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Towards more effective EU merger control

Content

I. Introduction

After more than 20 years in force, the basic features of the EU merger control system are well proven. The Merger Regulation[1] has been regularly reviewed in the past to improve the system and to take into account evolving practice. Nearly 10 years after the most recent reform[2], and in line with the Commission's goal of ensuring better regulation, it is now an appropriate moment to reflect on possible further improvements.[3]

The objective of the present consultation paper is to propose a reflexion and seek comments from stakeholders on two main issues:

- whether to apply merger control rules to deal with the anti-competitive effects stemming from certain acquisitions of non-controlling minority shareholdings;
- the effectiveness and smoothness of the case referral system to transfer cases from Member States to the Commission both before and after notification.

Finally, there may be scope for further technical improvements to the current Merger Regulation.

II. Merger control for the acquisition of non-controlling minority shareholdings ("structural links")

Effective competition policy requires having the appropriate means to tackle all sources of harm to competition and consumers. Acquisitions of non-controlling minority shareholdings (hereafter "structural links") may in some cases lead to anticompetitive effects. Today, the Commission does not seem to have the tools to systematically prevent anti-competitive effects deriving from such structural links. A solution explored in this paper could be to extend the scope of the Merger Regulation to give the Commission the option to intervene in a limited number of problematic cases of structural links, in particular those creating structural links between competitors or in a vertical relationship.

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1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1.

2 The Merger Regulation was first adopted as Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Council Regulation (EEC) No 4064/89 was later amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1). The re-casting of the Merger Regulation in 2004 led to the adoption of Council Regulation (EC) No 139/2004, the current Merger Regulation.

3 See also the ongoing public consultation on the revision of the simplified procedure and the merger implementing regulation, http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html

1. Objectives

Significant harm to competition and consumers can occur not only from acquisitions of control, but also from structural links, which as such are currently not covered by the Merger Regulation. According to established economic theory, structural links may lead to competitive harm in various manners:

- by reducing competitive pressure between competitors ("horizontal unilateral effects");
- by substantially facilitating coordination among competitors ("horizontal coordinated effects");
- in case of vertical structural links by allowing companies to hamper competitors' access to inputs or customers ("vertical effects").

Anti-competitive effects from structural links are likely to be less pronounced than in case of acquisition of control. However, at the same time the potential efficiencies from structural links are likely to be more limited. Consequently, structural links may lead to a significant impediment to effective competition (with effects, for instance, on innovation, growth, offer, prices).

The potential anti-competitive effects of acquisitions of minority shareholdings according to economic theory are set out in Annex I.

The Commission's and the Member States' practice shows that structural links can result in significant harm to competition.

An example of a structural link is Ryanair's shareholding in its competitor Aer Lingus. Ryanair had acquired a significant non-controlling minority stake in Aer Lingus' share capital, when Ryanair notified in 2006 the proposed acquisition of control of Aer Lingus. Due to the serious competition harm that was expected to result from the merger, the Commission eventually prohibited the acquisition of control in June 2007.

However, after the Commission's prohibition decision, Ryanair maintained a minority stake of 29.4% in Aer Lingus. In view of the fact that the Merger Regulation only provides for the ex ante review of operations leading to the acquisition of control, the Commission could not enforce against Ryanair's minority stake under EU merger control – a reasoning confirmed in 2010 by the General Court.[4] According to Aer Lingus, Ryanair's minority stake would have significant negative effects on competition between the two carriers. Aer Lingus argued that Ryanair uses the minority stake to get access to Aer Lingus' confidential strategic plans and business secrets, to block special resolutions, and to request extraordinary general meetings with a view to attempting to reverse already adopted strategic decisions As a result, Aer Lingus could have been weakened as an effective competitor of Ryanair or, alternatively,

[4] See the judgment of the General Court in Case T-411/07 Aer Lingus v Commission [2010] ECR II-3691.

Ryanair's desire to maintain the value of its investment in Aer Lingus could have reduced Ryanair's incentives to compete.

Under the Merger Regulation, the Commission has currently only the possibility to take pre-existing minority shareholdings into account in the context of a notified merger where the Commission is competent to analyse a separate acquisition of control. The Commission has intervened in such scenarios in a significant number of past cases and authorised such cases on the basis of remedies, often entailing a divesture of a (pre-existing) minority shareholding.[5]

In COMP/M.3653 – Siemens/VA Tech, Siemens had a minority stake in SMS Demag, a competitor of VA Tech in the market for metal plant building, and the Commission found horizontal concerns. Although Siemens had already exercised a put option to sell its stake in SMS Demag, the sale had not yet become effective due to on-going litigation. The Commission found that the influence which Siemens had via the still existing minority on the competitive conduct of SMS Demag could reduce competition in this highly concentrated market. The Commission approved the merger following a commitment by Siemens to transfer its rights as shareholder of SMS Demag to a trustee pending the divestiture.

In COMP/M.5406 – IPIC/MAN Ferrostaal, MAN Ferrostaal's minority participation in Eurotecnica, an important supplier of a licence and engineering services essential for the parties' and third parties chemical production, was a cause for concern in vertical respect, with regard to possible input foreclosure. The clearance of the merger was conditional to IPIC's commitment to divest its participation in Eurotecnica.

If, however, the minority stake had been acquired after the Commission examined the acquisition of control over another undertaking, the Commission would have had no competence under the Merger Regulation to deal with possible competition concerns even though the competition concerns would have been exactly the same. Therefore when the subsequent acquisition of a minority stake is unrelated to an acquisition of control, the Commission cannot investigate and possibly intervene against such acquisition. This situation seems rather unsatisfactory.

In the European Union, Austria, Germany and the United Kingdom currently have national merger control rules that also give them the competence to review structural links.

At the Member States level, the interventions of the German Bundeskartellamt in the energy sector provide good examples that structural links can result in a significant harm to competition. In a number of decisions the Bundeskartellamt either prohibited or conditionally cleared the acquisitions of minority shareholdings in local and municipal electricity suppliers

[5] An overview of merger cases that deal with pre-existing minority shareholdings are described in Annex II.

[6] See e.g. cases B8-107/02 EWE, E.DIS/Stadtwerke Eberswalde, B8-27/04 Mainova/Aschaffenburger Versorgungs AG, B8 – 96/08 EnBW / EWE, B8- 67/09 EnBW / VNG.

by companies active in the upstream wholesale markets due to vertical competition concerns[6].

In addition, in a number of other countries outside the EU, such as Canada and the United States, structural links are also subject to competition review under merger control rules.

The Commission's ability to use Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) to intervene against anti-competitive structural links is limited and does not cover all categories of anti-competitive structural links. Whereas the Court of Justice in the past considered that structural links may fall under Article 101 TFEU[7], it is unclear under which circumstances a structural link may constitute an "agreement" having the object or effect of restricting competition within the meaning of Article 101 TFEU, in particular if the structural link is built up by the acquisition of a series of shares via the stock exchange. The requirements of Article 102 TFEU, that the acquiring undertaking should already be dominant and that the acquisition should constitute an abuse would allow the Commission to deal with the competitive harm which may arise from structural links only in very narrow circumstances.[8]

Substantive considerations seem to call for tackling the acquisition of minority shareholdings under merger rules. Economic theory explains that structural links may have effects which are close to the ones which may arise from concentrations (see annex I) – what is in line with the Commission's case practice of dealing with structural links under the Merger Regulation when it had competence on the basis of a separate concentration.

In sum, in view of the above, an "upgrade" of the Commission's competition toolkit would be necessary to allow it to intervene in problematic cases of structural links. This would extend the application of the Merger Regulation, until now limited to "concentrations" defined as acquisitions of control, to a new category of transactions, namely acquisitions of non-controlling minority shareholdings or "structural links", in order to be able to deal with such transactions substantively under merger rules.

However, as the number of cases creating problematic structural links seems to be rather limited, it may be doubted whether it is necessary to apply all the procedural rules of the current merger regulation to structural links, in particular the mandatory ex-ante notification system, or whether procedural rules can be devised so that the Commission is able to select the problematic cases only. Different options in this regard are explored below.

2. Main options

Against this background DG Competition would like to consult stakeholders on whether to extend the scope of application of the Merger Regulation so as to give the Commission the possibility to investigate and, if necessary, intervene against anti-competitive structural links.

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[7] See Joined Cases 142 and 156/84 British-American Tobacco e.a. v Commission ("Philip Morris") [1987] ECR 4487.

[8] See also Case T-411/07 Aer Lingus v Commission [2010] ECR II-3691, in particular point 104, and Case 6/72 Continental Can v Commission [1973] ECR 216.

The substantive test applied could be the one of the Merger Regulation, when the thresholds for application of that Regulation are met.

As far as the selection of cases and the procedure is concerned, two basic options could be envisaged.

A first option would be simply to extend the current system of ex-ante merger control to structural links. This means that all relevant structural links would have to be notified to the Commission in advance and could not be implemented before the Commission has cleared them. The Commission would decide in each case whether or not the transaction could be authorised ("notification system").

Under a second option, the Commission would have discretion to select cases of structural links to investigate.

- This could either be achieved by a self-assessment system, where obligation to notify a transaction to the Commission in advance would not apply to structural links, but instead the parties would be allowed to proceed with the transaction but the Commission would have the option whether and when to open an investigation. The Commission would have discretion to investigate such structural links, but would have to rely on own market intelligence or complaints to become aware of structural links that may raise competition issues ("self-assessment system").

- Alternatively, in order to ensure that transactions do not take place unnoticed, it would also be possible to impose on the parties of a prima facie problematic structural link an obligation to file a short information notice (containing for example information on the parties, the type of transaction and possibly limited information on the economic sectors or markets concerned) to the Commission. This notice would be published on the Commission's website and/or in the Official Journal in order to make third parties and Member States aware of the transaction ("transparency system").

Under the second option (both under the self-assessment system and the transparency system), it would also have to be decided if the parties to a transaction should have the possibility to make a voluntary notification.

Regarding the substantive test foreseen in the Merger Regulation for the examination of "full" mergers, i.e. whether a transaction "significantly impedes effective competition", this could apply to structural links as well, possibly with some additional clarifications in the relevant Commission guidelines. As regards joint ventures, the Commission would also assess whether the structural link has the object or effect of coordinating the parents' conduct, and, if this is the case, whether such coordination infringes Article 101 TFEU – in the same way as currently set out in Article 2(4) of the Merger Regulation.

Equally, the turnover thresholds of the Merger Regulation currently in place to establish the Commission's jurisdiction for full concentrations would apply also to structural links.

3. Discussion

Depending on the above basic design options, further choices with respect to a number of other parameters would need to be made. These choices notably relate to (a) the scope and substance of the Commission's power to examine structural links, (b) the relationship between the Commission and national competition authorities (NCAs), and (c) procedural issues.

a) The Commission's power to examine structural links

First, it would have to be determined which acquisitions of minority shareholding should qualify as "structural links" that would be subject to the Commission's scrutiny. In doing so, "safe harbours" for transaction falling outside the Commission's scrutiny could be defined. As explained more in detail in Annex II, in jurisdictions already scrutinising structural links under merger control rules, definitions of “safe harbour” are sometimes based on a given level of shareholding, e.g. 10%, and/or the absence of special shareholder rights (e.g. veto rights or board representation), as for example in the United States. Other jurisdictions apply a more substantive criterion such as “competitively significant influence” (Germany) or “material influence” (United Kingdom). In principle, “safe harbours” should provide legal certainty for companies considering the acquisition of a minority stake in another company. Imprecisely defined “safe harbours” could however reduce legal certainty, unless there is clear guidance as to their interpretation (e.g. in the form of guidelines).

Under a self-assessment system or a transparency system, the Commission would have a discretionary power to select those cases of structural links that are *prima facie* most likely to potentially raise competition concerns and therefore merit closer scrutiny. The Commission might at a later stage consider issuing guidance on the type of cases it is most likely to examine (such as structural links between competitors in concentrated markets).

Another question would be how to delineate the scope of the Merger Regulation from Article 101 TFEU with regard to structural links, in particular non-controlling minority shareholdings in joint ventures.[9] In this respect, one option would be to continue applying the Merger Regulation’s current rule that only joint ventures that are “full-function” (i.e., that perform on a lasting basis all the functions of an autonomous economic entity) are subject to merger scrutiny. Structural links in non-full-function joint ventures could thus remain subject to competition scrutiny under Article 101 TFEU, save in exceptional cases where the structural links cannot otherwise be assessed under Article 101 TFEU.

b) The relationship between the Commission and NCAs

The current system of the Merger Regulation is based on a clear delineation of the respective powers of the Commission and NCAs based on turnover thresholds. For mergers above these

[9] In this section, the term “joint venture” will be used to refer to any target company that is jointly owned by several parent companies, regardless of whether one or more of these parent companies have control. The meaning of the term “joint venture” as used here is therefore broader than under Article 3(4) of the Merger Regulation and in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

thresholds (so-called "concentrations with EU dimension"), only the Commission is competent to carry out a competition review (principle of the "one-stop-shop").[10] Mergers below the thresholds need to be notified to NCAs if they fall under the scope of the applicable national merger control regimes.

The same clear distinction based on the "EU dimension" criterion could also apply to structural links. This means that the Commission would have exclusive jurisdiction to assess structural links with an EU dimension according to the current turnover thresholds; Member States could review structural links below these thresholds. Such a clear distinction of the respective jurisdiction of the Commission and NCAs would maintain the Merger Regulation's "one-stop-shop" principle also for structural links. It would avoid the need to make provisions for situations where the Commission intends to examine a structural link that is already subject to an investigation by an NCA or has even already been cleared by an NCA.

The existing system of case referrals – set out in Articles 4(4), 4(5), 9 and 22 of the Merger Regulation - overall works well and there appear to be good reasons to treat structural links generally in the same way as full mergers in this respect, irrespective of the basic design. It may therefore be appropriate to apply the referral system – subject to possible changes discussed in section II of this paper - also to structural links. This would mean that cases of structural links could be referred from the Commission to one or several Member States or vice versa, at the initiative of the parties or of the Member State(s) concerned, provided the Member State(s) in question is/are competent under its/their national law to examine structural links under merger control rules.

Under a notification system, the referral system would be applied to structural links as it is currently applied to full mergers.

Under the selective system (whether self-assessment or transparency system), applying the referral mechanism to structural links would notably enable the Member States to request a referral of a case involving a structural link that would fall under the Commission's exclusive jurisdiction if the Commission were to decide not to investigate that case. The application of the referral mechanism would thus contribute to the overall objective to ensure that all potentially problematic transactions may be properly scrutinised. To achieve this, it would be necessary to establish a system that Member States have sufficient information to be able to decide about a referral request. In case the possibility of a voluntary notification is introduced, Member States could decide about a possible referral on the basis of such a notification.

[10] According to Article 1(2) of the Merger Regulation, a concentration has an EU dimension where the combined annual world-wide turnover of the parties is above EUR 5 billion and the individual EU-wide turnover of at least two parties is above EUR 250 million, unless all the parties achieve more than two thirds of their EU-wide turnover in one and the same Member State. Under Article 1(3) of the Merger Regulation, also concentrations with an overall world-wide turnover above EUR 2.5 billion and an EU-wide turnover of each of at least two parties above EUR 150 million have an EU dimension if, in addition, the parties achieve in each of at least three Member States a combined turnover above EUR 100 million and each of at least two parties an individual turnover above EUR 25 million.

It would also be important for the Commission and NCAs to share with each other information they have obtained about structural links, so as to enable the Commission to decide whether or not to investigate and to enable an NCA to decide whether to request a referral of a particular transaction. Accordingly, it may be appropriate to further facilitate the exchange of information with respect to structural links between the Commission and NCAs.

c) The procedure

Different elements of the procedure depend to a large extent on the basic design option, i.e. the self-assessment system, the transparency system, or the notification system.

Under the self-assessment system or the transparency system, the question arises whether the parties to the transaction should be given the option to submit a voluntary notification, in order for them to have legal certainty with regard to the intended transaction. Giving the parties the possibility to notify voluntarily a structural link would be in line with the idea to give the Commission the option to investigate structural links and possibly to intervene, but not to cover exhaustively all structural links. Nevertheless, the rationale for a notification, even only on a voluntary basis, applies to a lesser extent to structural links as opposed to full mergers as it is more difficult to unwind completed mergers than to sell off a minority shareholding. In this respect, it could be considered whether the possibility to intervene *ex-post* would be sufficient for structural links, as opposed to the current *ex-ante* assessment of mergers where concentrations cannot be implemented before obtaining the Commission's clearance decision.

If the option of voluntary notifications was foreseen, it could be considered whether only transactions not yet implemented could be notified voluntarily and whether the notification triggered a standstill obligation. Indeed, if the parties decide that a transaction merits an investigation by the Commission, the possibility to easily dissolve the transaction should be provided for and a standstill obligation should apply. Under a self-assessment or a transparency system, for those cases which the Commission decides to investigate, the Commission would request the parties to submit a full notification, which would also trigger a standstill obligation (which of course applies only to those steps of transactions that had not already been implemented at the time of the request).[11] Once a notification is submitted, the normal procedural deadlines of the Merger Regulation would apply.

Under a self-assessment or a transparency system, the question also arises in which situations the Commission would adopt a decision. This could be done in situations in which the Commission has opened an investigation, received a complaint or a voluntary notification from the parties (if the possibility of voluntary notifications is introduced).

If a notification system were chosen, it could be considered whether a form requiring to provide only very limited information could be used (similar to the Short Form currently used for mergers notified under the simplified procedure). While following the rules of the Merger

[11] In this regard the decision to investigate a structural link is of course not to be confused with the decision to initiate proceedings under Article 6 (1) (c) of the Merger Regulation.

Regulation, the transaction would in general be subject to a standstill obligation, it could also be considered whether under such a notification system the standstill obligation would not apply to structural link transactions. It might then be considered that the Commission could impose a standstill obligation by a separate decision, similar to the current system in the United Kingdom where the competent authority can order a hold separate of the two merging companies.

Finally, it should be considered whether, in the interest of legal certainty, a limitation period should apply to the Commission's power to investigate structural links and if so, how long this limitation period should be.

Questions on structural links:

1. In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?

2. Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?

3. Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:

    a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,

    b) the administrative burden on the parties to a transaction,

    c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;

    d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;

    e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

4. In order to specify the information to be provided under the transparency system:

    a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets

concerned)?

b) What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?

5. For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the Commission decides to investigate a case, or under the notification system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.

6. Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?

7. Regarding the Commission's powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?

8. In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.

9. Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?

III. Referral of merger cases

The referral provisions of the Merger Regulation allow for a re-allocation of individual cases where the notification thresholds, based on turnover figures, do not provide for the best placed authority to deal with the case from the outset. While referrals were rather the exception before 2004, they have become more common as a consequence of the modifications introduced that year.

In this respect, the 2009 Report to the Council on the operation of Regulation No 139/2004[12] found that the existing thresholds and referral mechanisms lead to an appropriate allocation of cases in most instances but that a significant number of cross border cases are still subject to multiple review in several Member States (240 cases in 2007). To some extent, the reason for this could be the procedural burden associated with a referral as companies and their advisors criticised the referral procedures as cumbersome and time consuming.[13] In some cases, where the Commission might have been the more appropriate authority, companies may also have opted against a referral to the Commission in order to avoid the Commission's jurisdiction for reasons of "forum shopping".

To remove these obstacles, a modification of the referral mechanisms will be explored in the following sections, relating to pre-notification referrals to the Commission (Article 4(5) of the Merger Regulation) and post-notification referrals to the Commission (Article 22 of the Merger Regulation). The aim would be to facilitate referrals and to make them more efficient without fundamentally reforming the features of the system or the allocation of competences between the Commission and Member States.

1. Reform of Article 4(5) - pre-notification referrals to the Commission

a) Objectives

Article 4(5) of the Merger Regulation allows the merging parties to request, during the pre-notification period, the referral of mergers to the Commission that do not fall within the thresholds of the Merger Regulation and are notifiable in at least three Member States. Parties have to submit a "reasoned submission" ("Form RS") which requires the information necessary in particular to allow Member States to assess whether or not they accept the referral request. Under the current system the competent Member States have 15 working days to oppose the referral to the Commission (in which case the review stays with the Member States). In case no competent Member State opposes, the Commission obtains jurisdiction for the entire EEA and the parties have to submit a notification to the Commission ("Form CO").

[12] Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004 Brussels, 18.6.2009, COM(2009) 281 final ("2009 Report").

[13] See e.g. paragraph 19 of the 2009 Report.

Companies consider this procedure of two submissions and the 15 working day consultation period burdensome and time consuming[14] and may have opted against using the Article 4(5) referral procedure in some cases in the past.

Given that out of the 254 requests for pre-notification referral to the Commission made since the introduction of Article 4(5) in 2004 only 6 (or less than 3%) were opposed by (one of) the NCAs[15], this raises the question whether the current two-step procedure, i.e. the reasoned submission followed by a notification, is still justified, or whether the system could be made quicker and leaner.

b) Envisaged modifications

DG Competition would like to consult stakeholders on a possible modification of the procedure of pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation along the following lines:

- Abolition of a reasoned submission to the Commission and the subsequent consultation of the Member States as a preliminary step. Instead, the parties would be allowed to notify directly to the Commission which would immediately forward the notification to Member States (as it has done so far with the Form RS).

- As before, a referral would only be possible upon request of the notifying parties.

- The requirements would remain the same, i.e. a concentration within the meaning of the Merger Regulation for which the turnover thresholds are not met, but for which at least three Member States are competent under their national laws.

- The Commission would have jurisdiction unless a Member States that is competent to examine the transaction under national law opposes the jurisdiction of the Commission within 15 working days of receiving the notification. The consultation of the Member States would therefore take place after notification and in parallel to the Commission's phase-I investigation.

- In case at least one competent Member State opposes the jurisdiction of the Commission, the Commission would have to renounce jurisdiction and Member States re-obtain their original competence. The Commission would only adopt a decision stating that it is no longer competent and it would not have any discretion in this regard. As before, it would then be for the parties to determine in which Member States they have to notify.

The notification would provide all the information necessary to assess whether referral requirements are met. The prescribed notification form ("Form CO") would include a new

[14] Ibid.

[15] Figures include cases until March 2013.

section for cases not meeting the turnover thresholds, informing about the Member States that would be competent to review the concentration, similar as the Form RS at the moment.

Broadening the information exchange between Member States and Commission should also be explored, so that Member States can access and use the information gathered by the Commission in its investigation as the Commission might have done a significant investigation by the time one (or more) Member States exercise their veto. This could apply also to other forms of referrals.

c) Discussion

A change of Article 4(5) along these lines would not alter the distribution of competences between the Member States and the Commission. Although the Commission would have jurisdiction for cases which are notifiable in at least three Member States and which are notified to the Commission, Member States would have the power to "take back" a case by requesting that the case should not fall under Commission jurisdiction. In this way the Member States would re-obtain jurisdiction.

The Commission would not have discretion whether or not to acquire jurisdiction, but would simply state that it has no jurisdiction once a Member State has opposed the Commission's jurisdiction. As under the current system, the Member States would not have to give reasons why they request to retain jurisdiction.

Upon notification the Commission would investigate the transaction while the Member States have 15 days to oppose the Commission's jurisdiction and re-obtain jurisdiction for a case. This would allow for speedier procedures as it cuts out the 15 days the Member States currently have to examine the Form RS, plus the time to prepare the Form RS.

It is further worth considering whether it would be feasible to shorten the consultation period for the Member States, for example, to 10 working days. Shortening the period of 15 working days was proposed by stakeholders in the 2009 Report and a shortened period would fit with the Commission's procedure as, according to DG Competition's Best Practices on the conduct of merger control proceedings, by working day 15 the parties should be informed about the outcome the market investigation and possible remedies might be discussed with the Commission. To compensate for a shortening of the consultation period it could be considered whether it would be feasible to inform the competent Member States already before the actual submission of the notification during pre-notification[16]. This would require modifying the rules for sharing confidential information during the pre-notification period and might, in particular, be sensitive for transactions not yet in the public domain.

Finally, although the Commission would have carried out a significant part of the phase I review by the time it could still receive the veto of a Member State, we believe that in view of

[16] Although the parties are under no obligation to do so, it is common practice that they contact the Commission and submit a draft notification before they formally notify (so-called "pre-notification discussions", see DG Competition Best Practices on the conduct of merger control proceedings, points 5 et seq.).

the limited number of oppositions in Article 4(5) referral cases so far, the envisaged modifications could make a referral to the Commission more user-friendly by speeding up the process and by reducing the burden on companies to prepare an Article 4(5) request in addition to a subsequent notification.

2. Article 22 - post-notification referrals to the Commission

The second modification considered for the referral systems concerns post-notification referrals from the Member States to the Commission under Article 22 of the Merger Regulation.

a) Objectives

Originally, when the Merger Regulation was introduced in 1989, the purpose of Article 22 was to give Member States without a merger control regime the opportunity to refer a case to the Commission ("Dutch clause"). As a consequence, Article 22 only confers jurisdiction on the Commission over the case for the territory of those Member States requesting and joining the referral. While the original purpose has become less relevant, as all Member States (except Luxembourg) have introduced a merger control regime, this does not mean that Article 22 has become obsolete.

In line with general principles for case allocation among the Commission and Member States, Article 22 is currently used to allow national competition authorities to refer those cases for which the Commission is the "more appropriate"/"better placed" authority to deal with even if parties did not or could not request a pre-notification referral of the case. Most appropriate for such a referral are cases which pose serious competition concerns and have cross-border effects.[17]

At the same time, the Commission should be able to appropriately deal with the cases referred under Article 22. As such cases have cross-border effects, it seems appropriate that the Commission should have jurisdiction for the whole of the EEA. The Commission's jurisdiction following an Article 22 request would therefore be aligned to its jurisdiction in case of an Article 4(5) referral. This would also give considerable more weight to the one-stop-shop principle and could avoid the patchwork of competences where the Commission looks at part of a transaction, while some national competition authorities investigate the effects of a transaction in their territory.

Based on the guiding principle of the referral system that cases should go to the more appropriate authority, the Commission should therefore in cases where it is the better placed

[17] See Commission Notice on case referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2 ("Notice on Case Referral"), paragraph 45. According to the Notice, a case displays such cross-border effects in particular if it gives rise to serious competition concerns in markets which are wider than national in geographic scope or in a series of national or narrower than national markets in a number of Member States in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable.

authority, in general obtain EEA-wide jurisdiction and not only competence for the Member States making or joining the referral request. This would

- ensure a coherent treatment of a case displaying cross-border effects, reduce the risk of diverging decisions and increase legal certainty;
- reduce the administrative burden for the parties as they only need to deal with one authority in cases where the Commission is the more appropriate authority (principle of "one-stop-shop"), and
- help to capture cases of forum shopping where the parties opt against an Article 4(5) referral in order to avoid scrutiny by the Commission.

b) Envisaged modifications

Changes to the post-notification referral system along the following lines could remedy the concerns described above:

- The Commission may accept a referral of a case where at least one competent Member State requests the referral pursuant to Article 22 and no Member State competent to review the merger under national law opposes the referral. It is no longer required that a Member State joins the request.
- The Commission maintains its discretion whether or not to accept a referral. One of the reasons for not accepting, in line with the Notice on Case Referral, would be that the merger has no European scope (e.g. affects only purely national markets and has no cross-border effects).
- The substantive criteria are narrowed in such a way that, different from the current system, only Member States which are originally competent can request a referral.
- The procedural aspects remain largely unchanged: The Member States have a 15 working days deadline to make a referral request after national notification/knowledge of National Competition Authority. However, the possibility to suspend all national deadlines should be broadened in such a way that it would be triggered earlier than under the current rules, once a Member State considers referring a case to the Commission.
- The Commission's decision to accept a referral gives it jurisdiction for the whole of the EEA. However, if at least one competent Member State opposes the referral, the Member States retain their jurisdiction. This would align the scope of the referral under (currently) Article 4(5) and Article 22, i.e. EEA-wide jurisdiction for the Commission, and fully implement the one-stop shop principle.

c) Discussion

First, to grant the Commission jurisdiction for the entire EEA once a case is referred is in line with the treatment of all other cases the Commission deals with, including Article 4(5)

referrals. This means, in case the Commission is the more appropriate authority, it should look at the case in its entirety.

Second, the suggestion maintains the Commission's discretion to accept a case. The Commission can therefore determine if it is the more appropriate authority and could reject a referral in particular for purely national cases, in line with past practice.[18]

Third, the suggestion maintains the overall rationale of the referral system as it allows the Member States to refer the case to the Commission as the more appropriate authority in cases where the parties either do not wish or cannot avail themselves of the possibility of an Article 4(5) referral although the Commission is objectively the more appropriate authority. This may also limit attempts of forum shopping.

Unlike the current system, it is suggested that only Member States competent to review the transaction under their national law can request a referral, which would limit the number of cases which could come to the Commission. This would give a high degree of legal certainty to the parties as after the lapse of the 15 working days deadline of notification to the competent Member States, the case can no longer be referred to the Commission.

Furthermore, experience has shown that, under the current system of Article 22, it can be challenging for Member States which are not competent to obtain the necessary information to establish whether the transaction would have a significant effect. This makes it difficult for them to join a request. This would be solved by the suggested reform.

It should be noted that one of the challenges raised by this suggestion is that it could lead to a scenario where a Member States has already cleared a transaction before the referral occurs.

In the first place, the aim would be to avoid such a scenario to the extent possible. This could be done by an alignment of the timing of national notifications and by broadening the suspensive effect, so that any prior decision of NCAs is avoided.

Next to any procedural safeguards, and in case a Member State has already cleared the transaction before the referral occurs despite these procedural safeguards, a possible option could be that the Commission could still accept the referral and obtain jurisdiction for the whole of the EEA. The Member State in question – like any other Member State – would have the right to oppose the referral and thereby maintain its decision if it wishes. In case a transaction would be a likely candidate for a referral, it might also be possible that the Member State issues a clearance decision under the condition of not exercising its veto in a later referral procedure. It would also need to be explored if, in case the Member States decided not to veto the referral, it would be possible that its prior national clearance decisions

[18] Out of four referral requests only concerning national markets in recent years (COMP/M.3986 - Gas Natural/Endesa, COMP/M.4124 – Coca Cola Hellenic Bottling Co./Lanitis Bros., COMP/M.5828 Procter & Gamble/Sara Lee air care, COMP/M.5969 SCJ/Sara Lee) the referral was only accepted in the last two cases. From the conditions set out in the Notice on Case Referral (see paragraph 45) when the Commission would be the more appropriate authority in case of national markets, the reason of "investigative efforts" seems to carry less weight in the exercise of the Commission's discretion than the possibility that the case might require remedies that are wider than in national in scope.

becomes obsolete.. In case of a veto due to a prior clearance decision, it may be appropriate exceptionally, to allow the Commission to take a case in the context of Article 22 although it would not obtain jurisdiction for the entire EEA.

DG Competition believes that this approach to deal with a prior national clearance would be an appropriate solution. If the Commission were to be automatically barred to accept a referral in case of a prior national clearance, this would lead to incentives for the Parties to make early filings in less problematic jurisdictions so as to stop a referral from taking place and could ultimately lead to forum shopping.

With a reform along these lines the Commission would obtain a solid basis to deal with cases for which the Member States consider the Commission as the more appropriate authority due to cross-border effects of a case.

Questions on the case referral system:

1. Do you consider that the suggestions would make the referral system overall less time-consuming and cumbersome?

2. Regarding the suggestion on Article 4 (5) referrals:

    a) Do you support the idea to be able to directly notify to the Commission without preceding Form RS?

    b) Please try to estimate savings in (a) time and (b) costs resulting from the elimination of the Form RS procedure in a typical case.

    c) For transactions to be notified in at least three Member States, would you consider that you will use the referral according to Article 4(5) under the suggested system more often than under the current system - or that you will advise your clients to use it more often?

    d) Do you consider that the 15 working days consultation period could be shortened in order to limit the duration of uncertainty as to whether or not a case will remain in the competences of the Member States?

    e) Do you consider it useful if contacts between the Commission and the competent Member States could take place already during a possible pre-notification phase, in order to enable the Member States to assess the referral?

    f) Do you agree that a broad information exchange between the Commission and the Member State which includes the information gathered in the market investigation should be made possible? Should the results of the Commission's market investigation be accessible to NCAs also following a veto of a Member State?

g) What would be in your view appropriate measures to assure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral (e.g. early information of the Member States, forwarding of a draft notification received by the Commission)? How do you view this suggestion with regard to confidential transactions which are not yet in the public domain?

h) Regarding pre-notification referrals from the Commission to the Member States, Article 4(4), do you see similar room for improvement to streamline the process and to align it with the suggestions on Article 4(5) above, while at the same time safeguarding the interests of all Member States?

3. Regarding the suggestion on Article 22 referrals:

a) Do you agree with the underlying principle of the envisaged modification, i.e. that Article 22 should enable the Member States to refer cases to the Commission for which the Commission is the more appropriate authority due to cross-border effects? Do you also agree that the Commission should then have EEA-wide jurisdiction as for all the other cases it is dealing with?

b) Do you agree that the envisaged modification would lead to a clear delineation of which level - Commission or Member States - should deal with a case, taking account of the one-stop-shop principle? Do you agree that this would avoid a patchwork approach of parallel proceedings of the Commission and Member States?

c) Do you agree that the envisaged system would make European merger control more effective and would allow it to obtain cases for which the Commission is the more appropriate authority? In particular, do you consider it appropriate that only competent Member States can refer cases to the Commission, as opposed to the current system where also non-competent Member States can refer a case?

d) Do you agree that legal certainty for undertakings would be increased if only a Member State competent under its national law could make a referral request?

e) Do you agree that the procedural solutions would prevent the scenario or mitigate the risk that a Member State might have already cleared the transaction before another Member State requests a referral? In your view what would be appropriate procedural solutions?

f) How do you see the possibility of a making national clearance decision conditional upon no Article 22 referral taking place? Under the law of your

respective Member State, would it be possible to issue clearance decisions under the condition that no Article 22 referral takes place?

g) In your view, could the suggestion raise costs for undertakings or would it lead to costs savings due to a better predictability of the system?

h) Regarding Article 22 (5) do you consider that the current procedure that the Commission can invite the Member States to refer a case could be improved in terms of procedure? And if so, in which ways?

IV. Miscellaneous

In addition to the above discussion of structural links and the case referral system, DG Competition considers that there could be scope for a number of technical improvements to the current Merger Regulation. These could for example relate to the following points:

- It could be considered to limit the jurisdiction for concentrations that do not have any effect in the EEA, such as the creation of a full-function joint-venture located and operating outside the EEA and that would not have any conceivable impact on markets in the EEA.

- In order to further smoothen the functioning of the case referral process, it could be considered to introduce and/or reinforce rules allowing the exchange of confidential information between the Commission and Member States before and after notification of a concentration.

- It could be considered to modify of Article 4(1) of the Merger Regulation in order to improve flexibility for notifying mergers that are implemented by way of acquisition of shares via the stock exchange without a public take-over bid. On the one hand, if no public take-over bid is made or no such intention is publicly announced, the current rules do not allow for notification before the acquisition of control on the basis of "*good faith intention*". On the other hand, the current rules do not allow for the implementation of control (exercising voting rights, etc.) once control has been acquired, that is to say after the acquisition of shares via the stock exchange without a public take-over bid, either. The existing rules could be complemented to find a suitable solution to address such a scenario.

- Article 5(4) of the Merger Regulation could be complemented with a view to explicitly laying down the methodology for the calculation of a joint venture's relevant turnover currently set out, following the Commission practice, in the Commission Consolidated Jurisdictional Notice.[19]

- It could be considered to modify Article 8(4) of the Merger Regulation in order to bring the scope of the Commission's power to require the dissolution of partially implemented transactions declared incompatible with the internal market in line with the scope of the suspension obligation (Article 7(4) of the Merger Regulation). In case COMP/M.4439 Ryanair/Aer Lingus I in 2007, Ryanair's acquisition of a non-

[19] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1), section 5.2.

controlling minority shareholding in Aer Lingus and Ryanair's subsequent proposal to acquire control of Aer Lingus through the acquisition of additional shares were treated as one single concentration for the purposes of EU merger control.[20] However, although the Commission declared the proposed concentration incompatible with the internal market, the Commission could not order the divestiture of Ryanair's already acquired non-controlling minority shareholding in Aer Lingus pursuant to Article 8(4) of the Merger Regulation. A modification of Article 8(4) could address such a scenario. It would need to be consistent with any new suggestion on merger control for structural links.

– The Merger Regulation could be amended so as to ensure, notably through sanctions, that parties and third parties that are given access to non-public commercial information of other undertakings exclusively for the purpose of the proceeding (e.g. through access to the file or being informed of the subject matter of the proceeding for the purpose of participating in an oral hearing) do not use or disclose such information for other purposes.

Question:

1. How could the jurisdictional rules of the Merger Regulation be modified in order to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not have to be notified to the Commission? Please take into account the need for jurisdictional rules to be clear and easy to apply.

2. Would you recommend any other amendments to the Merger Regulation? Please elaborate.

[20] See Case T-411/07 Aer Lingus v Commission [2010] ECR II-3691.