may elicit unrepresentative answers, and

4 This section focuses on third party market testing in merger control, but ERT Members would also urge the EC to adopt the reforms suggested here for market testing in Sector Inquiries.

there is a feeling amongst some ERT Members that the EC uses statements by third parties out of context in a way that may lose the intended meaning. ERT would therefore encourage the EC to take advice from professional survey companies on how to prepare surveys and then adopt their best practices when framing their market questionnaires, and when interpreting the results of those surveys in terms of the use of statistical evidence.

4.4. More fundamentally, ERT would encourage the EC to limit the use of the clunky e-questionnaires and replace them with meetings and calls, which are more targeted and efficient. The EC could then follow up with notes of the meeting or call for third parties to comment on. ERT Members have been encouraged by the increasing trend at the EC to ask for calls with the relevant business teams before sending a questionnaire, and urge the EC to fully embrace calls as a replacement for questionnaires where desirable for third parties.

4.5. ERT also appreciates where the EC share agendas ahead of these calls, as these ensure targeted discussion and allow for preparation by third parties. ERT therefore suggests that the EC make it standard practice to share an agenda with attendees sufficiently in advance of third party market test calls.

4.6. If the EC is, in some instances, unable to rely on a call with third parties, and a written questionnaire is necessary, the following reforms should be undertaken at a minimum:

(A) Written questionnaires should only contain questions relating to the third party's core business area. Questions should be clear and short, using straightforward language. Third parties should be free not to answer questionnaires where their views are neutral. ERT Members appreciate when the EC follows up on a call with a questionnaire that reflects the information discussed and would encourage the EC to make this practice universal.

(B) Longer deadlines to respond to questionnaires should be given as a matter of routine.

(C) Leading questions should be avoided and comments should not be taken out of context by the EC in subsequent EC documents, in order to accurately identify and reflect market dynamics. The EC should give the merging parties the opportunity to comment on questionnaires before they are sent to third parties, to avoid the current situation where questions may not be as clear and concise as they would be if they were coming from industry participants.

(D) Where data or other types of document are requested, the EC should allow them to be submitted in their original format.

4.7. In addition, third party market testing should begin during pre-notification (as suggested in paragraph 3 above). The EC should also ensure that questions are consistently addressed to the same team within third party respondents (e.g. the legal team) rather than addressing different questionnaires to different teams – though this issue has improved since the EC adopted its contacts register.

PART B: REFORMS TO IMPROVE ADMINISTRATIVE PROCESSES

5. Earlier, rolling access to file

5.1. The EC often rely on third party market comments when taking decisions, and it is well known that reactions from the market have a large impact on whether or not the EC has a favourable view of a merger. As well as allowing the merging parties to comment on proposed questions to the market before they are shared, there is no reason to delay providing the parties to the transaction with visibility of market comments until late in the Phase 1 process.

5.2. Earlier access on a rolling basis from the start of Phase 1 to relevant parts of the EC's file would create significant efficiencies, allowing notifying parties to address material concerns earlier, as well as address any factual misunderstandings that market testing may

give rise to. The EC should therefore shift to providing the same access to file to the parties, but on a rolling basis, keeping the merging parties up to date with market testing progress as well as any emerging issues.

6. Empowering case teams to investigate cases flexibly

6.1. ERT Members are encouraged to see that some EC case teams are willing to waive unnecessary requirements during the merger review process, and avoid a formalistic or mechanical approach to merger control review. This pragmatic approach is to be applauded, and ERT is keen for the EC to encourage this type of behaviour by case teams.

6.2. Key areas in which case teams should be encouraged to adopt a more flexible approach include:

(A) Making use of waivers for data and other requirements in the Form CO where appropriate (e.g. waiving the requirement to particularise markets where concerns clearly do not arise) – or even waiving sections of the Form CO entirely where appropriate; and

(B) Recommending a more streamlined Phase 1 decision where there have been no relevant or material third party complaints or interest in the merger.

6.3. ERT encourages the hierarchy to empower case teams to take this pragmatic attitude to cases, and to be clear that case teams are expected to be bold in the execution of their function rather than sticking to formalistic processes when they are not required.

7. Checks and balances over decisions

7.1. ERT Members are concerned that there are insufficient checks and balances applied during the decision making process in complex merger control cases. Unlike many jurisdictions where merger control investigators must prove their case to an independent decision maker, the line between the investigative and the decision making roles are blurred within EU merger control. Long timelines at the European courts also limit the scope for judicial resolution of any concerns that merging parties may have over an EC merger decision.

7.2. The net effect of these points is that each EC case team has an immense amount of power relative to case teams in other territories when taking merger control decisions. The checks and balances that this power is subject to are not transparent to merging parties – indeed, it is not clear that checks and balances exist in a meaningful way. Whilst ERT is keen for case teams to have sufficient operational flexibility to run the investigation, it is also important that proper, impartial oversight is applied to the decision making process, and that merging parties are given an opportunity to present their views to that decision maker.

7.3. Some ERT Members consider that merging parties would feel significantly more comfortable if there was a meaningful opportunity for unbiased and independent review of merger decisions within the EC's process for complex merger control cases, where a senior EC decision maker that has not been involved in the investigation can take a final view on the quality of the EC's case. This would give the notifying parties an effective means of challenging the positions taken by the case team by allowing them to bring their arguments before a fresh pair of eyes.

8. Improve Case Search on Europa.eu

8.1. ERT appreciates the open and transparent way in which the EC ordinarily conducts itself. This approach is exemplified by the EC's voluminous online publications, including its repository of case law on Case Search. Whilst ERT appreciates access to EC cases, the way in which these are displayed and categorised would be greatly improved by the introduction of a simple 'key word search' function. The EC should therefore engage IT consultants to introduce this functionality.

PART C: REFORMS TO THE SUBSTANTIVE ASSESSMENT

9. Market definition

9.1. ERT supports market definition as a foundational aspect of competition law enforcement, and is generally supportive of the EC's use of market definition to anchor competition law analysis. However, ERT also believes that the EC should take a more dynamic and forward-looking approach to market definition, as the current approach is unduly static. Market definitions (both product and geographic) are fact based, and facts are changing rapidly in the current geo-political and geo-economic environment. The EC must avoid over-reliance on precedent given this rapid change, and must ensure that market definitions are assessed by reference to current, robust and reliable data where they are relied on. The EC should not feel overly reliant on internal resources to conduct this exercise – private sector economic specialists may sometimes be an appropriate tool for the EC to use to ensure rapid identification of accurate market definitions.

9.2. Product market definitions in particular are changing in many industries as a result of the fast-paced evolution in technology and the ability of digital platforms to leverage strength in one market to enter seemingly unrelated markets. The EC needs to ensure it takes a more forward looking view on these changes to market definition, ensuring that the product market definition captures and takes account of new entrants and the evolution of supply and demand side structures.

9.3. ERT has previously shared certain observations on the EC's approach to geographic market definition.[5] As articulated in those previous papers, traditionally the EC's analysis of geographic markets focused on local, national and EU/EEA level, depending on the sector in question. This narrow approach may have been appropriate in the past, but now needs to be adjusted to the realities of the competitive pressure of global markets in many sectors of the economy. The key points that ERT has made previously to the EC are as follows:

(A) The EC should not overly rely on precedent to find national markets: the EC's decisions on geographic market definition (GMD) tend to be made on the basis of historical data, its previous findings and regulatory market definitions, which often results in defining markets nationally. However, it is clear that globalisation, Single Market integration initiatives and the development of online marketplaces have encouraged convergence across the EEA and worldwide, suggesting GMD should be wider than in the past. The EC should collect information on and take into account current and forward-looking developments, including non-price factors, to assess the competitive constraints exerted on relevant players.

(B) Insufficient weight is given to non-EEA imports and other potential entrants: in assessing GMD, the EC too frequently fails to appreciate competitive constraints arising from imports from non-EEA countries, such as China and the US, for a variety of reasons (e.g. (perceived) lower quality, longer lead times, limited product range, regulatory constraints and unfavourable payment conditions, etc.). This approach is outdated given the importance of non-EEA imports within the EEA. The EC should carry out a thorough analysis of the perceived barriers to entry for imports in order to determine the competitive effect they exercise on the market. The EC should also be forward-looking in assessing the GMD and take into account any likely entry within a period of up to at least five years (depending on the market).

(C) The digital economy creates wider than national markets: the EC should recognise the extent to which online platforms operate across borders and act as a competitive restraint to traditional bricks-and-mortar operations. Consumers' online activity should be given greater weight in GMD.

5 See, for example, "European Round Table's comments on the Fletcher/Lyons study published by DG COMP on the definition of geographic market (the "Study")" (2016), responding to Amelia Fletcher and Bruce Lyons, "Geographic Market Definition in European Merger Control", available at https://ec.europa.eu/competition/publications/reports/study_gmd.pdf

9.4. Finally, ERT would emphasise that a conclusion on market definition in an Article 101 or Article 102 TFEU context will not always be relevant in an EU merger control context and *vice versa*. The EC should keep a dynamic and open mind to market definition during merger control review.

10. Ensure the competitive assessment is an accurate, forward looking process

10.1. The EC's backwards-looking approach to the competitive assessment and the evidence that underpins it can result in unrealistic conclusions. There are two key areas where this causes concern:

(A) Counterfactual analysis often assumes conditions would be as they have been in the past absent a merger, but this is not always the case. A more forward-looking and realistic approach to counterfactuals is required that takes account of how markets might evolve, in particular to take account of the disruptive and fast-paced impact of technology.

(B) The EC typically considers whether new entrants will enter a market within the next two-three years. However, for many markets, the investment cycle is longer than that, meaning that limiting the review period to two-three years misses out on important competitive constraints.

10.2. Accordingly, ERT urges the EC to avoid 'backwards-looking' counterfactuals based on past events, and to adopt an approach that considers both present competition and the likely trend in future competition absent a merger. Subject to the nature of the specific case and market, the general timeframe the EC considers for potential entries to relevant markets should also be extended. The EC should reflect the market as it is and would likely become, as well as wider geo-political and geo-economic changes.

10.3. These concerns are particularly in focus due to the COVID-19 pandemic. The long term impact of COVID-19 may not yet be known in precise detail, but what is clear is that it has changed competitive dynamics in a variety of markets in a permanent way. When the pandemic is over, markets will not return to the structures they had in 2019. The EC will need to reflect these changes in its merger assessments.

11. Efficiencies

11.1. The EC typically applies an unduly high standard of proof to establish efficiencies – higher, in particular, than the standard of proof the EC applies to evidence of anti-competitive effects. This is not logical as the EC should look to balance the positive and negative effects of a merger, nor is this analytical structure set out in the EUMR (unlike Article 101). The EC is often candid about the obstacles parties face, indicating openly that the hurdle the parties face to establish efficiencies is insurmountable. As a result, important innovation and other non-price efficiencies including investments, sustainability, environmental, living standards, human rights, child labour, and nutritional aspects are neglected by the EC when conducting the competitive assessment on a merger.

11.2. This position is no longer tenable, particularly given the findings of the General Court that the EC must take account of efficiencies as a part of the competitive assessment relating to price.[6] As well as taking account of efficiencies when considering the impact of a merger on price, the EC should reverse the burden of proof and take into account non-price efficiencies and the benefits they bring as part of the competitive assessment. In other words, it should not be a burden on the parties to prove these non-price efficiencies – they should form part of the EC's own assessment, alongside price. Once the EC has investigated the presence of efficiencies but has nonetheless concluded that there remain competitive concerns, it would then be for the

6 CK Telecoms UK Investments Ltd v European Commission (2020), paras 277 – 279. Available here

parties to further establish efficiencies as part of an efficiencies defence (if appropriate).

11.3. Furthermore, at present the EC does not look at a long enough timeline when considering efficiencies that will arise from a merger. As a result, the EC does not accurately capture innovation and significant non-price consumer benefits (including investments, sustainability and other non-price aspects) arising from mergers that may take time. In light of the proposed 'Green Deal' for Europe, the efficiencies defence may take increasing salience going forward as mergers result in more environmentally sustainable businesses in the long run. Efficiencies will also be increasingly important for driving the energy transition, investment in high performance networks, and the recovery and EU competitiveness in a post-pandemic world.

11.4. In order to address these concerns, the EC should:

(A) Ensure that sufficient importance is given to efficiencies in the merger control analysis and simplify, clarify and lower the requirements for a successful efficiencies defence;

(B) Make more explicit recognition of sustainability benefits as being able to offset other (e.g. price) related harms;

(C) Adopt a more flexible approach to the question of in/out-of-market benefits. From an economic standpoint, both should be relevant to the overall question of the competitive harm caused by the merger. This will be particularly important in the consideration of sustainability benefits given the potential timeframes in question in such cases;

(D) Regard efficiency arguments neutrally, and not perceive them as an admission that the transaction gives rise to competition concerns;

(E) Ensure the standard of proof the EC applies is the same lower standard adopted for identifying potential anti-competitive effects;

(F) Shoulder the burden of proof for both price and non-price efficiencies by integrating consideration of both price and non-price efficiencies into the normal competitive assessment, rather than solely relying on parties to raise these as a defence;

(G) Adopt a longer timeline when considering what efficiencies might emerge, as efficiencies could feasibly manifest over a longer period of time;

(H) Adopt realistic approaches to counterfactuals, rather than appearing to search for supposed alternative deals or deal structures that could theoretically deliver similar efficiencies, thereby enabling the EC to dismiss efficiencies on the basis that they are not merger specific; and

(I) Where efficiencies are rejected, clearly set out the reasoning for this, and give the parties an opportunity to respond on these reasons before taking a final decision.

12. Behavioural remedies

12.1. It is well known that the EC has a strong preference for structural remedies as a solution to competition concerns arising from mergers. However, divestments come with many negatives that ERT is concerned the EC does not give appropriate weight to (e.g. they may undermine or eliminate the very efficiencies that the merger created).

12.2. ERT Members are of the view that behavioural remedies can be appropriate and sometimes more effective at resolving competition concerns than divestments, and encourage the EC to adopt them more often. Behavioural remedies are more flexible than structural remedies, do not involve unnecessary transaction costs and give the EC a flexible balance between over and under-enforcement. If rigorously imposed upon companies, behavioural remedies make it possible to carry out mergers without harming competition whilst also respecting the rights of merging parties. The Monitoring Trustee system works well in providing oversight of remedies without the EC having to re-direct excessive resources from merger cases.

12.3. Behavioural remedies are popular worldwide, and the EC would be well placed to move to a more positive (or at least neutral) position on behavioural remedies. ERT is encouraged by recent examples of behavioural or hybrid remedies being approved by the EC, such as in *Google/Fitbit*,[7] and hopes this trend will continue. It is notable that behavioural remedies are regularly applied in other major competition law hubs (such as China), and it is expected that application of behavioural over structural remedies would help support European businesses in successfully competing globally in the aftermath of the COVID-19 pandemic.

13. Adjust application of the SIEC Test

13.1. One of the most powerful tools available to the EC is the power to prohibit mergers. It is important that the EC exercise this power only in the most serious circumstances where there is no doubt that significant anticompetitive effects will arise.

13.2. Accordingly, the EC should follow the guidance set out by the General Court in *CK Telecoms UK Investments Ltd v European Commission* (2020),[8] before finding that a merger would result in a significant impediment of effective competition (SIEC) capable of being prohibited. In particular, as the General Court sets out, the EC should:

(A) First establish that any competitive constraint represents an 'important competitive force' having a greater influence on the market than suggested by its market share, **and** should stand out in some way from other competitors in terms of its impact on competition, before finding that such removal would result in a SIEC;

(B) Ensure that competition between parties is accurately measured for the purposes of establishing that merging parties are close competitors, including taking account of efficiencies arising from a merger when conducting any quantitative analysis on upward pricing pressure;

(C) Establish that any non-coordinated effects will themselves result in a SIEC before relying on such non-coordinated effects to prohibit a merger;

(D) Take account of efficiencies as part of the competitive assessment, rather than only seeing efficiencies as a defence for the merging parties to prove; and

(E) Ensure that the standard of proof met for alleged anticompetitive effects is that there is a 'strong probability' of such effects.

13.3. Finally, ERT encourages the EC to apply a consistent approach to the theories of harm it deploys, and avoid contradictory theories of harm. For example, where a theory of harm concerns non-coordinated price effects, this should necessarily preclude the EC also asserting theories of harm on the basis of coordinated price effects.

PART D: REFORMS TO JURISDICTION

14. Article 22 referrals

14.1. The EC has unilaterally changed its approach to Article 22 referrals; now accepting – and even encouraging – such referrals from Member States without jurisdiction to review the transaction themselves. ERT understands that this expansion in the application of Article 22 is prompted by concerns that 'killer acquisitions' of promising start ups – especially by large digital and pharma companies – have previously escaped merger review in the EEA due to targets having no or little turnover.

7 M.9660 Google/Fitbit (2020), https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9660

8 CK Telecoms UK Investments Ltd v European Commission (2020), available at the following link

14.2. ERT acknowledges the concern in relation to killer acquisitions but has significant concerns over the damage the EC's new policy does to legal certainty. A particular strength of the EC merger control procedure has always been the clear jurisdictional thresholds, which give legal certainty as to whether a merger filing is required. It has now become unpredictable whether EU merger rules will apply to a given deal or not, as the previously clear jurisdictional thresholds at EU and national level are now not the only criteria for the deal to be subject to merger control. ERT notes that, whilst EC guidance mentions the digital and pharma sectors in particular, it does not limit the policy change to these sectors, let alone particular operators in these sectors. The new Article 22 policy may therefore apply in practice to all sectors. Practically, in the absence of certainty, merging parties can only attempt to quantify EU merger control exposure by briefing all 27 EU Member States in an attempt to manage the risk of a referral occurring after deal closing. This is an extreme and excessive requirement, which the EC has nonetheless suggested is appropriate. The key benefit of EU merger control – the one-stop-shop within the EU – is likely to be undermined by this move.

14.3. Practically, this means that it will no longer be possible to accurately capture the risk of review by the EC, because the EC can review transactions after they have closed even where they did not meet any merger control threshold within the EEA. Capturing this risk in deal documentation with appropriate risk allocation, conditions precedent and long-stop dates is essentially impossible, and as a result the feasibility of mergers within the EU will increasingly be called into question. For such a policy to be unilaterally introduced without consultation in the market is of serious concern and runs counter to the fundamental EU legal principle of proportionality.

14.4. It is also important to recognise the role of the EC as a global role model within competition law. The behaviour of the EC is seen as best practice within the competition law world, and EC practices are often imitated by other regulators. ERT is therefore concerned that this change in policy by DG COMP could undermine the principle that merger control jurisdictional thresholds should be certain, as well as the idea that private sector stakeholders should be given prior warning (and be consulted with) before major changes are made to the merger control rules they are subject to. Through its actions in relation to Article 22, the EC has set an unfortunate precedent for global competition enforcement.

14.5. In the first instance, ERT strongly suggests that the EC reverse this new Article 22 policy pending consultation with the market on the impact and implications of the change. Absent that move, in the interests of legal certainty, the EC should at the least confine Article 22 referral reviews that fall below the relevant thresholds under EU law or the law of Member States to exceptional cases, such as digital gatekeepers. If the new policy is retained, ERT calls upon the EC to create rigorous guidance on when this new policy will be applied, as current guidance is not sufficiently clear and creates significant legal uncertainty. Key provisions that guidance would need to include are:

(A) A stricter time-limit on interventions of no more than one month after a transaction becomes public, rather than the current six;

(B) Further guidance on what steps constitute a transaction being 'made known' to the EC and Member States; and

(C) Clearly defined transaction thresholds to avoid legal uncertainty and to reduce the hurdle to deal-making that the new Article 22 policy presents. These transaction thresholds could, for example, be linked to a set multiple of the turnover of the target that might indicate a so-called 'killer acquisition'. Alternatively, thresholds could be linked to a range of criteria that might indicate a so-called 'killer acquisition' (e.g. if the transaction concerns a digital gatekeeper).

It would also be necessary for the EC to publicly consult on this guidance so that the potential risks of the new policy and proposed guidelines are properly understood and taken account of.

15. Exempt mergers with no EEA economics effect

15.1. As described in ERT's response to the EC's consultation, EU merger control is the most prominent of the competition regimes worldwide that claim jurisdiction over the formation of joint ventures with no local nexus, based on the turnover of JV parents within the EEA. This has the effect of catching JV transactions that have no relevance to the EEA, often between merging parties that are not competitors within the EEA. The delay that this can create for transactions that have no EEA nexus is disproportionate and should be avoided. The burden of making a filing for each of these transactions is needlessly time-consuming for both the merging parties and the EC.

15.2. A local nexus requirement should be introduced to provide that, where a joint venture has no local nexus in the EEA, it is either not subject to merger control or is subject to a super-simplified procedure. A super-simplified procedure would provide some safeguards – for example, the EC could require that such transactions fill out an ultra-short form notification containing a tick-box form listing the parties, the JV and its lack of presence within the EEA.

Recovery, European competitiveness and an international level playing field

As Europe recovers from the COVID-19 pandemic, and faces new challenges in the digital era, it is important that the EC recognise the role that merger control, efficiencies and wider competition policy can take in supporting digital developments and the wider recovery. The reforms suggested here will help renew European merger control so that it is fit for purpose for the challenges facing Europe in the coming years.

Wider competition law issues exist aside from merger control. Recovery from the pandemic, the European Green Deal, continuous market digitisation, and other measures to support the European economy will increase the need for pro-competitive cooperation between companies, both through merger and through other forms of agreement. The EC should be considering broadening the scope of permissible horizontal agreements that are pro-competitive and needed to meet EU policy goals. It should also be considering broadening the scope for vertical agreements that require an integrated approach to meet the demands of consumers.

European competitiveness needs to be supported, partly to ensure a level playing field internationally but also to drive efficiencies. Industries face unprecedented challenges due to changing global landscapes and increasingly global markets. There is a real risk that American and Chinese behemoths will be able to leverage their strengths in stable home markets to gain share in Europe and out-compete European players globally. Innovation, investment, scale and efficiency are key to meeting this challenge, and the EC should undertake the reforms described in this paper to tackle issues raised by the 21st century's digital and globalised economy and the energy transition, and to support European competitiveness on these points.

Contribution ID: a85c85db-1c4f-4130-b5ce-8525b1c2c295
Date: 18/06/2021 17:02:15

Questionnaire on Revision of certain procedural aspects of EU merger control

Fields marked with * are mandatory.

Introduction

Responding to the questionnaire

You can contribute to this consultation by filling in the online questionnaire. If you are unable to use the online questionnaire, please contact us using the email address below.

The questionnaire is available in English, French and German. You can submit your responses in any official EU language.

For reasons of transparency, organisations and businesses taking part in public consultations are asked to register in the EU's Transparency Register.

How to answer?

You are invited to reply to this public consultation by filling out the EUSurvey questionnaire online. The questionnaire is structured as follows:

The first part of the questionnaire concerns general information on the respondent.

The second part focuses on policy options for a possible revision of the Notice on Simplified Procedure, and the Implementing Regulation as set out in section B of the Inception Impact Assessment, namely regarding (a.) the categories of simplified cases, (b.) the review of simplified cases, (c.) the review of normal cases and (d.) the possibility to use electronic notifications. This is the main part of the questionnaire. It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring.

The third part of the questionnaire addresses other issues and elements to be considered during the impact assessment phase.

The Commission will summarise the results in a report, which will be made publicly available on the Commission's Better Regulation Portal.

To facilitate the analysis of your reply, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies. You are not required to answer every question. You may respond 'no opinion' to questions on topics where you do not have particular knowledge, experience or opinion or simply do not answer if this option is not available. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.

You are invited to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in maximum 2000 characters.

Questions marked with an asterisk (*) are mandatory.

To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: COMP-SIMPLIFICATION_IMPACT_ASSESSMENT@ec.europa.eu

If you encounter technical problems, please contact the Commission's CENTRAL HELP-DESK.

Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published. If you choose to submit an anonymous reply, we ask you not to refer to your identity in any of your replies.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

Please note that your replies and any attachments you may submit will be published in their entirety even if you chose 'Anonymous'. Therefore, please remove from your contribution any information that you will not want to be published.

About you

* Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ German
- ○ Greek
- ○ Hungarian
- ○ Irish
- ○ Italian
- ○ Latvian
- ○ Lithuanian
- ○ Maltese
- ○ Polish
- ○ Portuguese
- ○ Romanian
- ○ Slovak
- ○ Slovenian
- ○ Spanish
- ○ Swedish

* I am giving my contribution as

- ○ Academic/research institution
- ○ Business association

- (●) Company (other than law firm or economic consultant)
- ( ) Consumer organisation
- ( ) EU citizen
- ( ) Economic consultant
- ( ) Non-EU citizen
- ( ) Law Firm/ Lawyer
- ( ) Public authority
- ( ) Trade union
- ( ) Other

* First name

Philippe

* Surname

Adriaenssens

* Email (this won't be published)

philippe.adriaenssens@ert.eu

* Organisation name

255 character(s) maximum

European Round Table for Industry (ERT)

* Organisation size

- (●) Micro (1 to 9 employees)
- ( ) Small (10 to 49 employees)
- ( ) Medium (50 to 249 employees)
- ( ) Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

25487567824-45

*

Country of origin

Please add your country of origin, or that of your organisation.

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan

- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands

- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

7

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **Fo r the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

○ **Anonymous**

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

◉ **Public**

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions

* The main activities of your organisation:

Text of 1 to 2000 characters will be accepted

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage.

* Please mark the countries/geographic areas where your main business is based.

between 1 and 33 choices

☑ Austria	☑ France	☑ Malta	☑ United Kingdom
☑ Belgium	☑ Germany	☑ Netherlands	☑ Others in Europe
☑ Bulgaria	☑ Greece	☑ Poland	☑ America
☑ Croatia	☑ Hungary	☑ Portugal	☑ Asia
☑ Cyprus	☑ Ireland	☑ Romania	☑ Africa
☑	☑	☑	☑

Czech Republic	Italy	Slovak Republic	Australia
☑ Denmark	☑ Latvia	☑ Slovenia	
☑ Estonia	☑ Lithuania	☑ Spain	
☑ Finland	☑ Luxembourg	☑ Sweden	

* Has your company/business been the addressee of a Commission decision under Article 6 or Article 8 of Council Regulation (EC) No 139/2004, or has it been another involved party (such as the target or seller) or has your company/business organisation acted as external counsel or economic consultant of an addressee of such decision?

between 1 and 8 choices

- ☑ Yes, Article 6.1.(a) decision
- ☑ Yes, Article 6.1(b) decision (simplified procedure)
- ☑ Yes, Article 6.1(b) decision (normal procedure)
- ☑ Yes, Article 6.1(b) in conjunction with Article 6.2 decision
- ☑ Yes, Article 8.1 decision
- ☑ Yes, Article 8.2 decision
- ☑ Yes, Article 8.3 decision
- ☑ None of the above

Policy options for revising the Commission Notice on Simplified Procedure and the Implementing Regulation (Commission Regulation (EC) No 802 /2004 implementing Council Regulation (EC) No 139/2004, as amended by Commission Implementing Regulation (EU) No 1269/2013)

The general objective pursued with this initiative is to improve the EU merger control procedures which aim at preventing lasting damage to competition in the internal market stemming from anti-competitive mergers. The specific objectives are to (i) better target the merger review process, allowing the Commission to focus its investigations on the cases that merit a more detailed review and (ii) reduce the administrative costs and burdens of the merger review process.

To pursue these objectives, the following policy options are considered.

B.1 Expanding the categories of simplified cases

According to the Notice on Simplified Procedure, the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

i. Two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area

(EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see paragraph 5 (a) of the Notice);

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

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

iv. A party is to acquire sole control of an undertaking over which it already has joint control (see paragraph 5 (d) of the Notice);

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

The evaluation showed that there may be some, albeit potentially limited, scope for further expansion of the categories of simplified cases or for introducing additional flexibility to the review of cases under the simplified procedure that do not fall under any of the current categories of simplified cases but where no competition concerns are likely. The system may also benefit from further clarifications as to which cases merit further review and should therefore not be subject to simplified treatment because of special circumstances.
Against this background, the following policy options concerning paragraphs 5, 6 and 8ff of the Notice on Simplified Procedure are considered (both options could be introduced cumulatively):

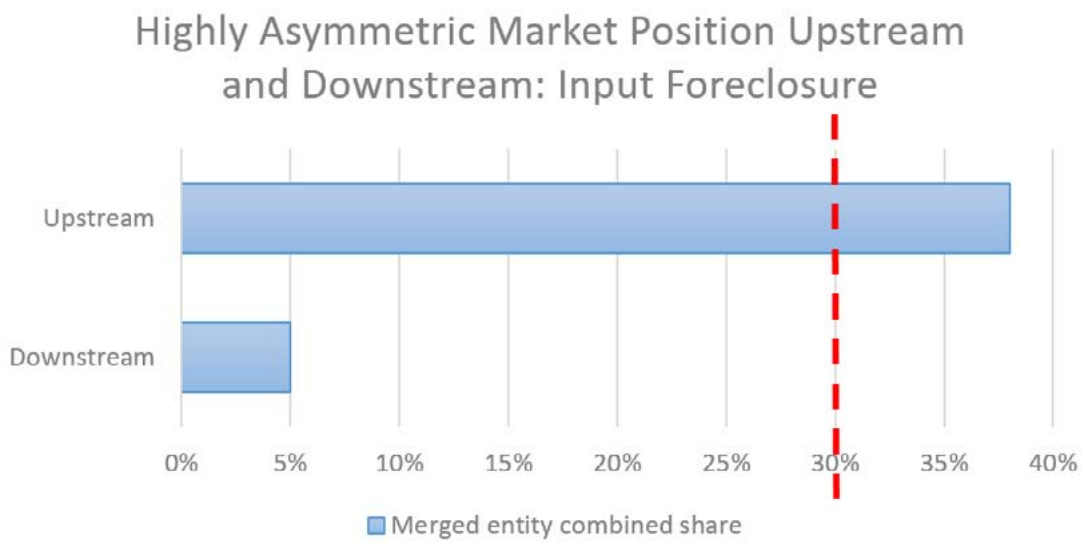
Option 1: Introducing a flexibility clause in the Notice on Simplified Procedure, giving the Commission discretion to treat additional cases under the simplified procedure under certain circumstances (for instance if the current market share thresholds of the Notice on Simplified Procedure are exceeded only slightly or in cases of joint ventures with turnover or assets value slightly exceeding EUR 100 million (e.g., up to a turnover of EUR 150 million).
Option 2: Adding new categories of simplified cases for certain vertical links:

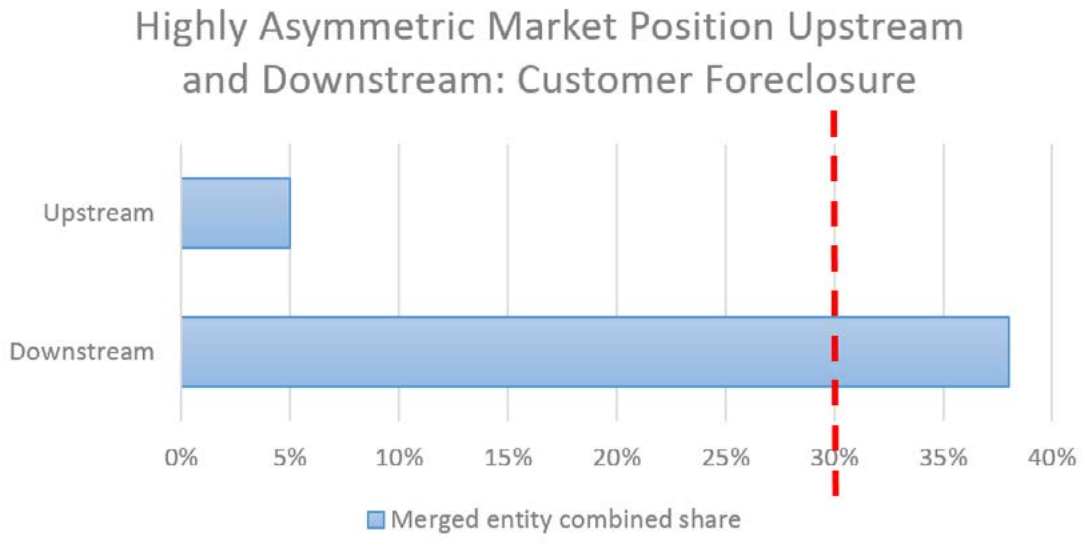
- Cases with highly asymmetric market positions upstream and downstream (as defined in the Guidelines on the assessment of non-horizontal mergers, paragraph 4, footnote 4), with an increased maximum market share in one market (e.g., <40%) but low market shares in the other market (e.g. <5%).

- Cases with high downstream sales shares (e.g., <50%) but relatively low purchasing share by downstream entity as customer on the upstream market (i.e. the percentage that the purchases of a specific input by the downstream entity represent of the overall demand of such input, e.g., <5% or <10%) while the upstream sales share remains beneath the current threshold (<30%).
- Cases with relatively high combined market shares but limited increments to a pre-existing vertical integration, for instance by applying a rule to vertical cases similar to the one for horizontal cases in point 6 of the Notice on Simplified Procedure.

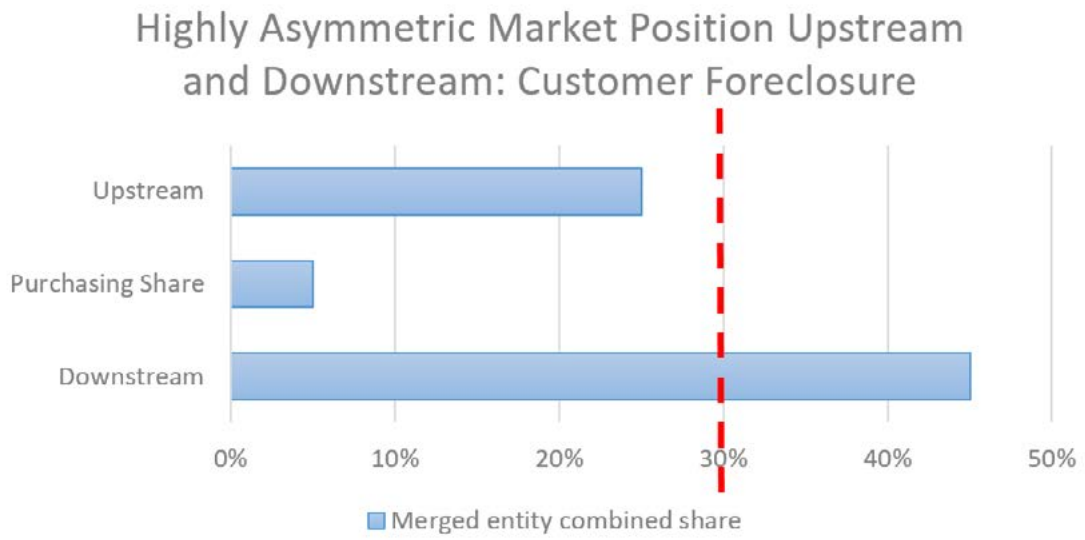
The following graphs illustrate which cases could fall under the scenarios discussed within Option 2:

- Cases with highly asymmetric market positions upstream and downstream

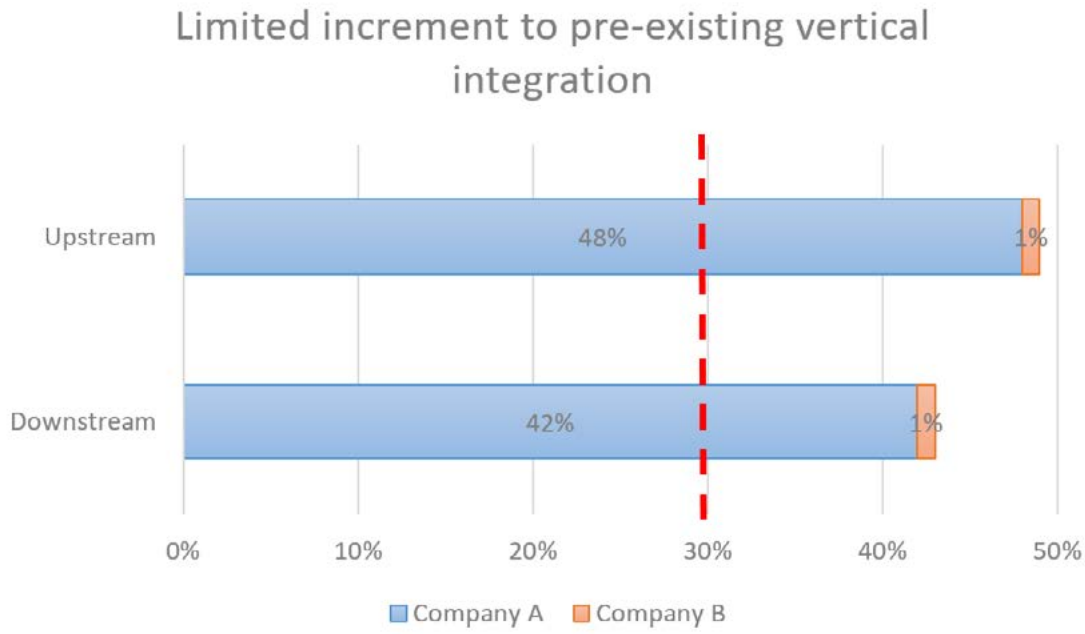




- Cases with high downstream sales shares but relatively low purchasing share by downstream entity as customer on upstream market



- Cases with relatively high combined market shares but limited increments to a pre-existing vertical integration



The present questionnaire also seeks to gather feedback in order to clarify certain aspects of the Notice on Simplified Procedure, namely on the scope and interpretation of the safeguards and exclusions in points 8ff of the Notice on Simplified Procedure.

1.1: Would the introduction of a flexibility clause in the Notice on Simplified Procedure for any of the following categories capture only cases that are generally unproblematic?

Categories of cases	Yes, these cases are generally unproblematic	No, these cases may be problematic
The market share thresholds laid down in paragraph 5 of the Notice on Simplified procedure are marginally exceeded (e.g., by up to 1%)	◉	○
The market share thresholds laid down in paragraph 5 of the Notice on Simplified procedure are exceeded by up to 5% (i.e., 20-25% for horizontal overlaps and 30-35% for vertical overlaps)	◉	○
Cases of joint ventures with turnover or assets value slightly exceeding EUR 100 million (e.g., up to a turnover of EUR 150 million)	◉	○

1.3 What would be the effect (in terms of reducing administrative burdens and costs) of introducing a flexibility clause for each of these categories? Please fill in the table indicating the scope of such effect (please take into account the potential effect of treating additional cases under the simplified procedure but also the potential effect of reducing the number of markets investigated in a case falling under the normal procedure).

	Significant reduction	Moderate reduction	No or negligible reduction
The market share thresholds laid down in paragraph 5 of the Notice on Simplified procedure are marginally exceeded (e.g., by up to 1%)	○	◉	○
The market share thresholds laid down in paragraph 5 of the Notice on Simplified procedure are exceeded by up to 5% (i. e., 20-25% for horizontal overlaps and 30-35% for vertical overlaps)	○	◉	○
Cases of joint ventures with turnover or assets value slightly exceeding EUR 100 million (e.g., up to a turnover of EUR 150 million)	○	◉	○
All the above combined (i.e. transactions slightly exceeding market share thresholds and slightly exceeding JV's turnover and assets value thresholds introduced together)	○	◉	○

1.4 Please provide reasons for your answer if you consider it appropriate

Text of 1 to 2000 characters will be accepted

For the borderline cases where the Commission chooses to exercise the discretion envisaged in 1.3 above, there would likely be a reduction in administrative burden and costs relative to the normal procedure. However, there will be no reduction in the burden of the simplified procedure itself, which is already considerable. As an element of discretion is also afforded to the Commission on how to treat these borderline cases, the extent to which all borderline cases would experience this reduced burden is likely to be varied.

A more effective approach would be to both raise the thresholds that qualify for the simplified procedure and introduce flexibility to allow cases above those thresholds to benefit from the simplified procedure. Limiting reform to introducing a small amount of flexibility within a limited range of cases falls short of materially reducing the burden on merging parties.

Given these points, the overall reduction of the burden on companies following these changes would only be moderate at best.

In any event it is important as a general principle to ensure that the level / exercise of Commission discretion does not come at the cost of legal certainty and accurate analysis and planning by businesses.

1.5 Would the introduction of each of the following categories in the Notice on Simplified Procedure capture only cases that are generally unproblematic?

Addition in categories of cases	Yes, these cases are generally unproblematic	No, these cases may be problematic	It depends on the thresholds introduced
Vertical cases with highly asymmetric market positions upstream and downstream: higher market shares upstream (e.g. up to 40%) but low market shares downstream (e.g. up to 5%)	◉	○	○
Vertical cases with highly asymmetric market positions upstream and downstream: lower market shares upstream (e.g. up to 5%) but higher market shares downstream (e.g. up to 40%)	◉	○	○
Vertical cases with high downstream sales shares but relatively low purchasing share by downstream entity as customer on the upstream market while the upstream sales share remains beneath the 30% threshold	◉	○	○
Cases with relatively high combined market shares but limited increments (upstream, downstream or both) to a pre-existing vertical integration	◉	○	○

1.9 What would be the effect (in terms of reducing administrative burdens and costs) of introducing each of the following categories of vertical cases? Please fill in the table indicating the scope of such effect (please take into account the potential effect of treating additional cases under the simplified procedure but also the potential effect of reducing the number of markets investigated in a case falling under the normal procedure).

	Significant reduction	Moderate reduction	No or negligible reduction

Vertical cases with higher market shares upstream (e.g. up to 40%) but low market shares downstream (e.g. up to 5%)	○	◉	○
Vertical cases with lower market shares upstream (e.g. up to 5%) but higher market shares downstream (e.g. up to 40%)	○	◉	○
Vertical cases with high downstream sales shares but relatively low purchasing share by downstream entity as customer on the upstream market while the upstream sales share remains beneath the 30% threshold	○	◉	○
Cases with relatively high combined market shares but limited increments to a pre-existing vertical integration	○	◉	○
All of the above introduced together	○	◉	○

1.10 Please provide reasons for your answer if you consider it appropriate

Text of 1 to 2000 characters will be accepted

Introducing new categories of case that qualify for the simplified procedure would be welcomed, and would be expected to reduce the administrative burden and costs for any cases benefiting from these new categories compared to the normal procedure. However, there will be no reduction in the burden of the simplified procedure itself, which is itself considerable.
A more effective approach could be to both raise the thresholds that qualify for the simplified procedure, expand it by new categories and introduce flexibility to allow cases above those thresholds to benefit from the simplified procedure.
As a result, the overall reduction of the burden on companies arising from the Commission's merger control processes would only be moderate following these reforms.

1.11 Do you consider that additional categories of simplified cases not included in the Commission's options discussed above should be included to capture generally unproblematic cases?

- ◉ Yes
- ○ Yes, but only if additional safeguards are introduced at the same time
- ○ No
- ○ No opinion

* 1.12 If yes, please explain which additional categories of cases would merit a review under the simplified procedure and, where applicable, describe the additional safeguards that should be introduced at the same time to help to identify those cases that may be problematic and therefore should be treated under the normal procedure.

Text of 1 to 2000 characters will be accepted

EU merger control is the most prominent of the competition regimes worldwide that claim jurisdiction over the formation of joint ventures with no local nexus, based on the turnover of JV parents within the EEA. This has the effect of catching JV transactions that have no relevance to the EEA, often between merging parties

that are not competitors within the EEA. Furthermore, there are instances where local regulators in jurisdictions where the JV will be active approve the merger, whilst EC approval is still outstanding. The delay that this can create for transactions that have no EEA nexus is disproportionate and should be avoided.

There is an opportunity through reform of the simplified procedure to fix this situation. A local nexus requirement should be introduced to provide that, where a joint venture has no local nexus in the EEA, it is not subject to EU merger control.

1.13 Are the safeguards and exclusions in paragraphs 8ff of the Notice on Simplified Procedure sufficient and adequate to identify transactions a priori falling under the current categories of simplified cases, but which may be potentially problematic and therefore may merit a closer examination under the normal procedure? Please take into account potential horizontal, vertical or conglomerate effects in your reply.

- ○ Yes, they are sufficient and adequate
- ○ No, further or clearer safeguards and/or exclusions would be desirable
- ◉ No, they are excessive
- ○ No opinion

* 1.14 If you answered no to the previous question, please explain what additional (clearer) safeguards and/or exclusions should be introduced or what safeguards or exclusions are not needed.

Text of 1 to 2000 characters will be accepted

Market definition safeguards (paragraphs 8 & 12 of the Simplified Procedure Notice)
In practice, where the formation of a JV with no nexus in the EEA falls under EU merger control jurisdiction, it is unnecessary for merging parties to produce detailed market definition information on markets that are not relevant to the EEA. However, paragraphs 8 & 12 of the Simplified Procedure Notice emphasise that parties must provide clear market definitions along with supporting data, and that - where markets or market shares are difficult to identify - the EC may not allow the simplified procedure to be followed. Whilst the safeguards generally (though not universally) talk about “relevant markets”, they would be improved by explicitly recognising that the need to identify markets in the context of formation of a JV only applies where the JV has or will have an EEA presence.

Joint to sole control safeguards (paragraph 17 of the Simplified Procedure Notice)
Where neither the EC nor the NCAs have reviewed an original acquisition of joint control, the EC may decide that a case should follow the normal procedure rather than the simplified procedure. The lack of previous review should not be relevant to the EC’s considerations as it does not speak to the impact on competition that the acquisition of sole control may have now. Furthermore, there may be cases where the formation of the joint venture did not fall under the jurisdiction of the EC or NCAs, whereas the move from joint to sole control does. As a result, it is excessive for the EC to treat this as a reason to move a merger review onto the normal procedure and this safeguard should be removed.

JV’s without EEA nexus (proposed addition to the Simplified Procedure Notice)

The EC should clarify that, where a joint venture has no local nexus in the EEA, it is exempt from even the simplified procedure and is not subject to EU merger control.

1.15 Please rank the likelihood that each of the following factors could have a negative impact on competition (and therefore should be relevant for the decision whether a case merits a closer investigation under the normal procedure) despite being eligible for assessment under the simplified procedure:

	Unlikely impact on competition in all cases	Potential impact on competition in certain cases	Likely impact on competition in certain cases
Number of competitors remaining	◉	○	○
Strength of the competitors remaining, including whether their market share exceeds the increment brought about by the transaction	◉	○	○
Shares thresholds are exceeded in terms of capacity shares or production shares	◉	○	○
One of the merging parties is a recent entrant (entered the market in the last three years)	◉	○	○
One of the merging parties is an important innovator in the overlapping markets	◉	○	○
The Transaction gives rise to pipeline-to-pipeline (two products that are still being developed) or pipeline-to-marketed products (one product still in development but the other already available) overlaps	◉	○	○
Vertical overlaps exceed thresholds in distant levels of the value chain (in terms of market shares, capacity shares or production shares)	◉	○	○
The activities of the merging parties overlap in highly differentiated products	◉	○	○

1.16 Feel free to provide reasons for your answer if you consider it appropriate.

Text of 1 to 2000 characters will be accepted

Where a transaction otherwise falls within the simplified procedure, that is generally conclusive on the question of whether or not the transaction can impact competition – the other factors listed here which are clearly relevant to competitive assessments more generally do not alter that prima facie conclusion.

1.17 Are there additional safeguards not considered in question 1.15 that you consider necessary to introduce?

○ Yes

- ◉ No

B.2 Streamlining the review of simplified cases

The evaluation showed that, while the Simplification Package overall contributed to reducing the pre-notification phase in simplified cases, there still remain some practical constraints to shortening the pre-notification phase further and to making full use of the invitation made in the 2013 Simplification Package to notify certain categories of cases directly without pre-notification. Clarifying certain information requirements could be useful in that respect, for instance by standardising simplified notifications further through tick-the-box forms that require fewer descriptions and allow for faster processing by the Commission. Furthermore, the Commission's assessment could be further streamlined by relying on statements of fact made by the merging parties under Article 4 of the EU Merger Regulation, without a need for further explanations or underlying evidence, in particular with respect to the assessment of jurisdictional questions in simplified cases and of the competitive assessment in cases without overlaps.

The following policy options are considered (the options could in principle be introduced cumulatively; options 2 and 3 would entail limiting certain information requirements and would therefore constitute an alternative to option 1 for certain parts of the notification forms):

Option 1: Maintaining the current information requirements but replacing the current notification form ("short Form CO") by a streamlined tick-the-box form, in full or in part.

Option 2: Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on questions of jurisdiction.

Option 3: Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on the assessment.

2.1 Are the current information requirements and format of the Short Form CO adequate and proportionate for the analysis of simplified cases?

- ○ Yes
- ◉ No, the information requirements are excessive/less information should be requested in the Short Form CO
- ○ No, the information requirements are insufficient/more information should be requested in the Short Form CO
- ○ No, the current format (mainly descriptive text as opposed to a tick the box form) of the Short Form CO is neither adequate nor proportionate.
- ○ No opinion

*

2.2 If you answered “No” to the previous question, and as applicable, please explain (i) which information request(s) could be excluded from the Short Form CO or (ii) which additional information would be required in your view or (iii) how the format of the Short Form CO should be changed.

Text of 1 to 2000 characters will be accepted

The Short Form CO info requirements are excessive and need streamlining. Sections 1–3 could be streamlined and replaced with a tick-the-box approach. Information requests could be excluded from the Short Form CO:
Annex 3: Competitor contact details should not be requested where it is obvious from the facts the merger will not impact competition
Section 5+Attachments E&F: Where it is obvious from the facts there can be no impact on competition within the EEA as a result of the merger,it is disproportionate to require internal documentation from the parties (especially if not be available in an EEA language)
Section 6&7: The Short Form CO should not require details on every feasible alternative market without any materiality threshold. In many industries(e.g. insurance & pharmaceuticals)there can be different plausible markets. Furthermore, the Short Form CO takes no account of the potentially negligible presence of the merging parties in a given market, and requires excessive detail regardless of how immaterial the parties’ presence in that market is. This requirement can create a greater burden than in the full Form CO, as the full Form CO is at least focused on affected markets. A market should only need to be addressed in Sections 6&7 where the parties’ turnover in the market exceeds a certain de minimis value threshold(variable depending on the nature of the market) If this turnover threshold is not met,any discussion of the market should be unnecessary and irrelevant to the competitive assessment. Where turnover exceeds this de minimis threshold, Sections 6&7 should be amended to include an appropriate market share threshold for a “reportable market” and to make clear that only markets with a share above that threshold need to be considered in Sections 6&7. A threshold of 15% for horizontal cases and 25% for vertical cases is appropriate
Section 8: repeats often info provided in Section 1&3. Replace it with a tickbox section with optional comment boxes

2.3 Is the Short Form CO template easy to fill out, clear and user friendly?

- ○ Yes
- ◉ No
- ○ No opinion

2.4 Would you replace the current Short Form CO by a tick-the-box form?

- ◉ Yes, in full
- ○ Yes, but only for some parts
- ○ No
- ○ No opinion

2.6 Please describe any improvements you would suggest to the current format of the Short Form CO.

Text of 1 to 2000 characters will be accepted

Replacement of the Short Form CO with a tick-the-box form would have many advantages. This would allow the EC to specify the key points it needs from the parties, focusing the notification process on these key points rather than relying on extensive narrative. Such an approach would streamline preparation for the parties and speed up (or remove the need for) pre-notification. It would also streamline the EC's review of matters that have no or limited EEA nexus and save time for both the parties and the EC.

For some key sections around the competitive assessment (Sections 6, 7 and 8) a tick-the-box approach could include comment boxes where the parties can explain to the EC why a certain box has been ticked. This would act as a safeguard to ensure that relevant information is not excluded.

We would suggest that, unless explicitly requested, there should be no expectation that the parties will provide additional evidence with the revised form (e.g. presentations on the transaction, or details to support market definition). It would then be open to the EC to request such evidence should it feel a case merits such a request, whilst reducing the burden on those cases where further evidence is not required.

2.7. Would the following options entail any risk for effective enforcement of merger control rules (e.g. the Commission may not receive sufficient information to assess whether a transaction should be reviewed under the simplified procedure or not) or any other risk?

	Yes, it would entail such risks	No, it would not entail such risks	No opinion
Maintaining the current information requirements but replacing the short Form CO by a streamlined tick-the-box form	○	◉	○
Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence	○	◉	○
Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence	○	◉	○

2.9 What would be the effect in terms of reducing information requirements for businesses of introducing each of the following options? Please fill in the table indicating the scope of such effect.

	Significant reduction	Moderate reduction	No or negligible reduction

Maintaining the current information requirements but replacing the current notification form (“short Form CO”) by a streamlined tick-the-box form, in full or in part.	○	◉	○
Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on questions of jurisdiction.	◉	○	○
Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on the assessment.	◉	○	○
All of the above introduced together	◉	○	○

2.10 Please provide reasons for your answer if you consider it appropriate.

Text of 1 to 2000 characters will be accepted

The current information requirements for the Short Form CO are too burdensome for non-problematic mergers. Introducing a tick-the-box form and removing the narrative requirements in the Short Form CO will marginally reduce the burden on the parties and slightly streamline the preparation time required. However, keeping the same information requirements would mean the burden on the parties remains large.

Moving towards a tick-the-box approach on the jurisdictional and competitive assessments will result in larger reductions in the burden on parties, and reduce the need for pre-notification contact with the EC. This will have a positive impact on the Parties by reducing the burden in terms of information provided, and by streamlining and speeding up the simplified procedure.

2.11 What would be the effect in terms of reducing the average time needed to obtain a clearance decision in unproblematic cases of introducing each of the following options? Please fill in the table indicating the scope of such effect.

	Significant reduction	Moderate reduction	No or negligible reduction
Maintaining the current information requirements but replacing the current notification form (“short Form CO”) by a streamlined tick-the-box form	○	◉	○
Introducing a streamlined review of jurisdiction in simplified cases with a tick-the-box list of statements on the basic facts relevant for the jurisdictional assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on questions of jurisdiction	◉	○	○
Introducing a streamlined review of the competitive assessment for simplified cases without overlaps with a tick-			

the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence, thereby reducing or removing the need for pre-notification contacts on the assessment	◉	○	○
All of the above introduced together	◉	○	○

2.12 Please provide reasons for your answer if you consider it appropriate.

Text of 1 to 2000 characters will be accepted

The current information requirements for the Short Form CO are too burdensome for non-problematic mergers. Introducing a tick-the-box form and removing the narrative requirements in the Short Form CO will marginally reduce the burden on the parties and slightly streamline the preparation time required. However, keeping the same information requirements would mean the burden on the parties remains large.

Moving towards a tick-the-box approach on the jurisdictional and competitive assessments will result in larger reductions in the burden on parties, and reduce the need for pre-notification contact with the EC. This will have a positive impact on the Parties by reducing the burden in terms of information provided, and by streamlining and speeding up the simplified procedure.

2.13 Do you consider that additional measures not included in the Commission's current options should be introduced to further streamline the treatment of simplified cases?

- ◉ Yes
- ○ No
- ○ No opinion

* 2.14 If yes, please explain which additional measures should be introduced and, if applicable, which additional safeguards should be introduced with them to ensure effective merger control enforcement.

Text of 1 to 2000 characters will be accepted

(see response to question 1.12) EU merger control is the most prominent of the competition regimes worldwide that claim jurisdiction over the formation of joint ventures with no EEA local nexus, based on the turnover of JV parents within the EEA. The delay this can create for transactions that have no EEA nexus is disproportionate and should be avoided. A local nexus requirement should be introduced to provide that, where a joint venture has no local nexus in the EEA,it is not subject to EU merger control
If the EC considers that additional safeguards would be appropriate here, at the very most such mergers should be subject to a new super-simplified procedure rather than the full simplified procedure. A super-simplified procedure would provide safeguards–for example,the EC could require that such transactions fill out an ultra-short form notification containing a tick-box form listing the parties,the JV and its lack of presence within the EEA,along with some assurance that the JV is not going to enter the EEA market within 3 years. A "positive silence" rule could also be introduced for clearance of these types of case where, assuming no complaints over the case after a set period of time, the matter would be deemed cleared by the EC.This time period could be set at 15 days, to give time for Member States to comment on the merger–after which time, if the parties have had no word from the EC,the matter would be considered cleared.
Two other areas that would benefit from streamlining are:(i) the communications between the Commission

and the NCAs related to the eventual referrals of a case to/from NCAs;and (ii) in the deadline for the Commission to decide to ask the parties for an ordinary Form CO.Both processes should happen as promptly as possible,to avoid merging parties having to switch from a simplified procedure to an ordinary procedure at the very end of the simplified procedure,effectively penalising the companies for a delayed analysis by EC/NCA

B.3 Streamlining the review of non-simplified cases

Based on the experience gained by the Commission in its enforcement practice over the years, the Evaluation results showed that some information requirements in non-simplified cases could be streamlined. In particular, it could be appropriate to introduce modifications to the structure of the notification form and to reduce information requirements that may not be needed in specific case constellations.

The following policy options are considered (both options may be introduced cumulatively):

Option 1: Introducing modifications to the structure of the current notification form by separating sections for factual information and for advocacy (where the Parties could summarize their main arguments, on a voluntary basis) and by introducing a table with an overview of all affected markets.

Option 2: Identifying opt-out sections in section 8 of the Form CO to be waived by the Commission at the request of the Parties if appropriate, on a case-by-case basis.

The Commission will simultaneously explore whether certain additions should be made to the notification form for questions that the Commission asks regularly through requests for information, in order to provide increased transparency and predictability for notifying companies.

The Commission will simultaneously assess whether the notification forms for referrals could benefit from limited streamlining.

3.1 Are the current information requirements and format of the Form CO adequate and proportionate for the analysis of non-simplified cases?

- ○ Yes
- ◉ No, the information requirements are excessive for all non-simplified cases /less information should be requested in the Form CO in all non-simplified cases.
- ○ No, the information requirements are excessive for certain non-simplified cases/less information should be requested in the Form CO in certain non-simplified cases.
- ○ No, the information requirements are not sufficient/more information should be requested in the Form CO for all non-simplified cases.
- ○ No, the information requirements are not sufficient/more information should be requested in the Form CO for certain non-simplified cases

- ○ No, the current format of the Form CO is neither adequate nor proportionate.
- ○ No opinion

* 3.2 If no, and as applicable, please explain (i) which information requirements(s) could be excluded from the Form CO or (ii) which additional information would be required in your view or (iii) how the format of the Form CO should be changed.

Text of 1 to 2000 characters will be accepted

The EU merger control process is often amongst the most burdensome worldwide. Lengthy pre-notification,a data and narrative heavy Form CO and extensive requests for internal documents result in a process that is more labour intensive and timeconsuming than elsewhere (e.g. US)
The Form CO does not distinguish between cases that result in competition concerns,which may require either remedies or a Phase 2 investigation,and the larger pool of cases that clearly will not result in competition concerns. For such non-problematic cases,the level of detail requested in the Form CO is excessive. The Form CO should be more focused on markets that will genuinely be of interest for the competition assessment,rather than requiring exhaustive details on all technically affected markets and sub-segments(including proving which markets and sub-segments are/not affected).This is particularly the case when it comes to demonstrating that competition concerns do not arise in “affected markets”–essentially a requirement to prove a negative,even in cases where it is obvious that competition concerns do not arise. The EC should revise the concept of “affected markets” in the Form CO,raising the market share threshold for what constitutes an affected market from 20% to 30% for horizontal overlaps. The detailed info requested in Sections 7&8 of the Form CO,and the sub-sections in Sections 1,3&5 on affected markets should only be required for markets meeting these revised thresholds. This reflects that the EC rarely finds horizontal competition concerns in markets where combined horizontal shares are below 30%.Another area where the Form CO and EU merger control process are burdensome is on internal document requests. The requirements in Section 5 subsection 5.4 and further internal document requirements set out in RFIs,should be greatly reduced. Internal docs should only be requested when EC has exhausted less burdensome methods of gathering data. See the ERT Expert Paper for more info.

3.3 Is the Form CO template easy to fill out, clear and user friendly?

- ○ Yes
- ◉ No
- ○ No opinion

3.4 Please describe any improvements you would suggest to the current format of the Form CO.

Text of 1 to 2000 characters will be accepted

The Form CO does not distinguish between cases that result in competition concerns(ie those which may require either remedies and/or a Phase 2 investigation),and the larger pool of cases that will not. For the latter group of cases,the level of detail requested in the Form CO is clearly excessive. The Form CO should be more focused on markets that will genuinely be of interest for the competition assessment, rather than requiring exhaustive details on all technically affected markets and sub-segments (including proving which markets and sub-segments are not affected) This is particularly the case when it comes to demonstrating that competition concerns do not arise in “affected markets”–essentially a requirement to prove a negative, even in cases where it is obvious that competition concerns do not arise. The EC should revise the concept of “affected markets” in the Form CO,raising the market share threshold for what constitutes an affected

market from 20% to 30% for horizontal overlaps. The detailed information requested in Sections 7&8 of the Form CO, and the sub-sections in Sections 1,3&5 on affected markets should only be required for markets meeting these revised thresholds. This reflects the reality that the Commission rarely finds horizontal competition concerns in markets where combined horizontal shares are below 30%. In addition, the small size of the increment should be grounds to opt-out of all of Section 8-for example,where horizontal shares are above 30%,but the increments are less than 5% Another area where the Form CO and EU merger control process more generally are excessively burdensome is on internal document requests. The internal document requirements in Section 5 subsection 5.4, and further internal document requirements set out in RFIs,should be greatly reduced. Internal documents should only be requested where the EC has exhausted other,less burdensome methods of gathering data. For further info, please see the Expert Paper

3.5 Would identifying opt-out sub-sections in section 8 of the Form CO – to be waived by the Commission at the request of the Parties if appropriate, on a case-by-case basis – entail any risk for effective enforcement of merger control rules (e.g. the Commission may not receive sufficient information to assess whether a transaction would raise competition concerns or not)?

- ○ Yes, it would entail risks for effective enforcement
- ◉ No, it would not entail risks for effective enforcement
- ○ No opinion

3.7 Which sub-sections in Section 8 of the Form CO are good candidates to be ear-marked as potential opt-out sub-section?

Text of 1 to 2000 characters will be accepted

It is important to recognise that Section 8 is not the only excessively burdensome part of the Form CO or wider normal review procedure. The Form CO and wider merger control process is in need of revision in a number of aspects - including around the burden of document requests, the way in which third party market testing is handled and the length of review periods.
All of Section 8 should be “opt-out” at least where combined market shares on horizontal and vertical markets are below 30%. The concept of affected market should be updated by raising the market share threshold for what constitutes an affected market from 20% to 30% for horizontal overlaps. Cases where shares are only slightly above 30% should also be “opt-out”. In addition, the small size of the increment should be grounds to opt-out of all of Section 8 - for example, where horizontal shares are 30% or more, but the increments are less than 5%.

In addition, all parts of Section 8 should be “opt-in” only for relevant industries (as demonstrated by the fact they are in practice already often left blank) or where they are not relevant to the competition analysis. For example:

Research and development
For some markets, research and development is not a significant driver of competition (e.g. certain financial markets), which makes it a good candidate to be opt-in only.

Trade between Member States and imports from outside the EEA
For some markets, transport costs may not be relevant (e.g. digital markets or financial markets) and whilst imports represent an important constraint in some markets, for other markets imports may not be relevant (e. g. out of home eating). As a result, this sub-section may be a good candidate to be opt-in only.

Trade associations
Not all industries have trade associations (either upstream or downstream). Accordingly, it may be appropriate for this sub-section to be opt-in only.

3.8 What would be the effect (in terms of reducing administrative burdens and costs) of introducing each of the following options? Please fill in the table indicating the scope of such effect.

	Significant reduction	Moderate reduction	No or negligible reduction
Introducing modifications to the structure of the current notification form by separating sections for factual information and for advocacy (where the Parties could summarize their main arguments, on a voluntary basis)	○	○	◉
Identifying opt-out sections in section 8 of the Form CO to be waived by the Commission at the request of the Parties if appropriate, on a case-by-case basis	○	◉	○
All of the above introduced together	○	◉	○

3.9 Please provide reasons for your answer if you consider it appropriate

Text of 1 to 2000 characters will be accepted

It would be artificial and counterproductive to split out factual information from advocacy within the Form CO, and the proposal is inherently flawed. The parties' understanding of the facts typically forms a crucial part of the advocacy,and the two are essentially inseparable. Changing the structure of the Form CO to split out factual information from advocacy would not reduce the burden on parties;parties will still want to present advocacy alongside plain statements of fact and indeed may struggle with where to allocate different types of information. Furthermore,advocacy is necessary to contextualise the facts and ensure the position is properly understood–splitting the facts from the advocacy would result in misunderstandings by the EC and a potentially compromised review process. As a practical matter,splitting the two would also result in a longer, more repetitive Form CO. As discussed above in response to 3.7,all of Section 8 should be "opt-out",given not all sections will always be relevant to the Form CO. Furthermore,at least where combined market shares on horizontal and vertical markets are below 30%,Section 8 should be opt-out. The concept of affected market should be updated by raising the market share threshold for what constitutes an affected market from 20% to 30% for horizontal overlaps. Cases where shares are only slightly above 30% should also be "opt-out" In addition, the small size of the increment should be grounds to opt-out of all of Section 8-for example, where horizontal shares are 30% or more,but the increments are less than 5%. This would reduce the burden on the parties in cases where Section 8 was not required. Regardless,in many cases parts of Section 8 are likely already excluded from submitted Form COs where those sub-sections are not relevant to the EC' s assessment The resulting reduction in burden on the parties of this is appreciated but immaterial in comparison to the overall burden of the Form CO information requirements

3.10 Do you consider that additional measures not included in the Commission's current options should be introduced to further streamline the treatment of non-simplified cases?

- (●) Yes
- ( ) No

*3.11 If yes, please explain which additional measures should be introduced.

Text of 1 to 2000 characters will be accepted

We would propose several additional key reforms to the Commission's merger control processes.

Ensure that document requests to notifying parties are proportionate
The internal document requests the Commission makes are often excessive and very burdensome on companies. The Commission should focus more on what is essential and will be of use in the merger review. Parties must be able to exclude both privileged materials and information not relevant to the deal from documents provided to the Commission. Documents should then be reviewed in context, without single phrases being taken out of context.

Ensure quicker and more predictable timetables
The Commission must endeavour to speed up review processes (both formal and informal), which are often too long in simple cases. Key reforms would include agreeing to target timetables with the parties established at the outset of pre-notification, avoiding unjustifiably extended pre-notification and stop-the-clocks, and where necessary using formal powers to ensure merger review can continue over holiday periods.

Take a more flexible approach to market testing
The Commission's current approach to market testing is burdensome and inefficient, and may result in misleading impressions of the market. A key reform would be to move to a model of setting up calls with third parties during market testing, and asking relevant parties to sign-off on call notes in lieu of written questionnaire responses. Third parties should be free not to answer questionnaires where views are neutral. "Leading" questions should also be avoided.

Empower case teams to take a flexible, pragmatic approach to the investigation.
Case teams should be encouraged and empowered by the hierarchy to waive aspects of the EC process in appropriate cases – in particular where no competition concerns arise and there are no third party complaints.

These points are further particularised in the Expert Paper provided with this response.

3.12 Do you consider that the Form RS for referrals should be streamlined?

- (●) Yes, for both Article 4(4) and 4(5) referrals
- ( ) Yes, for 4(4) referrals only
- ( ) Yes, for 4(5) referrals only
- ( ) No
- ( ) No opinion

* 3.13 If yes, please explain which information you do not consider necessary for the assessment of referrals, identifying specific sections of the Form RS (please explain your answer with respect to both Article 4(4) and Article 4(5) referrals).

Text of 1 to 2000 characters will be accepted

Establishing jurisdiction should be a straightforward and streamlined process, to encourage merging parties to select the most appropriate venue for filing a merger in the EU. The Article 4(4) and 4(5) referral processes are in need of major revisions, as the Form RS is an unnecessary barrier to establishing jurisdiction.

The Form RS is burdensome on merging parties, requiring the provision of a large amount of information that is often not relevant to the question of jurisdiction. The large resource requirement for completing the Form RS and consequent time delay to reaching a final decision deters referral requests by merging parties, meaning that some mergers are not reviewed in the correct forum simply due to resource and timing concerns. Establishing jurisdiction should not require a lengthy submission that almost amounts to a substantive merger control filing, but this is currently the situation for Article 4(4) and 4(5) referrals due to the Form RS.

However, establishing the correct jurisdiction for review of a merger is a substantive matter, and so a tick-the-box form would not be an appropriate replacement for the Form RS. The Form RS should instead be replaced with a process whereby a short paper is submitted by merging parties seeking referral under either Article 4(4) or 4(5). To facilitate this, the EC should provide clear, streamlined guidance on the points the paper should include, focusing on the key factors defining the appropriate venue. This paper would address the key points on referral (currently set out in Section 5 of the Form RS) whilst reducing the burden on parties seeking referral, thereby encouraging use of the referral system.

3.14 Do you consider it appropriate to replace the current Form RS by a streamlined tick-the-box form, in full or in part?

- ○ Yes
- ◉ No
- ○ No opinion

B.4 Introducing electronic notifications

The Commission is currently allowing businesses to notify their merger cases electronically due to the Covid-19 restrictions. It would be beneficial to clarify the notification rules permanently in this respect to ensure safe, reliable and cost-efficient document transmissions.

The following policy options are considered (Options 1 and 2 are alternatives)

Option 1: Allowing electronic notifications to be followed by originals on paper without delay

Option 2: Introducing fully digital notifications, including digital signatures

4.1 Would you use electronic notifications, either followed by originals in papers or fully electronic notifications?

	Yes, I would use this system	No, I would not make use of this possibility	No opinion
Electronic notifications followed by originals on paper	◉	○	○
Fully electronic notifications, including digital signatures	◉	○	○

4.3 Please explain the main advantages/disadvantages of both options

	Advantages	Disadvantages
Electronic notifications followed by originals on paper	Utilises electronic notification thereby reducing costs and administrative burdens.	Reverses the efficiencies of electronic notifications by retaining the requirement of paper copies.
Fully electronic notifications, including digital signatures	More efficient process with reduced costs and less administration, as well as being more environmentally friendly.	None.

4.4 What would be the effect in terms of facilitating the notification of concentrations of introducing each of the following options? Please fill in the table indicating the scope of such effect.

	Significantly facilitated	Moderately facilitated	Not facilitated (or only minimally)
Allowing electronic notifications, to be followed by originals on paper without delay	○	◉	○
Allowing electronic notifications, introducing fully digital notifications, including digital signatures	◉	○	○

4.5 Please provide reasons for your answer if you consider it appropriate

Text of 1 to 2000 characters will be accepted

4.6 Do you consider that additional measures not included in the Commission's current options should be introduced to facilitate the notification of concentrations?

- ◉ Yes
- ○ No

* 4.7 If yes, please explain which additional measures should be introduced.

Text of 1 to 2000 characters will be accepted

The Commission's case management system is in need of updating, in particular to raise the size limits on submissions from their current level of 4GB per submission, 500 documents per submission and 100MB per document. These sizes are sometimes far below the levels required for more complex cases, and the EC should include flex for where greater amounts of material needs to be uploaded or should ask for less information so that the current limits are sufficient again.

For submission of necessary documents aside from the notification, such as Language Waivers and Powers of Attorney in favour of merging parties' legal representatives, the EC should retain the practice adopted during the COVID-19 pandemic of accepting electronic signatures, and not revert to requiring hard copies of such ancillary documents.

B.5 Additional information

5.1 Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation.

The document is an optional complement and serves as additional background reading to better understand your position.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

9b64acd1-a1f2-4e2b-8938-467f39e8a6cf/ERT_Expert_Paper_on_EU_Merger_Control.pdf

5.2 Do you have any further comments on this initiative on aspects not covered by the previous questions?

Text of 1 to 3000 characters will be accepted

There are several aspects which merits further former beyond the scope of this questionnaire. Please find the ERT Expert Paper attached with more ideas and suggestions on reforming merger control processes.

5.3 You may also provide additional information which may be relevant for this initiative (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

* 5.4 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

- (●) Yes
- ( ) No

Contact

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The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

This Expert Paper has been prepared by the Competition Policy Working Group of the European Round Table for Industry.

More info and previous papers on: https://ert.eu/focus-areas/competition-policy

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