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Response to the European Commission's evaluation of procedural and jurisdictional aspects of EU merger control

17 January 2017

General observations

1. **These remarks express the opinions of the Work Group members of the Spanish Association for the Defence of Competition ("AEDC") and do not represent the position of either all the AEDC members or the official position of the AEDC itself[1]. As in previous notes issued by the AEDC regarding a variety of drafts legislation or communications from the European Commission or the Spanish competition authority, the aim is to provide a set of impartial considerations and to contribute to a better implementation of the Merger Regulation.**

2. **Many members of the ACDC have preferred to respond the questions set by the Commission individually rather than collectively in order to gather more specific details of the experiences of the lawyers.**

Part 1: Simplification (Questions 1-13)

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:
This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;
Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

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[1] The Working Group of the AEDC responsible for this document was coordinated by Patricia Vidal and Ana Raquel Lapresta and also formed part of the group Oriol Armengol, Jaime de Blas, Pedro Callol and Borja Martínez Corral.

1. **The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.**

The AEDC considers that the use of the simplified procedure has brought many benefits for businesses that meet the criteria. The introduction in 2013 of new categories of cases which are eligible for the simplified procedure was welcome. However, we consider that there is scope for further reduction of the administrative burden on businesses in non-problematic cases.

Further simplification of the treatment of certain categories of non-problematic cases

2. **In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?**

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

- **YES**

The treatment of these mergers under simplified procedure has reduced the administrative burden on companies. Moreover, since these transactions are unlikely to give rise to anti-competitive effects within the EEA, further simplification of the amount of information to be provided by the parties could be considered. In any event, we consider that it is important that these cases retain an EU dimension and continue to benefit from the "one-stop shop" to avoid undermining the administrative efficiencies gained by the avoidance of multiple national filings.

The Commission expresses concern that "by exempting from notification all cases without horizontal or vertical overlaps, the Commission may not be able to examine certain concentrations that could raise competition concerns." The AEDC considers that this should not be a concern in practice as the Commission will retain the right to require formal notification of the relevant transaction if appropriate (i.e. in exceptional circumstances).

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

- **YES**

The AEDC considers that by increasing the thresholds to 30% and introducing the HHI threshold in 2013, the Commission has permitted a greater number of concentrations to benefit from the Short Form simplified notification procedure. However, the introduction of additional information requirements prescribed by the revised Short Form CO[2] and the extensive increase of the amount of information requested in pre-notification phase has reduced the total quantum of cost savings that could be obtained.

Indeed, it is the experience of AEDC members that parties are sometimes required (in the face of a cautious case team) to prove that there is no possible, hypothetical, "plausible" market (or sub-segment of the market) where the parties' shares may be over the relevant thresholds. Whilst this can have the advantage of flushing out any issues and avoiding a finding of incompleteness in the event of a sophisticated complainant identifying high shares in niche segments, the pre-notification process can also see the parties being subjected to burdensome information requests. These often require the parties to provide as much information as would have been required for a full Form CO.

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);

- **YES**

Since these transactions are unlikely to give rise to anti-competitive effects within the EEA, further simplification of the amount of information to be provided by the parties could be considered. In any event, we consider that it is important that these cases retain an EU dimension and continue to benefit from the "one-stop shop" to avoid undermining the administrative efficiencies through multiple national filings.

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

- **YES**

The previous reform in 2013 did relatively little to reduce the administrative burden on parties to such transactions. Experience shows that transactions which result in the move from joint to sole control only rarely give rise to any effects within the EEA. Such cases would, therefore, be obvious candidates for a further reduction in administrative burden.

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission

[2] These additional requirements are: (i) the need to provide internal documents; and (ii) the need to consider "plausible markets". The latter "new" Short Form CO requirement in particular can materially increase the information required (typically disproportionately to any value to the Commission in assessing the case).

in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

- **NO**

[Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.]

(ii) Post notification:

- **NO**

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

4. **Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure?**

□ **NO**

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

5. **Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?**

□ **YES**

Apart from the parties' combined 20% market share ceiling for simplified notifications, it could be considered to specifically contemplate mergers which do not involve a significant addition of market share or concentration to the market, despite the fact that the merging parties achieve a combined share of more than 20%. For instance, a simplified filing could be appropriate when the merger involves an addition of market share of less than 5% (as well as when the HHI delta is below 150 as already contemplated by the notice as a possible case for simplified filing).

Another possible cause for simplified notification is for cases referred to the Commission by a national competition authority under Article 22 in order to partially compensate for the accumulated delays caused by double filing situation (i.e. first before a NCA and subsequently before the Commission) and partially to reflect the fact that a case subject to Article 22 referral has – by definition – a limited economic impact upon the overall EU since it lacks EU dimension.

6. **The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall**

under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

☐ **NO**

As mentioned before, we consider there is further scope for simplification of the administrative burden in some cases that only in rarely give rise to any competition concerns. In those cases, we believe that the costs incurred by businesses are not justified by any benefit of reviewing concentrations with an EU dimension.

[Please explain your answer with respect to each of the categories of cases listed in question 2 above.]

- **Transactions falling under point 5a of the Notice:**

☐ **NO**

As mentioned before, these transactions are unlikely to give rise to any competition concerns in the EEA. Thus, in most cases the costs incurred by businesses are disproportionate as compared to the achievement of the objective of the Merger Regulation.

- **Transactions falling under point 5b of the Notice:**

☐ **NO**

Idem.

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

☐ **YES**

- **Transactions falling under point 5d of the Notice:**

☐ **NO**

Idem.

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

The 2013 simplification package has reduced the costs for business. However, as explained in the reply to question 2 (iii) above, the introduction of additional information requirements prescribed by the revised Short Form CO and the extensive increase of the amount of information requested in pre-notification phase has reduced the total quantum of cost savings that could be obtained

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

☐ **YES**

If you replied yes or other, do you consider that there is scope for further simplification by, in particular:

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

☐ **NO**

We consider that it is important that these cases retain an EU dimension and continue to benefit from the "one-stop shop" to avoid undermining the administrative efficiencies through multiple national filings.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

☐ **YES**

8.3. Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

☐ **NO**

The introduction of a self-assessment system would create legal uncertainty to the merging parties. It is questionable whether in practice the introduction of such kind of mechanism would reduce the number of filings. In addition, it would be possible for NCAs to open an investigation at national level.

8.3 Other

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects.
Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the

Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.
In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

Further simplification of the treatment of extra-EEA joint ventures

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

□ **NO**

We consider that only in rare cases, extra-EEA joint ventures would result in any competition concerns in the EEA.

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

□ **YES**

The one stop shop review at EU level of extra-EEA joint ventures has reduced the costs for business and the risks of adoption of contradictory decisions for different NCAs.

11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

□ **NO**

See reply to questions 6 above.

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

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

- **There is scope for further simplification.**

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

- **NO**

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

We consider that it is important that these cases retain an EU dimension and continue to benefit from the "one-stop shop" to avoid undermining the administrative efficiencies through multiple national filings.

(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

- **YES**

We consider it would be possible to introduce a light information system for extra-EEA joint ventures. An exemption from notification or a self-assessment system could reduce legal certainty for businesses.

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

(iii) Other.

~~IV.~~Part 2: Jurisdictional thresholds

14. In your experience, have you encountered competitively significant transactions in the digital economy in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction?

Yes, we have encountered a few examples of such transactions that were not captured by the Merger Regulation. The ones we have experienced, however, were captured by the relevant national thresholds and were dealt with nationally. Occasionally, we have also witnessed examples of transactions being subject to streamlined referrals such as, but not limited to, the largely commented *Facebook/Whatsapp* merger. Another example is the Amadeus/Navitaire merger (case COMP M.7802), a transaction in the reservations systems markets which did not fall under the ECMR but which was reportable in Spain and other Member States and ended up being referred upwards to the European Commission under Article 22 ECMR.

15. In your experience, have you encountered competitively significant transactions in the pharmaceutical industry in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover

thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction?

Yes, we have seen such cases, which were reported nationally with the relevant NCA also reviewing potential effects EEA wide when relevant. See response to point 14, above.

16. In your experience, have you encountered competitively significant transactions in other industries than the digital and pharmaceutical sectors in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?

See response to point 14, above.

17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?

First, it may be noted that national merger control rules will serve largely the same purpose as the ECMR in that competition in the relevant market is to be safeguarded. Hence, it should not be immediately assumed that, because a merger is not reportable under the ECMR, that merger's potentially adverse effects will go unnoticed or will not be addressed. Coordination within the ECN should enable merger control by NCAs even where supranational coordination is required.

Second, wherever it is deemed that the Commission is the Authority that should review a given merger, the rules on streamlined referrals are in principle sufficiently comprehensive to enable the Commission to review a merger.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

A glance at merger thresholds applied internationally shows a variety of criteria applied to discriminate which transactions should be reviewed. Such thresholds include, amongst others, merging parties' turnover, assets, market shares, size of transaction or combinations thereof.

The European merger control system taken as a whole combines the (exclusive) jurisdiction of the European Commission to review mergers under the ECMR, with the jurisdiction of the NCAs to review mergers which do not have European dimension, yet meet the merger control thresholds of one or more NCAs, which in turn display a great variety of criteria across Member States. This variety turns into

a major advantage when combined with the ECMR jurisdiction referral system. Indeed, the variety of merger threshold criteria applied across Member States means that many sensitive or potentially sensitive mergers will be caught; and if it is deemed necessary that the European Commission deals with any of these, the European Commission can ultimately acquire jurisdiction through the ECMR referral system. The key would therefore seem to lie in the coordination mechanisms between NCAs and the European Commission, of which the referral system forms part.

Moreover, there is no robust evidence of an enforcement gap since there is no evidence of cases which were not captured by the EU Merger Regulation that resulted in reductions in consumer welfare in the EEA. In this regard, the AEDC considers that any amendments to the existing EU Merger Regulation thresholds should be carefully considered and only developed on the basis of empirical evidence of need and in a way that does not impose unwarranted additional burdens on business.

In principle, therefore, it does not seem necessary to include additional criteria. Many additional criteria of different natures are already contained in the national merger control rules, as discussed. It would seem right to focus on making the ECMR referral system work smoothly; to the extent this is not yet the case.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

No. See above for additional reasoning.

Furthermore, transaction value does not necessarily indicate anything in terms of antitrust relevance. Although it is true that there are mergers in the technologies or high value sectors (*Facebook/Whatsapp* is again a good example) where transaction value seems inflated, for instance, in relation to business revenue, it may also be observed, for instance, that many businesses with high valuations fail to deliver as expected; likewise there may be businesses with high valuation which is justified on grounds other than expected success or radical innovation: transactions involving asset-rich businesses may be priced highly even if such assets generate little or no revenue.

It is relevant to take into consideration that the adoption of a value-based threshold may increase uncertainty for businesses since the concept of deal value is complex and can change materially over short periods. Indeed, many transactions have complex post-closing adjustments such as the final value of the deal will not be known until post-closing. Moreover, whether a transaction is particularly high value will depend on the sector involved. There is a risk that introducing value-based thresholds will disproportionately regulate certain sectors over others.

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

Not applicable.

The AEDC considers that if the European Commission were to introduce a new transaction value threshold, its level should be at least as high as the one applied by the United States.

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

Not applicable.

In case a value-based threshold is added, to ensure that only transactions with a meaningful nexus to the EEA are captured, it would be possible to introduce (i) foreign-to-foreign exemptions (as it is the case in the United States), duly attuned to take account of markets with worldwide dimension; (ii) a requirement that a certain level of deal value is attributable to the EEA; or (iii) the incorporation of turnover criteria into the value-based threshold.

22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

Not applicable.

If a value-based threshold were to be added, transactions which trigger the new value-based test but do not trigger the existing turnover threshold should benefit from the simplified procedure.

~~IV.~~ *Part 3: Referrals*

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9 and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

We consider that the current system has contributed to a better allocation of certain cases to the more appropriate and better placed competition authority. However, in our opinion, there is still room to improve the mechanism by modifying certain aspects.

Although the constant use of the case referral mechanism since its reform back in 2004 proves that it has been a positive system, we believe that the practice throughout these years has shown that the system is still burdensome and time-consuming.

24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating

merger cases to the more appropriate competition authority and/or reducing burden on businesses?

The case referral mechanism is aimed at allocating each case to the better placed and more appropriate competition authority to assess and decide on the concentration in compliance with the "one-stop-shop" principle. In this regard, we consider that the objective should be to try and avoid to the extent possible that a certain concentration is assessed by several different competition authorities at the same time, and in order to achieve such objective the system should be smoother and more user friendly by providing less procedural steps and reduced deadlines.

The proposals indicated in the White Paper will undoubtedly help to reduce the complexity and duration of the referral system, as well as certain potential undesirable and conflicting outcomes resulting from the intervention and assessment of different competition authorities.

In relation with referrals set out in Article 4 of the Merger Regulation, we consider that the procedure is complex, cumbersome and inefficient, insofar as the parties to the transaction requesting the referral shall first prepare and submit a Form RS including a considerable amount of information and an explanation of why the referral should be applied, and second, the Form CO once the competent authority to assess the case has been decided. In this regard, we consider that the proposal made by the White Paper of eliminating these two steps would be very positive, since it would enhance the efficiency of these referrals.

As regards referrals foreseen in Article 22 of the Merger Regulation, we believe that the main issue to be addressed should be to avoid that a competition authority requests the referral of a case to the Commission while at the same time a different competition authority has already decided on that same case. In order to avoid such undesirable situation, we also evaluate positively the proposal made by the White Paper by virtue of which all national deadlines would be suspended once a competition authority has informed about potential cross-border effects of a transaction that it is assessing and has indicated the possibility of requesting a referral.

25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9 and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

As it has been indicated in answers to Questions 23 and 24 above, the measures adopted should address the existing complexity and excessive duration of the referral system. In this sense, we consider that the proposals contained in the White Paper are positive and would contribute to an improvement of the system.

In our opinion, in order to create a more efficient and simple system, avoiding unnecessary delays and burdens throughout the process, we consider extremely important the establishment of a clear communication channel between the Commission and the NCAs (as well as between the NCAs themselves) at a very earlier stage in respect of each transaction which could be subject to a referral.

~~IV.~~Part 4: Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and

investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- ***Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.***
- ***Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.***
- ***Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.***
- ***Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation.***
- ***Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.***
- ***Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.***
- ***Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.***
- ***Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.***

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

We understand that it would be positive for the EU merger control system to make some of the proposed adjustments. In other cases, in our opinion the Commission should reconsider its position in a completely different direction.

In particular, taking into account the conclusions of the 2014 SWD:

a) In relation to the suggested modifications of Article 4(1), we understand that there is room for improvement in the sense proposed by paragraph 185 of the SWD. Indeed, considering that merger control proceedings should always look for the lesser impact on the notifying parties and their businesses, we understand that to flexibilize the moment where transactions on a stock exchange may be notified in order to allow formal notifications before the parties have acquired the controlling stake may represent a considerable gain in efficiency.

b) In relation to a mention on the EU merger control regulation of a clarification on the methodology for JV turnover calculation, and although every clarification should

always be considered positive for the legal certainty of all involved stakeholders, it may not be a priority at this moment. The SWD does not propose any change of the Jurisdictional Notice and, therefore, we do not see a reason to prioritize this proposal.

c) As to time limits, we certainly favor including a flexibility element in this regard that may allow the Commission to grant longer deadline extensions if so requested by all notifying parties or, at the Commission's request, prior agreement of all the notifying parties. As merger control deadlines are set for the benefit of the notifying parties (as the 2014 SWD expressly acknowledges), the parties should be allowed to request extensions to such deadline it they deem that the extension may help them to better present their case to the Commission. In this regard, the notifying parties, as main interested parties on the efficiency of the process, should decide the length of the extension (15, 20 or 30 days).

In the same line, we also think that the parties should be allowed to request this extension at any time before the hearing, and not be bound by any other deadline.

d) In relation to the possibility of broadening the scope of Article 8(4) of the EU Merger Regulation in order to allow the Commission to order the full unwinding of partially implemented transactions (as opposed of the elements granting control), we do not share the 2014 SWD's position.

Although it is true that the Commission may face situations as the one developed in the *Ryanair / Aer Lingus* saga, where the Commission could only order the divestiture of the last part of the transaction, we do not see that this exceptional case should mark the rule. There could be cases where legitimate acquisitions of minority shareholdings may, at some point, evolve into a control situation and trigger a notification obligation. However, in these cases, the EU Commission should not use its merger control powers to make encroaches beyond the pale of these rules and reverse previous acquisitions of minority shareholdings. Insofar the acquisition and holding of minority stakes was legally allowed, the Commission should only be concerned with companies acquiring control in the sense of Article 3 of the EU Merger Regulation.

We do not share the position of the 2014 SWD of the fact that the re-establishment of the *status quo ante* is the better option to avoid a "*potentially complex assessment*". This position would unduly limit the freedom of the parties beyond the scope of the EU merger control rules.

e) The 2014 SWD also considers the scope of Article 5(2)(2) of the EU Merger Regulation order to duly avoid the fraudulent splitting of transactions in order to avoid the fulfillment of the EU merger control thresholds.

The rule of Article 5(2)(2) is useful and should be maintained as a general principle. However, there are cases where there is no such fraudulent intent and the parties merely enter into successive transactions without a pre-ordained design to complete the transaction. In such cases, *bona fide* merging parties may be unduly affected by the Commission's presumption of fraud. For this reason, we understand that the rule of Article 5(2)(2) should be relaxed in order to allow the notifying parties to challenge this presumption before the Commission and avoid the application of Article 5(2)(2).

f) As to so-called "parking structures", we do not agree with the proposal of the 2014 SWD of including the position of the Jurisdictional Notice in the Merger

Regulation. Indeed, we think that the Commission should reconsider its stance in this matter. It is our belief that there are sound and strong arguments that should lead the Commission to reconsider the current stance of the Jurisdictional Notice and allow parking structures:

1) First of all, provided that the structure of the market is not affected in any way, parking structures may become a way for the parties to minimize costs and secure the transaction (particularly in multinational transactions where the potential competition concerns may be limited to a specific market or country). A well-designed parking structure would be more proportionate to the buyer (that could ultimately assume the risk of an adverse decision).

2) Secondly, if the transfer of the parked assets is envisaged in an unconditional manner (either to the final purchaser or to a third party) within a short period of time (e.g., one year), there would not be enough stability in the change of control to justify the prohibition as an early implementation of the main transaction. The holder of the parked assets would either transfer them to the buyer (if and when the transaction is fully cleared by the Commission) or to a third party.

3) Thirdly, to our knowledge, the Commission has, at least on one occasion, accepted a *parking* structure pending the review of a transaction under the Merger Regulation prior to the adoption of the 2008 Consolidated Jurisdictional Notice (*Lagardère/Natexis/VUP*, Case COMP/M.2978, Commission decision of January 7, 2004, 2004 O.J. L125/54). In that case, the acquisition of the target by the bank had not been notified based on an exemption regarding temporary acquisitions).

   In that case, Lagardère entered into a *parking* arrangement with Natexis for the acquisition and temporary holding of the publishing assets of Vivendi Universal pending review of the *Lagardère/VUP* transaction by the European Commission. On appeal, a competitor argued that the *parking* was designed to circumvent the suspension obligation attached to the notification, and was therefore illegal. Although the General Court and the Court of Justice did not expressly rule on the validity of *parking* arrangements as such, they found that the *parking* structure had no impact on the validity of the decision authorising the concentration, and therefore rejected the appeal (*Éditions Odile Jacob SAS v. Commission*, Case C-551/10 P of November 6, 2012, paras. 33-42; *Éditions Odile Jacob SAS v. Commission*, Case T-279/04 of September 13, 2010, paras. 154-155).

4) National Antitrust Authorities have accepted *parking* agreements in the context of merger control (although other authorities such as the *Bundeskartellamt* follow the restrictive approach of the European Commission). For example:

   a. The French Competition Authority issued revised merger control guidelines providing that "*only the transaction consisting in the resale of the business to the ultimate acquirer warrants notification*", subject to the following conditions: (i) the interim buyer does not acquire decisive influence (either jointly or solely) over the target assets during the interim period (*e.g.,* it does not exercise its voting rights with a view to determining the competitive behaviour of the business or it is represented

at the Board by independent members), (ii) the *parking* structure also does not confer decisive influence to the ultimate acquirer over the management of the business until the purchase of the business by the ultimate buyer is cleared by the French Competition Authority, and (iii) the disposal to the ultimate buyer takes place within one year of the date of acquisition of the business by the interim buyer (*Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations*, June 2013, para. 70; following this guidelines, a *parking* arrangement was used in the *Casino/Monoprix* case, Decision 13-DCC-90 of July 11, 2013)

b. Similarly, the 2002 Irish Competition Act exempts the short-term acquisition of a target company by a warehouse from notification to the Irish Competition Authority, subject to similar conditions as outlined above. In this regard, for example, a parking arrangement was validly used in the 2008 *Beamish & Crawford Irish* case as part of the overall acquisition by Heineken and Carlsberg of the Scottish & Newcastle assets.

c. The Portuguese competition authority has also accepted this type of structures in the past (article 36.4c) of Lei 19/2012; consutations/decisions Ccent. 30/2007 – Besaude/NSL, of 23.10.2007 (pp. 9 y 10); Ccent. 21/2008 - TV Cabo / TVTel., de 21.12.2008 (pp. 7 y 8); and Ccent. 56/2007 - TV Cabo Portugal / Bragatel / Pluricanal Leiria / Pluricanal Santarém, de 21.11.2008 (pp. 18 y 19).

g) We certainly support the Commission having useful tools to avoid the misuse of information obtained within the context of a merger control file for other purposes. It is important that the notifying parties and any company participating in a merger control procedure feels safe as to the information that they are disclosing to the Commission for its assessment and the Commission should defend such trust. Including economic sanctions for this fraudulent use of the information should be subject to fines with an adequate deterrence factor.

h) For the sake of consistency, we share the 2014 SWD's view as to the fact that the Commission's powers under Articles 6(3)(a) and 8(6)(a) of the Merger Regulation to revoke a decision clearing a merger which (i) was obtained by deceit or (ii) was based on incorrect information for which one of the parties is responsible should be extended to referral decisions under Article 4(4).

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

N/A

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

NO

YES

OTHER

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defence and to propose and discuss commitments.

As indicated in the reply to question 26, above, the parties should own the timing of the merger control procedure. At some point, the Commission may be interested in assessing a complex issue and the parties may require additional time either to provide the Commission with enough evidence in favor of the transaction or to have time to prepare and have meaningful discussions on the subject. This is particularly true when commitments may be required, since it is important that the authority receives all necessary information and adequately understands all the issues at stake.

In our experience, in merger control procedures companies are only interested in extensions of the deadline when such extensions are really justified. Therefore, the Commission should not impose tighter timeframes that may lead the parties to rush their arguments.

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

YES

NO

OTHER

Please explain.

The distinction works well in the sense that is a clear rule that the parties know beforehand the estimate timeframe of the proceedings. However, we insist on our previous idea that extension of deadlines should depend on the complexity of the case, and not on fixed deadlines. A fixed deadline may be positive as a ground rule, but the Commission should have the tools to flexibilize such deadlines to allow a more efficient down-to-the-case assessment if the notifying parties so request.