

**RESPONSE OF THE EUROPEAN COMPETITION LAWYERS FORUM (“ECLF”) TO THE EUROPEAN COMMISSION’S PUBLIC CONSULTATION ON PROPOSALS FOR SIMPLIFYING PROCEDURES UNDER THE EU MERGER REGULATION**

**INTRODUCTION**

The European Competition Lawyers Forum (“ECLF”) welcomes the opportunity to respond to the European Commission’s (“Commission”) Public Consultation on proposals for simplifying procedures under the EU Merger Regulation, launched on 27 March 2013. The Paper has been compiled by the ECLF Working Group on the Merger Review Process (“the Working Group”) and does not purport to reflect the views of all ECLF Members or of their law firms. Also, while the Paper has been circulated within the Working Group for comments, its content does not necessarily reflect the views of all individual members of the Working Group or of their law firms.

Our response has four sections:

- **Section 1** on the proposed changes to Form CO (and Short Form CO). In summary:
  - We broadly welcome the proposed changes, but doubt that they are sufficient to render the notification process more efficient and effective overall, and are concerned that some of the proposals are in fact likely to render the process more (rather than less) burdensome.
  - The **new requirements to provide “all plausible alternative product and geographic market definitions” imposes significant additional burdens** on the parties, which runs contrary to the Commission’s overall objective of streamlining information requirements. The term is so vague and the standard of “plausibility” so low that it is bound to be interpreted differently by different case teams. This introduces greater uncertainty as well as an element of arbitrariness into the system and is likely to have the effect of increasing the length of the pre-notification phase. Parties often already provide very detailed information on possible market definition, particularly in complex cases and/or where there are equally likely alternatives for the relevant market. Where they do not, additional market definition information can be requested in complex cases by way of an information request. If necessary information is not provided sufficiently early in the process, the consequences, such as a potentially unnecessary entry into second phase, will be borne by the parties.
  - The **expansion of the scope of 5.4 documents is excessive and unnecessary**. Such extensive documentation should only be requested in complex cases, by way of an information request, rather than as a condition for completeness in all cases. The

proposal to require 5.4 documents for a Short Form CO is wholly inconsistent with the Commission's aim of making the notification process simpler and more efficient.

- We are concerned that **the waiver process will remain inefficient and cumbersome** in a number of respects. Many of these concerns could be addressed by the publication of detailed guidance on the circumstances in which waivers are available and the process for obtaining them.
- We **welcome the general 5% increase in the market share thresholds but are doubtful that this level of increase will have any noticeable impact**. We also strongly recommend rendering the finding of an affected market conditional on the existence of a significant market share "increment", in particular in relation to vertical relationships to avoid the absurd situation where a market share of as little as 1% (or less) will constitute an affected market if another party has 30% or more in a vertically related market.
- **Section 2** on the referral system and simplification of Form RS. In summary:
  - The proposed changes to the Form RS generally reflect our concern that the requirements of that Form should be limited solely to information needed to determine whether a concentration meets the criteria for referral. However, we believe that there remains **scope to further streamline the information requirements of the Form RS** in a way that eases the burden on the parties without prejudicing the Commission's and the NCAs' ability to conclude as to whether or not a referral is appropriate. We offer a number of recommendations for how this could be achieved. In particular, we think the requirement to provide information for all "plausible" affected markets introduces even more excessive and unnecessary burdens than with the equivalent proposed Form CO changes.
  - We recommend that the **Commission's Best Practices in Merger Regulation proceedings are updated** to take account of the developments in this area in the past 10 years since publication of the Best Practices.
  - We also have various **recommendations for broader legislative changes to the referral mechanisms under Article 4(5) and 22 of the EUMR**, which would address unnecessary and disproportionate burdens that exist at present.
- **Section 3** on notification of extraterritorial JVs under the EUMR. In summary:
  - Mandatory notification of extraterritorial JVs which have no actual or foreseeable effects within the EEA creates a disproportionate administrative burden and is a waste of vital resources, both for the European Commission and for the undertakings concerned. It also seems to lack compliance with ICN Recommended Practices. These resources could be allocated to areas of greater need. We continue to **advocate amendment of the EUMR to expressly exclude the need to notify transactions without an actual or potential effect in the EU**, and the publication of appropriate guidance on identifying such transactions.

- Even the use of the simplified procedure for the notification of extraterritorial JVs is costly and burdensome. The notifying parties are still required to pre-notify, supply drafts before formal notification and submit lengthy Short Forms CO. We welcome the Commission's proposed changes to the Short Form in this respect, but **recommend additional changes to balance more appropriately the benefits and burdens of notifying extraterritorial JVs**, such as the use of short letters to inform the Commission of an intention to engage in such activities and/or a truncated Short Form CO with automatic waivers for certain sections of the form; and
- **Section 4** on pre-notification procedures. In summary:
  - The Commission's proposals for simplification of the notification process, for example the all "plausible" affected markets requirement, risk exacerbating certain problems with the current pre-notification process that the ECLF has previously described to the Commission. These relate primarily to the increasing duration and unpredictability of the pre-notification period, particularly for simplified procedure cases. We offer various suggestions for shorter, more user-friendly pre-notification.
- A summary of our recommendations can be found at **Annex 2**.

## **1. CHANGES TO FORM CO AND SHORT FORM CO**

- 1.1 We welcome the Commission's initiative to reappraise the provisions of the standard Form CO. The Commission's draft proposal contains a number of helpful amendments seeking to facilitate the notification process. The number of redundant questions has been reduced and the coherence within the Form has been increased.
- 1.2 We also note that the Commission has endorsed a number of the ECLF's recommendations for improving the way the Form works. Nevertheless, the Form CO procedure remains one of the most onerous procedures for notifying mergers worldwide. We doubt that the proposed reforms are sufficient to render the notification process more efficient and effective. Several information requirements in the Form are either irrelevant for the large majority of the concentrations or they concern issues that hardly ever play a role during an initial screening in a first-phase proceeding.
- 1.3 We also wonder whether some of the modifications suggested in the Commission's proposal do not risk producing outcomes that are counterproductive to the stated objective of simplifying the notification process. One should not overlook the major benefits to be reaped by the case teams and the parties from making the notification process more predictable.
- 1.4 The following are comments relating to issues which we believe are worth highlighting in relation to the standard Form CO (certain additional comments regarding the Short Form CO are contained in Section 3 of this response). Our comments relate to four subject matters in particular: (A) Plausible Relevant Market Definitions; (B) 5.4-type Documents; (C) Waivers; and (D) Market Share Thresholds.

**(A) All “plausible” relevant market definitions**

***(i) Introduction***

- 1.5 The draft amendments to the Form CO and Form RS include a new requirement for the notifying parties to provide information on affected markets, which consist of “all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions)”. It is proposed that the provision of such information will become a requirement for completeness of the Forms. A reference to “plausible alternative relevant product and geographic market definitions” is already contained within the current Short Form CO but has been expanded.
- 1.6 We have two main concerns in relation to this proposed change, namely that: (i) it imposes a significant additional burden on the parties in terms of requirements for completeness of Form CO, which runs contrary to DG Competition’s overall objective of streamlining information requirements; and (ii) it is likely to have the effect of increasing the length of the pre-notification phase. The fact that similar wording is currently included in the Short Form CO with respect to reportable markets does not alleviate our concerns.

***(ii) Additional information requirement***

- 1.7 Our view is that the revised wording on plausible market definitions will significantly increase the administrative burden imposed on notifying parties.
- 1.8 The term “plausible” is vague and cannot be defined with any certainty. Interpreted literally, the term could mean all market definitions that are not patently absurd. As a result, there is a strong risk that different case teams will interpret the term differently and that less experienced teams will interpret it in the broadest possible way. In the Form CO, for each “plausible market definition”, Sections 7 and 8 will have to be completed, leading to a significant increase in the volume of information to be provided by the parties. Arguably, the outcome may not differ from the Commission’s practice today in many cases. However, the experience of our members is that even today case teams and their respective approaches differ. Therefore, if the proposed wording is adopted, this risk of creating additional “affected” markets cannot be excluded nor can it be controlled in individual cases.
- 1.9 Even if, compared to the current position, only one additional market definition is deemed “plausible” following pre-notification discussions with the Commission, this is already a considerable additional burden on the parties. This is a risk that runs counter to the Commission’s objectives in carrying out the current review of procedures and reducing the number of affected markets.

*Practice to date does not call for such a change*

- 1.10 In our experience, practice to date indicates that this change is wholly unnecessary. This is because:
- 1.10.1 even today, the Commission usually has a great deal of input from the parties in relation to alternative reasonable market definitions as the parties frequently set out to demonstrate that no concerns exist under any possible definition; and
  - 1.10.2 a strict approach to market definition and adopting measures to gather data split according to every conceivable relevant market definition is no longer necessary as merger review tools and techniques have moved globally towards a more economics based approach. For example, in September 2010 the Competition Commission and the Office of Fair Trading in the UK launched revised Merger Guidelines and noted that the amendments included "a shift in emphasis towards the direct assessment of effects on competition and away from a detailed assessment of market definition." Similarly, in the US, the antitrust agencies published Horizontal Merger Guidelines in 2010 which state that "[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition".<sup>1</sup>
- 1.11 If it is the Commission's belief that the change will in fact reduce information burdens - as notifying parties are currently providing information on markets that are not plausible (e.g. providing information on national, EEA-wide and worldwide markets by default) – that problem would be better addressed through enhanced guidance and feedback from case teams during the pre-notification procedure (see further our comments under section 4.1 below).

*The offer of a waiver does not alleviate our concern*

- 1.12 For the reasons set out in paragraphs 1.32 to 1.39 below, we do not consider that the possibility of obtaining a waiver (referred to at footnote 23 of the draft revised Form CO) alleviates these concerns.
- 1.13 In addition, there is no guarantee that a waiver will in fact be granted. The change shifts the burden of deciding which markets are relevant entirely to the Commission, rather than its being a product of mutual understanding.

**(iii) *The impact on the pre-notification period***

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<sup>1</sup> Finally, the French Competition Authority (the "FCA") also appears to support this shift to a certain extent, as evidenced in the draft version of its Merger Control Guidelines that were recently submitted for public consultation. Even though the FCA still considers market definition as a "*necessary step*", it appears open to using analytical tools which do not require a precise market definition, in particular where the products concerned by the transaction are not homogenous (see paragraph 333 of the Draft Merger Control Guidelines, available at [http://www.autoritedelaconurrence.fr/doc/projet\\_ld\\_concen\\_22fev13.pdf](http://www.autoritedelaconurrence.fr/doc/projet_ld_concen_22fev13.pdf)).

1.14 The proposed change means that parties cannot notify a transaction unless they have provided detailed information on all plausible market definitions (or obtained a waiver during the pre notification phase). As explained above, our view is that such a change would have the effect of significantly extending the pre-notification period in many cases (both under the standard and the simplified procedures) and of introducing a further element of arbitrariness since much would depend on the experience of the reviewing case team.<sup>2</sup> Parties would be required to negotiate and agree with the Commission on all plausible market definitions before being able to collate information without which their filing would not be deemed complete, or waiting for the Commission to approve a waiver for that information.

1.15 In response to recent criticism concerning the length of the pre-notification period, our experience is that the Commission is of the view that it is up to the parties to determine when a Form is complete and to file. The argument is that, although the parties are encouraged to engage in pre-notification discussions, they do have the ability to determine for themselves the length of this “phase” by filing when they deem the Form to be complete. In our view, the proposed changes, to a large degree, remove this possibility for the parties, reducing legal certainty and diminishing the DG Competition’s justification for not providing additional guidance on the pre-notification period. This is because if the proposed amendments are adopted DG Competition will almost always have at its disposal a ground for declaring incompleteness on the basis that not all “plausible” market definitions have been dealt with.

***(iv) The current reference to plausible alternative relevant market definitions in the Short Form CO does not alleviate our concerns***

1.16 The fact that wording referring to "plausible alternative relevant product and market definitions" has already been tested in the Short Form CO does not indicate that its proposed inclusion in the Form CO and Form RS will be unproblematic. This reference in the current Short Form only appears in section 6 and is therefore only applicable to the provision of additional information in section 7 of the Short Form CO, which is far less burdensome than, for example, the information requested at sections 7 and 8 of the Form CO. Moreover, due to the benign nature of transactions notified using the Short Form, DG Competition is less concerned with pushing parties to provide information on every conceivable market split. For these reasons, the risk of having to provide information on additional plausible market definitions in the Short Form CO is of less concern in general to parties.

1.17 The view of the Working Groups is that an attempt to “harmonise” the Form CO and the Short Form CO in relation to market definitions including all plausible alternatives will

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<sup>2</sup> Please refer to Section 5 of this response for our additional recommendations for reform of the pre-notification process.

have the effect of increasing the information requirements placed on the parties and of extending the pre notification period for the reasons set out above.

**(B) New requirements for the provision of “5.4-type” documents**

**(i) Form CO**

- 1.18 In the draft revised Form CO, the requirement to provide 5.4 supporting documents has been significantly expanded. The production of the extended 5.4 documents would constitute a requirement for completeness of the Form CO. In the view of the Working Group, the documents requested are not essential for an initial phase I review of most concentrations. Given that the vast majority of cases are non-complex and are cleared in Phase 1, these proposed changes are excessive. This Working Group is of the view that extensive documentation should only be requested in the handful of complex cases reviewed by DG Competition each year. This has been the practice to date where additional documentation is requested by the Commission using its powers under Article 11 EUMR. We believe that this approach works well in principle (subject to our comments in paragraph 1.25 below).
- 1.19 Should the Commission wish to address concerns on gathering documents up front and avoiding delays and a time squeeze later in the process, our suggestion would be to retain the current practice of requesting additional supporting documents via an information request in appropriate cases and consider providing guidance encouraging parties to gather additional documents in the event of a more complex analysis. The provision of all of these documents up front should not be a condition of completeness.
- 1.20 In the following, we set out our concerns in more detail.

*Requirement too broad and not limited to the concentration or to competition issues*

- 1.21 In the view of the Working Group, the additional documents that notifying parties would be required to provide will be neither useful nor interesting for DG Competition in the context of its review of the impact of the transaction on market structure and competition, In particular:
- 1.21.1 the requirement to provide all minutes of board/shareholder meetings during which the transaction has been discussed (draft 5.4(i)) includes any discussion of the transaction and is not limited to competition issues. Much of this information will relate to price and other financial issues; and
- 1.21.2 the requirement to provide presentations analysing different options for acquisitions, including but not limited to the transaction (draft 5.4(ii)) is not limited in time and would capture, for example, presentations by investment bankers (solicited and unsolicited) looking at a broad range of hypothetical situations, and not only those actually contemplated by the parties. In our experience, many of the documents which will be captured by this request often do not accurately reflect the competitive situation on the relevant markets and

detail potential acquisitions and/or deal structures which are not relevant to the transaction under review, and are not relevant to assessing the counterfactual to the transaction.<sup>3</sup>

- 1.22 When reviewing a transaction under the EUMR, DG Competition is only concerned with the competitive effects of a merger, comparing the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. As such, the Working Group is of the opinion that the additional information requested in draft 5.4(ii) is superfluous to the information requirements of DG Competition and the proposed amendment is therefore disproportionate.
- 1.23 Thus, the requirement to provide analyses, reports, studies, surveys etc. for the last three years for the purpose of assessing competitive conditions in any of the affected markets will, in most cases, be grossly disproportionate, and will result in high volumes of irrelevant reports. This is because the thresholds for “affected” markets are low (even taking into account the proposed increases) so that many markets which will be categorised as “affected” will in fact not give rise to competition concerns (particularly if they are have been categorised as affected markets on the basis of “plausible” market definitions).<sup>4</sup> In many cases (for example in the high tech sector) information on relevant affected markets dating back three years will no longer be relevant to the competitive analysis. In addition, many of the responsive documents will likely also concern a number of additional markets that are not “affected”.

*The change goes further than formalising current practice*

- 1.24 We note that DG Competition’s current practice in complex cases is to request much of the “additional” documentation which now appears in the revised draft 5.4 using its powers under Article 11 EUMR.
- 1.25 However, we consider that an attempt to “formalise” DG Competition’s current practice by front loading the Form CO with excessive documentation requirements is an unhelpful development. The experience of our members is that DG Competition’s current approach to Article 11 information requests in merger cases is often excessive and disproportionate. Thus formalising an already over-burdensome practice (and making the provision of a very broad document dump a ground for completeness) is not in line with the Commission’s objective of streamlining its information requirements and focusing on the information necessary for it to conclude a Phase I review. As noted above, in only a handful of complex cases will additional documents to those requested in the current

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<sup>3</sup> The requirement also goes beyond that which was recently introduced in the US under item 4(d) of the HSR form, for the submission of banker pitch books created in the one-year period prior to filing but only to the extent that they analyse competition issues and relate to the notified transaction.

<sup>4</sup> As an example a vertically affected market where one party has a market share of 30% and the other party a market share of 2% is unlikely to give rise to competition concerns.

Section 5.4 in fact be required by DG Competition for it to carry out its assessment. In the majority of cases the Commission will neither require nor will it have the time or resources to review the large volume of documents such a request is likely to produce.

*Waivers do not provide an appropriate solution*

- 1.26 For the reasons set out in paragraphs 1.32 to 1.39 below, we do not consider that the possibility of obtaining a waiver in relation to the provision of the documents required at 5.4(iii) and 5.4(iv) alleviates the concerns described above.
- 1.27 As a further comment, we note that waivers have specifically been “offered” in relation to 5.4(iii) and 5.4(iv). It is unclear why a waiver has not been offered in relation to 5.4(ii), considering that the documents requested therein are not restricted to an analysis of the transaction or to competition issues. This is particularly so, given that a waiver has been offered in relation to 5.4(iii) documents, which reflect the most relevant documentation for the purpose of analysing a transaction and correspond to the documents requested in the current section 5.4 of the Form CO (see **Annex 1** below).

*HSR requirements are not the correct benchmark*

- 1.28 The Working Group is also concerned that the proposed 5.4 requirement expand the scope of required documents far beyond the US HSR requirements. This is specifically because the 5.4 documents required would no longer be limited to competition issues and would no longer be limited to the transaction being notified. This development is illustrated in the table set out at **Annex 1**.
- 1.29 We believe that the rule of thumb must be that significantly less documentation is required in support of an EUMR filing (at least in the vast majority of non complex cases) than in support of an HSR filing. This is because an EUMR filing requires the production of a detailed and lengthy Form CO, the preparation of which is burdensome and data intensive. The Form CO serves to inform DG Competition of all of the factors relating to the proposed transaction relevant to the competitive analysis. Conversely, the HSR filing is largely a document based filing. It does not require the parties to create any analysis of the competitive impact of the transaction or proffer a definition of the relevant markets. Rather, it calls for the provision of management’s contemporaneous analysis of the specific proposed transaction. This means that the US authorities rely heavily on the 4(c) and now 4(d) documents provided by the parties in order to assess the proposed transaction. We believe that to require the completion of a data intensive Form CO as well as far-reaching supporting documentation requirements goes beyond what is necessary for DG Competition to review most mergers and imposes an excessive burden on parties notifying a transaction under the EUMR.
- 1.30 It could be argued that parties have to collect 4(c) and 4(d) documents for the purpose of an HSR filing in any event. Therefore, the additional burden in providing the same documentation to DG Competition is not disproportionate. However, in the view of the Working Group the current draft of section 5.4 goes far beyond what is required for a US

filing and, in any event, not every transaction notifiable under the EUMR filing will trigger a corresponding HSR filing.

**(ii) Short Form CO**

- 1.31 The proposed new section 5.3 of the Short Form CO adds a new requirement to provide “5.4” type documents, including documents relating to alternative acquisition structures and documents that do not discuss competition issues. In our view, this change is not in line with DG Competition’s objective of streamlining the procedure and reducing information requirements given that it increases the burden on parties under the Short Form CO significantly. In cases where there are no or very limited overlaps, the provision of such documentation would give rise to no benefits for the Commission, and considerable additional burden for merging parties.

**(C) The requirement of a complete notification – waivers**

*The current waiver system is not working*

- 1.32 The revised text defines two alternative scenarios in which a notifying party may be exempted from submitting a complete notification:

- Either the information concerned is not reasonably available (Section 1.4 (f)); or
- the information is not necessary for a full assessment of the concentration under consideration (Section 1.4 (g)).

- 1.33 The first alternative does not constitute a genuine exemption, because the notifying party is still expected to provide its "best estimates for missing data together with the sources for the estimates". Under both alternatives, the process is unnecessarily cumbersome since the parties are required to submit a written request stating the reasons why they believe a specific item of information is either unavailable or not relevant for the assessment of a particular concentration. In our experience DG Competition’s practice in relation to waivers is not always consistent and varies from case team to case team. There is no formal procedure for responding to waiver requests and parties can wait months for a decision by the case team on a waiver. As a result, it is often difficult to anticipate the circumstances in which a waiver will be granted and to advise clients. Without any specific guidance on instances where waivers will be granted or on timing with respect to the granting of waivers, parties often prefer to answer the Form CO as exhaustively as possible instead, even if this does impose a considerable burden on them. Moreover, the administrative effort involved is often disproportionate and may detract the case-team and the parties from the stated objective of identifying competitive concerns.

- 1.34 For example, the wording of Section 8.11 is particularly vague, which gives rise to legal uncertainty both for the parties and the case team (“If relevant, give details of the most important cooperative agreements ...”). Parties will often take the view that it would be more expedient to reply to the Question in Section 8.11 in a summary and approximate

fashion, rather than enter into a protracted debate as to whether the information concerned is actually of any use for the appraisal of the concentration at hand. Yet, past experience shows that knowledge about the existence of cooperative agreements is hardly ever crucial for an effective competitive assessment in a Phase-I investigation.

*Better guidance on the waiver process for both case handlers and parties is needed*

- 1.35 In the draft revised Form, the Commission has listed nine categories, in relation to which parties are “particularly invited to consider whether to request a waiver for any of these categories of information“ (see the last paragraph of Chapter 1.4 of the Introduction to the Form). Regrettably, the Form fails to provide any more detailed guidance. It only refers to DG Competition’s Best Practices on the conduct of EC merger control proceedings, which contain the following, rather non-committal statement in paragraph 19:

*“Pre-notification discussions provide the opportunity for the Commission and the notifying parties to discuss the amount of information to be provided in a notification. The notifying parties may in pre-notification request the Commission to waive the obligation to provide certain information that is not necessary for the examination of the case. All requests to omit any part of the information specified should be discussed in detail and any waiver has to be agreed with DG Competition...”*

- 1.36 As a result of the Form’s failure to provide appropriate guidance, the parties are unable to predict with any level of certainty whether or not a particular request for a waiver has any chance of being successful, whereas the officials in charge are largely left to themselves to decide on a case-by-case basis. As we have set out in our earlier recommendations for reform of the EU merger control process, guidelines on the use of waivers would give comfort to case-handlers that are relatively new to the process, who may realise that the information to be provided is not necessary in their assessment but nevertheless find it difficult to make a “judgement call”.
- 1.37 We also recommend defining certain realistic time-limits within which DG Competition should decide on waiver requests. We believe it would be reasonable to expect that a request could be dealt with within five working days.
- 1.38 The ECLF also considers that certain other categories of information should also be identified as typical candidates for waiver requests. In particular, Section 8.9 concerning Research and Development will often be irrelevant, and it would also be quite straightforward to define the conditions for an exemption for the obligation to provide information on R&D activities, for example where the industry concerned is not particularly innovation driven, taking into account the importance of the R&D budget as compared to the total turnover of an undertaking (see Footnote 29 of the draft revised Form).
- 1.39 We also note that the Commission reserves its right to ask undertakings for additional information, such as for example contact details (see footnote 32 of the draft revised

Form). In the ECLF's view this suggestion runs counter to the very idea of simplifying the process and rendering it more predictable. While we do not dispute that it may sometimes make sense to request additional contact details in a pre-notification phase, we recommend that requests for additional information should be handled separately, by means of formal or informal information requests if necessary.

**(D) Affected markets – market share thresholds**

*The 5% increase is not sufficient to have any noticeable impact*

1.40 The Commission proposes to increase the relevant market shares for affected markets within the meaning of Section 6.1 by 5 percentage points as follows:

- The market share threshold for horizontally affected markets is increased from 15% to 20%;
- the market share threshold for vertically affected markets is increased from 25% to 30%.

1.41 In addition, the wording is modified to clarify that only (horizontal or vertical) relationships between “relevant markets” are concerned. We understand this to mean that the markets must be relevant both with regard to the product and the geographical scope, so that a vertical relationship which merely exists because two parties are active in related product markets, without these markets being related geographically, is irrelevant. We would appreciate if the Commission could confirm whether this interpretation is correct. If so, it is, in our view, a very helpful clarification.

1.42 While we believe an increase of the market share thresholds has long been overdue, we doubt that a difference of a mere five percentage points will have any noticeable impact because this figure is within the usual error margin anyway. Furthermore, we are not convinced that setting the relevant threshold at 20% will enable the Commission to filter out those concentrations which may give rise to concerns. Finally, we strongly believe that there is a need for consistency across EU competition legislation and we welcome the alignment of the 30% share threshold for vertically affected markets with the threshold provided in the vertical BER. In the same perspective, the 20 % threshold should be increased to 25 % in order to be consistent with recital 32 of the EUMR, which lays down a presumption of compatibility with the Internal Market for concentrations where the market share of the undertakings concerned does not exceed 25 %, and with the Commission Horizontal Merger Guidelines, according to which concentrations are hardly ever liable to impede effective competition if the market share of the undertakings concerned does not exceed 25% (see paragraph 18 of the Horizontal Merger Guidelines).

*An affected market should be conditional on the existence of a significant market share "increment"*

1.43 Moreover, the ECLF regrets that the Commission has opted not to rely on market share "increments". This is particularly problematic in relation to vertical relationships where

according to the current draft a market share of less than 1% may suffice to qualify a market as affected if there exists a vertical relationship to another market, either upstream or downstream, where another party to the concentration has a market share of 30% or more. The parties must then also provide all the information required in relation to the first market, although they will hardly ever possess the necessary market intelligence, given their very limited involvement on this market. We also doubt that relationships of such a tenuous nature between two markets will ever justify a finding of an impediment of effective competition. For these reasons, we strongly recommend rendering the finding of an affected market conditional on the existence of a significant market share "increment", which should also be consistent with point 6 (ii) of the draft revised Notice on simplified procedure.

1.44 Furthermore, the Commission proposes to modify the market share thresholds with regard to the "other markets" in which a concentration has a significant impact:

- The market share threshold for potential horizontal relationships has been reduced from 25% to 20% and the period within which the potential new entrant must have considered a market entry has been extended from two to three years;
- the market share threshold relating to markets where an existing market share is combined with important intellectual property rights has been increased from 25% to 30%; and
- the market share threshold concerning closely related neighbouring markets has been increased from 25% to 30%.

1.45 We are surprised by the proposal to align the market share threshold concerning potential horizontal relationships with the one applied to "normal" horizontal relationships within the meaning of Section 6.3(a). We query how the Commission has come to the conclusion that this threshold has been too high in the past. As stated above, concentrations are usually presumed to be compatible with the Internal Market if the combined market share of the parties to the concentration is below 25%. The ECLF considers that it would be more logical to establish an alignment with the market share threshold applying to closely neighbouring markets, which is 30%.

1.46 Moreover, the ECLF regrets that the above mentioned third category concerning neighbouring markets only defines a market share level with regard to one of the markets concerned. This gives rise to the same concern described in paragraph 1.43 above. Again, a party having only a very small market share will regularly find it difficult to answer questions which presuppose an intimate familiarity with the functioning of a whole market.

## **2. THE REFERRAL SYSTEM AND SIMPLIFICATION OF THE FORM RS**

### **(A) Introduction**

2.1 We believe that the referral mechanism has worked well overall since it was introduced in 2004. However, we also believe that there remains scope for further improvement. In its paper of 2 March 2009 which the ECLF submitted in response to the Commission's public consultation on the operation of the Merger Regulation, we raised a number of points with regard to the application of the referral mechanism, which are related to the issues of legal certainty and the administrative burden and time delays imposed on merging companies. We also made a number of specific proposals to address those issues. As outlined in detail in our submission of June 2012, the intervening years have generally reaffirmed our concerns.

*The referral system is in need of reform to make it more efficient*

2.2 Since the Commission's Report on the Functioning of Regulation 139/2004, we have observed a number of general trends in the field of merger review which militate in favour of a careful revision of the referral mechanism:

2.2.1 The cooperation between the Commission and the NCAs has further increased. There are still challenges that need to be overcome such as language barriers which may limit cooperation in some cases. These limits may be more relevant where agencies are conducting parallel reviews and there is a need to align views on the substantive analysis or remedies. They are less likely to be an issue with regard to jurisdictional questions. Increased agency cooperation should allow for a streamlining of the referral mechanism.

2.2.2 Many of the "younger" NCAs have become more experienced and sophisticated in merger review. While national procedures can still be burdensome to merging companies in some cases, Member States have generally managed to make their regimes work more efficiently. Pre-notification referral requests will only remain an effective tool to re-allocate cases if merging companies do not perceive the referral mechanism as unduly burdensome. To the extent national merger review becomes more efficient, so should therefore the referral mechanism.

2.2.3 Companies opposing a transaction, be it third party complainants or the target company in a hostile scenario, are playing an increasingly prominent role in referral cases. We are not advocating that it might not be legitimate for such companies to actively participate in the merger review process and point out their concerns about the transaction. Indeed, they may provide valuable input for the investigation. However, the Commission should be wary of companies using the specificities of the referral mechanism to delay or even derail the review process.

- 2.3 In view of those considerations, we welcome the Commission’s initiative to review the requirements of the Form RS as part of its current effort to simplify procedures under the Merger Regulation. The amount of information currently asked for in the Form RS is excessive. The requirements of the Form RS should be limited solely to information needed to determine whether a concentration meets the procedural criteria such that a referral is appropriate. The proposed changes to the Form RS generally reflect our concern in that regard and are overall to be welcomed. However, we believe that there remains scope to further streamline the information requirements of the Form RS in a way which eases the burden on the parties without prejudicing the Commission’s and the NCAs’ ability to conclude as to whether or not a referral is appropriate.
- 2.4 Another practical disincentive to make pre-notification requests under Article 4(4) and 4(5) of the Merger Regulation stems from the fact that the overall process is too long. In our previous papers, we suggested that the 15 working day period which the Member States have to consider the Form RS was unnecessarily long and could be shortened to 10 working days; in addition, or in the alternative, we see scope for providing that the Commission acquires jurisdiction at the earlier of (i) the expiry of the 15 (or 10) working day period; or (ii) all Member States with jurisdiction having given positive confirmation that they do not intend to exercise the veto. We also proposed that the time periods should begin with the first working day following the date of receipt of a complete Form RS by the Commission, so providing the parties with a greater element of transparency over their deal timetables. While those proposals would require legislative change, there are also a number of best practice points which could help to shorten the overall length of the referral process and which the Commission could address as part of the current initiative.
- 2.5 We understand that the Commission is currently considering certain legislative changes to the referral system which may allow the parties to directly file a Form CO with the Commission in Article 4(5) cases or which may potentially seek to strengthen the “one-stop-shop” principle in Article 22 cases. In our view, those and other careful legislative changes to the Merger Regulation would help to create a more efficient referral system and increase parties’ incentive to make use of that system more often in appropriate cases.

**(B) Form RS**

- 2.6 We generally welcome the Commission’s proposals to streamline and simplify the Form RS, which are intended to reflect the inherently preliminary nature of the referral stage. Currently the Commission’s information requirements in the context of a reasoned submission in practice all too often exceed what is strictly needed to assess the relevant procedural criteria for a referral. While admittedly this may in the past in some cases have accelerated the subsequent preparation and formal notification of a Form CO, we believe the Form RS procedure should be focused exclusively on the assessment of the jurisdictional question.
- 2.7 The following proposed changes are consistent with that objective:

- 2.7.1 We welcome the reduced information requirements in relation to customers, competitors, suppliers, vertical integration, cooperation agreements, entry, activity on neighbouring markets and HHI data.
- 2.7.2 We agree with the increasing of thresholds for affected markets (Section 3) and related information requirements (Section 4) in line with the proposed changes to the Form CO, subject to our suggestions for further improvements, set out in paragraphs 1.40 to 1.46 above.
- 2.7.3 We appreciate that the Commission wishes to encourage parties to provide information that would facilitate international cooperation (Introduction, point 1.7). However, we ask for the Commission's understanding that at the Form RS stage parties will not always have concluded definitively which regulatory clearances will be required for their transaction.
- 2.8 However, with respect to the requirement to provide information for all "plausible" affected markets (Sections 3), we refer to the discussion on the topic in the context of our comments on the Form CO (see paragraphs 1.5 to 1.15 above) and add that this would be even more excessive in the context of an assessment that is intended to be aimed solely at determining at which level a transaction should be reviewed.
- 2.9 Finally, as a general matter and in line with our overall plea to limit the pre-notification period for the reasoned submission, we ask the Commission to treat the Form RS as a short and straightforward form without requiring the submission of extensive data that is more properly reviewed in the context of the subsequent substantive assessment of the transaction. This also involves a more systematic use of waivers, as is envisaged in the Form RS (see our further comments above on the Commission's approach to waivers in paragraphs 1.32 to 1.40).

**(C) Best Practice Points**

*Observations on best practice in the application of the referral mechanisms*

- 2.10 The Commission first adopted Best Practices on the conduct of merger control proceedings in 1999. Those were then revised and updated in 2004 shortly before the recast Merger Regulation (Regulation 139/2004) came into force. The 2004 Best Practices acknowledge (at footnote 2) that they "will continue to be applicable, possibly with further amendments, under the recast Merger Regulation." They make fleeting reference (at footnote 10) to the pre-notification referral mechanisms that were to come into force on 1 May 2004, including a statement that "DG Competition will be ready to discuss with notifying parties informally the possibility of such pre-notification referrals and to guide them through the pre-notification referral process." However, the lack of practical experience at the time meant that they are largely silent as to what this means in practice. We believe that it is high time that the Commission again revised and updated its Best Practices, including to take account of developments in the application of the Merger Regulation's referral mechanisms.

- 2.11 The referral mechanisms under Articles 4(5) and Article 22 apply to transactions that are often relatively small when compared to cases generally handled by the Commission under the Merger Regulation, reflecting the fact that the parties to such deals do not meet the Merger Regulation's normal jurisdictional thresholds. This makes it important that regulatory burdens on the parties to such cases are reduced as much as possible. As explained below, there is scope to aspire to greater consistency between Commission case-teams and transparency with regard to what parties can expect through setting this out more clearly in updated Best Practices.
- 2.12 Best Practices should formalise the recent welcome development of the Commission being willing to engage in pre-notification discussions on the Form CO in parallel with the Article 4(5) referral process still being underway, as this helps to allow the parties to submit a complete Form CO immediately after the 15 working day period has expired. While there may be some Article 4(5) cases where the risk of a Member State veto is seen as so high that the Commission may be reluctant to tie up resources in pre-notification discussions on the Form CO, this could be addressed by the Best Practices contemplating that the Commission will be willing to engage in pre-notification discussions on the Form CO early in the Article 4(5) process and, in any event, will do so as soon as it or the parties have received informal indications from the Member States concerned that they are not planning to exercise a veto.
- 2.13 The Best Practices could also provide clear guidance that, in cases where time is of the essence, merging parties should engage with all relevant competition authorities at an early stage to discuss and agree where the transaction would most suitably be reviewed (e.g. sending briefing papers to the Member States with jurisdiction).
- 2.14 The Best Practices could also assist in providing that only limited pre-notification should be required for the Form RS (on the basis that it should only be necessary to determine where best jurisdiction should lie). The parties and the case team should liaise closely to determine whether information is really needed for the Form RS or whether it is more suited for the Form CO (a pre-notification draft of which can be provided in parallel if time is of the essence).

**(D) Proposals for Broader Legislative Change**

- 2.15 The proposed changes to the Form RS, along with a revision of the Best Practices, could achieve substantial improvements without any changes to the Merger Regulation. However, we believe that a set of carefully drafted legislative changes could further increase the incentive of all stakeholders to use the system more frequently in appropriate cases.
- 2.16 We understand that the Commission is currently considering certain legislative changes to the referral mechanism which may allow the companies to directly file Form CO in Article 4(5) cases or which would seek to strengthen the one-stop-shop principle in Article 22 cases. We welcome those considerations and invite the Commission to further pursue them.

### *Article 4(5)*

- 2.17 The referral mechanism should strike a reasonable balance between providing the right incentives to parties to use Article 4(5) in appropriate cases, especially by limiting the burden on the parties in terms of delays and additional work, and the NCAs' interest in keeping cases that they take a significant interest in and that they might be better placed to review. Between 2004 and 2008, the Commission received 160 Article 4(5) requests, of which 151 were accepted. Of those 151 cases, only 7% were subject to a Phase II investigation, while 50% were cleared in Phase I and 33% qualified for a simplified procedure. These figures demonstrate that Article 4(5) cases generally do not raise any concerns, and they are hardly ever vetoed by Member States. In view of those findings, the current requirement to submit a Form RS imposes an additional administrative burden on companies which is unnecessary and disproportionate. A more efficient rule under those circumstances would be to allow the parties to directly submit a Form CO if a transaction is capable of being reviewed by at least three Member States.
- 2.18 Furthermore, if a transaction is capable of being reviewed by at least three Member States, the filing of a Form CO by the merging parties in an Article 4(5) case should be sufficient to give the Commission jurisdiction to review the case. While our proposal would remove the specific veto right which Member States enjoy under the current mechanism, it would not, in our opinion, impair their ability to keep jurisdiction over those cases which they take a significant interest in. Member States could always resort to Article 9 in appropriate cases. Article 9 differs from the veto right afforded by Article 4(5) in that a concentration is not referred to the Member States automatically if so requested. In Article 9 cases, there needs to be a showing of a sufficiently adverse effect on competition in a distinct market within a Member State. Furthermore, unless that distinct market does not constitute a substantial part of the common market, it is within the Commission's discretion whether or not to grant a referral request. However, the type of cases in which Member States are likely to express their disagreement under the current Article 4(5) mechanism will often, if not always, meet the substantive criteria of Article 9. In our opinion, where a case is capable of being reviewed by at least three Member States but does not raise any substantive concerns, the "one-stop-shop" principle and procedural efficiency mandate that the case be dealt with by the European Commission, if so requested by the merging parties.

### *Article 22*

- 2.19 In our previous submissions, we raised essentially three points of concern with regard to the application of Article 22, all of which address issues of legal certainty and significant delays to deal timetables for parties contemplating mergers and acquisitions which fall below the Merger Regulation's thresholds. Those concerns continue to be valid. One of our key concerns stems from the fact that the application of Article 22 may give the Commission jurisdiction to review a concentration even if the transaction has already been cleared in one or more Member States. It is thus possible that the same transaction is subject to a merger control investigation twice - first by the relevant NCA and then by the Commission - contrary to the "one-stop shop" principle. This creates legal

uncertainty for the parties as well as significant and unnecessary associated burdens both in terms of time and cost. We therefore welcome the Commission's consideration to potentially change the Article 22 referral mechanism with a view to ensuring that transactions are actually reviewed by the competition agency best placed to do so and with a view to strengthening the "one-stop shop" principle. A number of legislative changes to Article 22 may help to achieve those goals.

- 2.20 First, the Merger Regulation should be amended to make clear that the NCAs of the Member States do not retain the right to request a referral to the Commission under Article 22 when they do not have jurisdiction to review the concentration under their own national merger control rules. The EU Merger Working Group decided only last year that inter agency-cooperation should not provide a forum for NCAs which are not reviewing a transaction to nonetheless become involved in the investigation. There is likewise no valid reason for them to be able to request the Commission to review such a transaction. The original reason for the Article 22 mechanism (providing a mechanism for the review of transactions in situations where the Member State concerned lacked a system of domestic merger control) effectively no longer exists; only Luxembourg still falls into this category.
- 2.21 Furthermore, the use of Article 22 by NCAs without jurisdiction under their own rules is contrary to principles of subsidiarity and legal certainty. It creates a perverse situation where NCAs can circumvent the fact that the national legislator has deemed such transactions to be *de minimis* and not worthy of competition scrutiny by its administrative bodies by instead requesting the Commission to investigate at the EU level. If an NCA believes that such deals without an EU dimension should be subject to review, it would be more appropriate for it to press its national legislator to lower the relevant national thresholds.
- 2.22 Second, in accordance with the "one-stop shop" principle, Article 22 should provide that, where the Commission accepts a referral request, the Commission should obtain sole jurisdiction to review the transaction with respect to the entire EU and not just with respect to the Member States which have submitted or joined a referral request. Once a referral request has been accepted, jurisdiction would thus pass from the Member States to the Commission in its entirety. This would not only avoid the burden of parallel reviews at the EU and at the national level, but would also be in line with the mechanism for upwards referrals pre-notification pursuant to Article 4(5).
- 2.23 Introducing the "one-stop shop" principle to Article 22 would, in our opinion, require a number of additional changes to the referral mechanism:
- 2.23.1 A transaction should be eligible for a referral Article 22 if there is a sufficiently strong indication that the Commission is actually the best placed to review the case. Since a referral request, if granted, would result in the case being referred in its entirety, it would be appropriate for the Commission to provide additional guidance in its Notice on Case Referral in terms of the factors which it will consider in assessing Article 22 referral requests. A particular issue exists

where only one or two Member States have jurisdiction under their domestic merger control rules, as the parties to the transaction would not have been able to make use of the Article 4(5) pre-notification referral mechanism. In such situations, the principles of subsidiarity and legal certainty make it all the more compelling for the Commission not to accept an Article 22 request, unless there are special obstacles to the NCA being able to use its domestic merger control powers to remedy competition concerns.

2.23.2 The “one-stop-shop” principle entails that an NCA which is competent to review a transaction pursuant to its national competition laws might lose that jurisdiction if the case is referred to the Commission under Article 22 even if that NCA’s Member State has not submitted or joined a referral request. Under the current system, Member States can always retain jurisdiction by neither submitting nor joining a referral request. A revised Article 22 may have to provide for a surrogate which would allow Member States to protect their interest in reviewing a transaction at a national level notwithstanding another Member State’s referral request. For example, the Commission could consider to introduce a mechanism similar to the one used in Article 4(5) which would grant each Member State competent to review the transaction under its national laws the right to express its disagreement with the referral request, in which case the referral request would have to be denied.

2.23.3 In the interest of administrative certainty, Article 22 should be revised so as to ensure that jurisdiction is determined in a final and binding manner early in the review process. At present, the clock starts running on the ability of the individual Member States to make an Article 22 referral request within 15 working days of a concentration being notified to the NCA - or otherwise made known to the NCA if there is no mandatory notification requirement. This raises a particular issue as regards certainty in respect of the UK where there is no mandatory notification regime. It also makes it possible for Member States to use Article 22 late in the overall review process - for example, where the NCA would have limited jurisdiction to impose remedies because the merging parties have no, or limited, physical presence within that Member State. An alternative that would provide greater transparency and certainty to the merging parties would instead be to have the period start from when three Member States have already been notified. To make such a change workable in practice, however, would require some form of mandatory publication of national filings (and monitoring of such publication by both the NCAs and the Commission). One possibility would be to publish received notifications on the ECN intranet.

### **3. NOTIFICATION OF EXTRA-TERRITORIAL JVS UNDER THE EUMR**

#### **(A) Introduction**

3.1 In our June 2012 submission, we commented that the mandatory notification of extraterritorial joint ventures (“JVs”) which have no immediate, substantial and

foreseeable effect on the EEA is in pressing need of reform. While such extraterritorial JVs are dealt with under the simplified procedure, that procedure itself has become far from simple. In particular, the length of pre-notification and the amount of, arguably unnecessary, information which the parties must supply is burdensome.

3.2 The key points we made in our previous submission in relation to this issue can be summarised as follows:

3.2.1 In the case of newly-created JVs, the turnover thresholds under Article 1 (2) or (3) EUMR can be met solely on the basis of two jointly-controlling parent companies' turnover. This is the case, irrespective of the geographic location of the JV, its size and whether the JV will actually have activities that could raise competition concerns within the EEA. Examples of notifiable extraterritorial JVs which ECLF members believe illustrate the inappropriateness of the current regime include the following: acquisition of joint control by Goldman Sachs and Abertis Infraestructuras in a company maintaining and operating toll road concessions exclusively in Puerto Rico (Case COMP/M.6335); acquisition of joint control by Siemens and Sinara in a company manufacturing and selling Russian locomotives that could not be used in the EEA (Case COMP/M.5795).

3.2.2 The mandatory notification of extraterritorial JVs that have no actual or foreseeable effects within the EEA creates a disproportionate administrative burden and is a waste of vital resources, both for the European Commission and for the undertakings concerned.

3.2.3 Even the use of the simplified procedure for the notification of extraterritorial JVs is costly and burdensome. The notifying parties are still required to pre-notify, supply drafts before formal notification and submit lengthy Short Forms CO, complete with information on relevant markets, market shares and parents' corporate structures.

3.2.4 When the simplified procedure was originally introduced, waivers were freely given for irrelevant information and the Commission's review tended to be quite swift. At present, the experience of ECLF members shows that the practice for granting waivers has become inconsistent and there are cases where a large amount of additional and largely unnecessary questions are asked.

3.2.5 The current notification regime under the EUMR would not seem to be in compliance with ICN Recommended Practices. According to these, jurisdiction should only be asserted where there is an "appropriate nexus" - "merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or assets levels within the territory of the jurisdiction concerned".

3.3 We proposed a number of possibilities to reform the current regime:

- 3.3.1 The EUMR should be interpreted in compliance with the effects doctrine under public international law, as was held in *Gencor*. In that case, the General Court (then Court of First Instance) held that the applicability of the EUMR “*is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*”. Equally, the Commission has acknowledged the relevance of the effects doctrine in its substantive appraisals;
- 3.3.2 The EUMR should be interpreted in compliance with the Treaty on the Functioning of the European Union, and the requirement that any regulation based on Article 103 TFEU must require an effect on trade between Member States. To the extent the Commission has concerns about the increased risk of coordination between the JV parents, this can be appropriately addressed through Article 101;
- 3.3.3 The clearest solution would be to amend the EUMR by introducing an express clause which excludes the need to notify transactions without an actual or potential effect in the EU, for example a new Article 1 (4) EUMR which states as follows:
- “A concentration that meets the thresholds laid down in paragraph 2 and 3 cannot be considered to have a community dimension unless it has a foreseeable immediate and substantial effect within the territory of the European Union”;
- 3.3.4 The Commission should issue a “best practices” communication which would collect examples of cases in which the Commission is prepared to give waivers to the obligation to notify on Short Form CO;
- 3.3.5 The Commission could streamline their existing processes by accepting shorter Short Forms CO, speeding up the review and issuing a decision as soon as it is satisfied that a concentration will indeed not have any effects in its jurisdiction. It should be possible to get through the review process within one month.

**(B) Changes made in the draft revision of Short Form CO**

- 3.4 We have reviewed the proposals the Commission made in its draft revision of the Short Form CO in reply to the initial consultation on the review of the EUMR. We welcome the changes that have been introduced:
- 3.4.1 The reduction of the information required on the parties in section 2;
- 3.4.2 The details of the concentration required in section 3; and
- 3.4.3 The introduction of the qualification in sections 6 and 7 of the Short Form CO that these sections must only be completed “for concentrations that give rise to one or more reportable markets”. Therefore, this automatic waiver will always be given in the case of extraterritorial JVs.

- 3.5 While these are welcome changes, we feel that certain remaining sections are superfluous, especially as regards the notification of extraterritorial JVs. We believe that the information required in the following sections should also be automatically waived for extraterritorial JVs. For these sections, the burden would rest on the Commission to explain why the information is required in a given case. This automatic waiver system would considerably simplify the procedures, as compared to the current proposals for a pre-notification request from one of the parties to the Commission under section 1.3. and section 1.6.(g) of the draft revised Short Form CO. We believe that automatic waivers should be given in relation to the following sections:
- 3.5.1 **Section 3.1.1.** – “identify the undertakings or persons solely or jointly controlling each of the undertakings concerned, directly or indirectly, and describe the structure of ownership and control of each of the undertakings concerned before the completion of the concentration”;
  - 3.5.2 **Section 4.4.** – “turnover in each EU Member State (indicate the Member State, if any, in which more than two-thirds of EU-wide turnover is achieved)”;
  - 3.5.3 **Section 4.5.** – “EFTA-wide turnover”;
  - 3.5.4 **Section 4.6.** – “turnover in each EFTA State (indicate the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved; also indicate whether the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25% or more of their total turnover in the EEA territory)”;
  - 3.5.5 **Section 5.3.** – “...also provide copies of all presentations prepared by or for any members of the board of management, and the board of directors, and the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders’ meeting analysing different options for acquisitions, including but not limited to the notified concentration.
  - 3.5.6 **Section 5, end** - “provide a list of the above documents, indicating for each document the date of preparation and the name and title of the addressee(s)”.
- 3.6 For extraterritorial, non-EEA JVs, we believe that **none of this information should be required**, in light of the fact that the JV will have no activities in the EEA and therefore no immediate, substantial and foreseeable effect within the EEA. In section 8 of the Short Form CO, the notifying parties are required to explain the business activities of the parent companies and the JV and why the JV will not have any effect on markets within the EEA. ECLF members believe that the information in this section in particular is sufficient to enable the Commission to issue its decision and that further information is not required to enable the Commission to carry out its assessment. There is simply no apparent reason why such a complicated notification on the EU level should be warranted, when in fact

the nexus to the jurisdiction is limited to the turnover of the parent companies, which may well be achieved with entirely unrelated activities.

**(C) Our Proposals for additional changes**

3.7 In our opinion, while the Commission's draft revised Short Form CO reduces the information required, in particular for transaction which do not give rise to reportable markets, and could potentially reduce this information load further, the Commission's revisions do not address the fundamental preliminary considerations which need to be taken into account when it comes to the notification of extraterritorial JVs – they should not be notifiable in the first place. In our previous submission to the Commission's initial consultation in June 2012, we made a number of proposals, which we have summarised above.

3.8 In addition to these proposals, we would suggest further practical solutions to the current system of notification for transactions involving extraterritorial JVs:

***(i) Inform the Commission by letter of the transaction concerning the extraterritorial JV***

3.9 The only obligation on parties to transactions involving extraterritorial JVs should be to **inform the Commission by letter** of their intention to engage in such transactions. In this short letter not exceeding 1-2 pages, the parties would provide (i) general information about their own activities on a worldwide and EU-wide level; (ii) a description of the proposed activities of the joint venture, (iii) an explanation as to why the parties believe the JV is full-function, and (iv) a summary of why the parties believe that the transaction does not result in any actual or potential effect in the EEA.

The Commission would then have one week to take a position in relation to the transaction and it would either (i) confirm the inapplicability of the EUMR or (ii) substantiate why the Commission needs to review the transaction.

***(ii) Inform the Commission by letter of the absence of full-functionality***

3.10 ECLF members have been involved in very lengthy and pointless debates with case teams on the related jurisdictional issue of the full-functionality of extraterritorial JVs. Where the JV itself will not operate anywhere near the EEA market, this issue is largely academic and cannot be said to be the most efficient use of time and resources for both sides.

To avoid this in the future, we recommend that the parties to the transaction should be able to inform the Commission by a letter not exceeding 1-2 pages as to why they consider the JV to be full-function or non-full-function. This letter could be submitted either together with the letter informing the Commission of the extraterritorial JV or separately.

Again, the Commission would have one week to adopt a position on the full-functionality of the JV. In this way, the burden would fall on the Commission to take a view different to the one proposed by the parties. If the Commission does not respond within one week, the parties' assessment of this issue will prevail for the purposes of being able to proceed with or refrain from the filing. In any event, notifications involving extraterritorial JVs should not be held up by this moot jurisdictional issue.

**(iii) *A truncated Short Form CO***

- 3.11 If, after being notified by a short letter not exceeding 1-2 pages, the Commission insists on the submission of the Short Form CO, then ECLF members believe that there should be an automatic waiver for certain sections of the Short Form CO in line with our suggestions in paragraph 3.5 above. The parties would not have to request a formal waiver and would not have to discharge the burden of proving that the information in particular sections was unnecessary. Instead, the burden of proving the necessity of this information would fall on the Commission. This automatic waiver system would considerably simplify the procedures, as compared to the current proposals for a pre-notification request from one of the parties to the Commission under section 1.3. and section 1.6.(g) of the draft revised Short Form CO.

**4. PRE-NOTIFICATION PROCEDURES**

- 4.1 The Commission has not proposed any changes to pre-notification procedures and the consultation does not invite comments in this respect. However, we consider that the Commission's proposals, such as the "all plausible" market definition requirement, risk exacerbating certain problems with the current pre-notification process that the ECLF has previously described to the Commission in our June 2012 submission "Some Proposals for Reform of the EU Merger Review Process". As set out in more detail in that submission, the experience of our members can be summarised as follows:
- 4.1.1 The pre-notification process has become in many cases significantly more burdensome for merging parties as a result of the increasing number of questions that are put by case teams during pre-notification.
- 4.1.2 The result is a longer EU review process - often longer than in many other mature merger control regimes - with less predictable timing as to when the formal review will start and end.
- 4.1.3 This is true for all cases, but is a particular problem for simplified procedure cases. Our members reported that the duration of the pre-notification process for their simplified cases varied from 2 weeks to as much as 8 months and that they were required to submit between 2 and 4 drafts of the filing and respond to between 2 and 4 questionnaires during pre-notification.
- 4.1.4 In some instances, our members have reported deciding to submit a "full" notification, notwithstanding that the criteria for the simplified procedure were

likely to be met, in order to achieve greater certainty on timing of the clearance process.

- 4.2 Viewed in a broader context, this trend is starting to make the EUMR process one of the longer, and less predictable, merger control processes in the world. Moreover, as a model for many other merger control systems (the member states, as well as for example, Switzerland, Turkey and China), it is possible that, over time, they may evolve in the same way as the Commission's enforcement practice, and become slower.
- 4.3 Our June 2012 submission identified various factors that may account for this trend, such as turnover in case handlers, lack of appropriate sector expertise, lack of coordination between case team members, and a tendency for case teams to seek to address every conceivable question before the start of Phase I and thus "front load" the entire investigation to the pre-notification stage. In our view, the current proposals – and in particular, the requirement for parties to identify all plausible market definitions and to satisfy the case team that the relevant market share thresholds are not exceeded on any of these putative markets – are likely to exacerbate this trend.
- 4.4 In our June 2012 submission, we offered various suggestions for shorter, more user-friendly pre-notification, all of which remain relevant to the processing of simplified procedure cases. In summary:
  - 4.4.1 Case Team Composition: case teams should include at least one senior official (below Head of Unit level) with relevant sector experience and solid merger control experience. In cases involving a small number of national markets, inclusion of individuals having first-hand knowledge of those markets or, if relevant, the relevant national legal/regulatory framework.
  - 4.4.2 Changes to Pre-notification Practice: it should be the Commission's stated best practice to agree with the parties, at the beginning of the case, on a timeline and target date for notification. There should also be more of a dialogue between the case team and the notifying parties during the pre-notification stage. For pre-notification processes lasting longer than a month there should be regular calls between the case team and the parties to discuss the direction and focus of pre-notification and to ensure appropriate use of questionnaires. Questionnaires should be discussed wherever possible with the parties in order to ensure that they are clearly focused on potentially relevant information. Case teams should be encouraged to respond earlier to requests for waivers, and a guidance paper should be published outlining situations where waivers are appropriate.

**EUROPEAN COMPETITION LAWYERS FORUM**

**JUNE 2013**

## ANNEX 1

	<b>HSR 4 (c) and 4(d)</b>	<b>Form CO 5.4</b>	<b>New draft Form CO 5.4</b>	<b>New draft Short Form CO</b>
<b>Nature of the document</b>	All studies, surveys, analyses and reports  Plus:  Bankers analysis and CIMs prepared in the last year (4(d))	All analyses, reports, studies, surveys, and any comparable documents	All analyses, reports, studies, surveys, and any comparable documents (iii)  Plus: <ul style="list-style-type: none"><li>• Board minutes (i)</li><li>• <b>Presentations on different options for acquisitions</b> (ii)</li><li>• <b>Analyses of affected markets</b> (iv)</li></ul>	<b>Presentations</b>
<b>Limited to competition issues (<i>market shares, competition, competitors</i>)</b>	Yes (except CIMs and documents that analyse synergies and/or efficiencies) under 4(d))	Yes	<b>No (i) and (ii)</b>  Yes (iii) and (iv)	<b>No</b>
<b>Limited to transaction</b>	Yes <sup>5</sup>	Yes	<b>No (ii)<sup>6</sup> and (iv)</b>  Yes (i) and (iii)	<b>No<sup>7</sup></b>
<b>Addressees of the document</b>	By or for an officer or directors  Plus:  Documents prepared in the last year by investment bankers,	prepared by or for any member(s) of the board of directors, or the supervisory board, shareholders' meeting,	prepared by or for <b>or received by</b> any member(s) of the <b>board of management</b> , the board of directors, the supervisory board, or	<b>Prepared by or for any members of the board of management, the board of directors, the supervisory</b>

<sup>5</sup> Includes pitch books but limited to those that discuss the transaction.

<sup>6</sup> Different options for acquisitions, including but not limited to the notified concentration.

<sup>7</sup> Different options for acquisitions, including but not limited to the notified concentration.

	consultants or other advisors for any officers or directors		the shareholders' meeting	<b>board, or the shareholders' meeting</b>
<b>Name and titles</b>	Of the authors	Of the authors	Of the <b>addressees</b>	Of the <b>addressees</b>
<b>Waiver possible</b>	No	Not specifically	<b>Yes (iii) and (iv)</b>	Not specifically

## ANNEX 2

### SUMMARY OF RECOMMENDATIONS

	RECOMMENDATION	Paragraph Reference
<b>PART 1: CHANGES TO FORM CO AND SHORT FORM CO</b>		
<b>1</b>	Remove the revised wording on "plausible market" definitions (in all Forms) on the basis that it will significantly increase uncertainty and the administrative burden imposed on notifying parties.	1.5 et seq.
<b>2</b>	Do not modify Article 5.4 of the Form CO/ introduce 5.3 Short Form CO and retain the current practice of requesting additional supporting documents via an information request in appropriate cases and consider providing guidance encouraging parties to gather additional documents in the event of a more complex analysis.	1.18 et seq.
<b>3</b>	<p>Provide guidelines on the use of waivers. These guidelines should in particular:</p> <ul style="list-style-type: none"> <li>• List the categories of information where parties are invited to ask for waivers as items where information has to be provided only exceptionally. And add others, such as for example, Section 8.9 concerning Research and Development, which will often be irrelevant. It should be quite straightforward to define the conditions for an exemption for the obligation to provide information on R&amp;D activities. IF there is no change in response to our point 6 relating vertical markets below, waivers for Sections 7 and 8 should also regularly be given if the market share in one of the related markets is below 5%</li> <li>• Define certain realistic time-limits within which the Commission should decide on waiver requests. It would be reasonable to expect that a request could be dealt with within five working days.</li> </ul>	<p>1.35</p> <p>1.35</p> <p>1.36</p>
<b>4</b>	Remove the proposal whereby the Commission reserves the right to ask for additional information, such as for example contact details (see Footnote 32 of the draft revised Form) as a condition for a complete notification. This suggestion runs counter to the very idea of simplifying the process and rendering it more predictable. While we do not dispute that it may sometimes make sense to request additional contact details in a pre-notification phase, we recommend that requests for additional information should be handled separately, by means of formal or informal information requests if necessary.	1.38
<b>5</b>	Confirm that the modified wording in Section 6.1 means that the markets must be relevant both with regard to the product and the geographical scope, so that a vertical relationship which merely exists because two parties are active in related product markets, without these markets being related geographically, is irrelevant.	1.40

	<b>RECOMMENDATION</b>	<b>Paragraph Reference</b>
<b>6</b>	Introduce the use of significant market share increments for determining whether or not an affected market is created. This will avoid the situation where a 1% market share constitutes an affected market where another party has 30% or more of a vertically related market. (alternatively see point 3)	1.42
<b>7</b>	Remove the proposal to align the market share threshold concerning potential horizontal relationships with the one applied to “normal” horizontal relationships within the meaning of Section 6.3(a). It would be more logical to establish an alignment with the market share threshold applying to closely neighbouring markets, which is 30%.	1.44
<b>PART 2: THE REFERRAL SYSTEM AND SIMPLIFICATION OF THE FORM RS</b>		
<b>8</b>	<p>As the ECLF has previously suggested, enhance the referral process by:</p> <ul style="list-style-type: none"> <li>• Shortening the unnecessarily long 15 working day period which the Member States have to consider the Form RS to 10 working days</li> <li>• (In addition, or in the alternative) providing that the Commission acquires jurisdiction at the earlier of (i) the expiry of the 15 (or 10) working day period; or (ii) all Member States with jurisdiction having given positive confirmation that they do not intend to exercise the veto.</li> <li>• Making time periods begin with the first working day following the date of receipt of a complete Form RS by the Commission, so providing the parties with a greater element of transparency over their deal timetables.</li> </ul>	2.4
<b>9</b>	<p>Revise and update the Commission's Best Practices, including to take account of developments in the application of the Merger Regulation’s referral mechanisms.</p> <p>Best Practices should:</p> <ul style="list-style-type: none"> <li>• Formalise the recent welcome development of the Commission being willing to engage in pre-notification discussions on the Form CO in parallel with the Article 4(5) referral process still being underway, as this helps to allow the parties to submit a complete Form CO immediately after the 15 working day period has expired;</li> <li>• Provide clear guidance that, in cases where time is of the essence, merging parties should engage with all relevant competition authorities at an early stage to discuss and agree where the transaction would most suitably be reviewed (e.g. sending briefing papers to the Member States with jurisdiction).</li> <li>• Provide that only limited pre-notification should be required for the Form RS (on the basis that it should only be necessary to determine where best jurisdiction should lie).</li> </ul>	<p>2.10</p> <p>2.12</p> <p>2.13</p> <p>2.14</p>

	<b>RECOMMENDATION</b>	<b>Paragraph Reference</b>
<b>10</b>	<p>The ECLF also proposes legislative changes as follows:</p> <ul style="list-style-type: none"> <li>• If a transaction is capable of being reviewed by at least three Member States, the filing of a Form CO by the merging parties in an Article 4(5) case should be sufficient to give the Commission jurisdiction to review the case. The current requirement to submit a Form RS imposes an additional administrative burden on companies which is unnecessary and disproportionate.</li> <li>• The Merger Regulation should be amended to make clear that NCAs do not retain the right to request a referral to the Commission under Article 22 when they do not have jurisdiction to review the concentration under their own national merger control rules.</li> <li>• Article 22 should provide that, where the Commission accepts a referral request, the Commission should obtain sole jurisdiction to review the transaction with respect to the entire EU and not just with respect to the Member States which have submitted or joined a referral request.</li> <li>• A transaction should be eligible for a referral Article 22 if there is a sufficiently strong indication that the Commission is actually the best placed to review the case.</li> <li>• It would be appropriate for the Commission to provide additional guidance in its Notice on Case Referral in terms of the factors which it will consider in assessing Article 22 referral requests.</li> </ul>	<p>2.17 / 2.18</p> <p>2.20</p> <p>2.22</p> <p>2.23</p> <p>2.23</p>
<b>PART 3: NOTIFICATION OF EXTRA-TERRITORIAL JVs UNDER THE EUMR</b>		
<b>11</b>	Amend the EUMR to introduce an express clause which excludes the need to notify transactions without an actual or potential effect in the EU.	3.3.3
<b>12</b>	Issue a “best practices” communication which would collect examples of cases in which the Commission is prepared to give waivers to the obligation to notify on Short Form CO.	3.3.5
<b>13</b>	Streamline existing processes by accepting shorter Short Forms CO, speeding up the review and issuing a decision as soon as it is satisfied that a concentration will indeed not have any effects in its jurisdiction. It should be possible to get through the entire review process within one month.	3.3.6
<b>14</b>	<p>Proposal for additional changes:</p> <ul style="list-style-type: none"> <li>• The only obligation on parties to transactions involving extraterritorial JVs should be to inform the Commission by letter of their intention to engage in such transactions.</li> <li>• The information required in the sections 3.1.1, 4.4, 4.5, 4.6 and 5.3 should be automatically waived for extraterritorial JVs. For these sections, the burden would rest on the Commission to explain why the information is required in a given case/alternatively provide a “truncated Form CO”.</li> </ul>	3.5/3.9/3.11

	<b>RECOMMENDATION</b>	<b>Paragraph Reference</b>
<b>PART 4: PRE-NOTIFICATION PROCEDURES</b>		
<b>15</b>	Case teams should include at least one senior official (below Head of Unit level) with relevant sector experience and solid merger control experience. In cases involving a small number of national markets, inclusion of individuals having first-hand knowledge of those markets or, if relevant, the relevant national legal/regulatory framework.	4.4.1
<b>16</b>	<p>It should be the Commission's stated best practice to agree with the parties, at the beginning of the case, on a timeline and target date for notification.</p> <p>There should be more of a dialogue between the case team and the notifying parties during the pre-notification stage.</p> <p>For pre-notification processes lasting longer than a month, there should be regular calls between the case team and the parties to discuss the direction and focus of pre-notification and to ensure appropriate use of questionnaires.</p>	4.4.2
<b>17</b>	Case teams should be encouraged to respond earlier to requests for waivers.	4.4.2