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COVER NOTE

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE EVALUATION of procedural and jurisdictional aspects of EU merger control

Delegations will find attached document SWD(2021) 67 final.

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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE EVALUATION

of procedural and jurisdictional aspects of EU merger control

{SEC(2021) 156 final} - {SWD(2021) 66 final}

1. BACKGROUND AND OBJECTIVES

EU merger control aims to ensure that major corporate reorganisations do not result in lasting damage to competition in the internal market. To achieve this aim, the EU Merger Regulation grants the Commission exclusive jurisdiction to review whether such concentrations may significantly impede effective competition in the internal market or a substantial part of it.

The scope of application of EU merger control is determined using turnover thresholds. If the merging companies' turnover at worldwide, EU and Member State level exceeds certain thresholds, they have to notify their concentrations to the Commission and must not implement them before receiving approval. Concentrations not captured by EU merger control may still come within the jurisdiction of one or several EU Member States. To ensure that the most appropriate authority carries out the assessment, and as long as certain conditions are met, the review can be referred from the Commission to the Member States or vice versa under the EU Merger Regulation's referral system.

The obligation to notify the concentration and delay its implementation until approval applies regardless of whether the concentration is likely to raise competition concerns. To alleviate the burden on businesses and the Commission itself, the Commission has put in place specific rules for a simplified procedure that applies to categories of concentrations generally considered unproblematic and allows for a simpler and faster review.

The Commission launched in 2016 an **Evaluation** of selected aspects of EU merger control. The aim of the Evaluation is to build on the Commission's work in previous years and to assess the functioning of selected aspects of EU merger control, focusing on two related topical issues identified by stakeholders and the Commission.

- (1) The first question is whether the current framework allows the Commission sufficient scope to capture and review concentrations which may have a significant impact on effective competition in the internal market or, conversely, whether potentially problematic mergers may fall outside the Commission's jurisdiction. At the core of this topic is the issue of whether the turnover-based thresholds are effective, particularly as there is evidence of transactions involving highly valued firms *with limited turnover* that may, however, play (or develop into playing) a significant role in the market in sectors like digital, pharma and others.
- (2) The second question is whether specific initiatives to further simplify the EU merger regime adopted in 2013 have significantly reduced the burden involved in merger proceedings and resulted in a more efficient use of Commission resources, without detracting from effective merger control.

In addition to those two main topics, the Evaluation also assessed the system of case referrals.

The Evaluation has gathered evidence on the functioning of these specific jurisdictional and procedural aspects, with a view to informing potential policy action in the future, including possible reforms of the relevant regulatory texts.

To carry out its Evaluation, the Commission drew on multiple sources of information. Building on previous work and consultations, the Commission carried out an open public consultation, held numerous meetings with stakeholders, carried out extensive research into deal activity and analysed its own enforcement practice. The Commission also relied on evidence from a separate work stream on the effects of digitisation on competition policy, and closely monitored the introduction and application of additional jurisdictional thresholds based on transaction value in Austria and Germany.

The Evaluation did not examine the overall functioning of the EU merger regime, and so did not touch upon recent debates concerning the substantive assessment of mergers, which concern the factors that the Commission should take into account when assessing whether a notified concentration can be approved. The Commission has launched separate specific work streams and initiatives to examine and address these and closely related topics.

2. MAIN FINDINGS

The Evaluation indicates that, at this stage, the EU Merger Regulation's turnover-based jurisdictional thresholds, complemented with the referral mechanisms, have generally proved effective in capturing significant transactions in the EU internal market. The absence of complementary transaction value-based thresholds has not in itself significantly impaired the effectiveness of the existing jurisdictional thresholds, as transaction value may not always be sufficiently correlated with potential competitive significance. Besides, introducing a value-based threshold would likely increase the costs of the system for the Commission and merging parties, and would thus have to be carefully balanced against any expected added value.

In any case, the Evaluation has also shown that under the current jurisdictional rules, a number of transactions which could potentially have an impact on competition in the internal market are not caught by the EU Merger Regulation's jurisdictional thresholds. While this issue has partially been mitigated by referrals from EU Member States, certain concentrations with cross-border impact in the EU, in which the turnover was not indicative of the competitive significance of (some of) the merging companies, have not been reviewed by the Commission or by any Member State. That includes in particular acquisitions of nascent competitors and innovative companies, including in (but not limited to) the digital, pharmaceutical, biotechnology and certain industrial sectors.

In that regard, the Evaluation indicated that the Commission's current approach of discouraging referrals under Article 22 of the EU Merger Regulation where the concentration falls outside the referring Member State's national merger control thresholds *limits the effectiveness of these referrals* as a corrective mechanism to the turnover-based thresholds. In practice, under this approach, only transactions which are notifiable in at least one Member State can be potentially referred under Article 22. This provision allows Member States to ask the Commission to examine any concentration that does not have an

EU dimension but which affects cross-border trade and threatens to significantly affect competition within the territory of the Member State(s) making the request (irrespective of whether such transaction is notifiable in the referring Member State). Consequently, the current practice has resulted in the potential of the corrective mechanism offered by Article 22 not being fully realised, thus reducing its effectiveness. Accepting and encouraging the referral of such relevant transactions would give Member States and the Commission the flexibility to target concentrations which merit review at EU level, without imposing the notification of transactions that do not.

Furthermore, the evidence collected has overall borne out the belief that the EU Merger Regulation's referral mechanisms have generally served their objectives well in ensuring a 'one-stop shop' and in successfully allocating cases to the best placed authority. At the same time, the mechanisms have been effective in avoiding a significant number of parallel investigations at national level and – as a result – have reduced burden for merging parties and reduced the risk of conflicting outcomes in different Member States. This conclusion does not detract from the noted limitations coming from the Commission's current practice of discouraging referrals under Article 22 from Member States that do not have jurisdiction to review the concentration.

As regards simplification, the Evaluation found that the 2013 simplification package has been effective in increasing the simplified procedure's application to unproblematic mergers and in reducing burden both for businesses and the Commission, while ensuring effective enforcement of the merger rules. However, it also showed that there is still some, albeit possibly limited, room for further simplification and cutting of red tape, notably in the treatment of some categories of cases which are generally not likely to raise competition concerns and in the information required to notify a concentration. However, the further simplification explored in the Evaluation that would require amendment of the EU Merger Regulation did not receive generalised support from either public or private stakeholders.

The Evaluation also showed that, while some improvements are possible, the jurisdictional and procedural aspects evaluated: (i) continue to pursue relevant objectives; (ii) have overall achieved their objectives efficiently and (iii) in a way which is consistent with other policies and actions at EU level; and (iv) have provided EU added value.