



COMMENTS TO THE EUROPEAN COMMISSION'S PROPOSAL TO REVISE ITS SIMPLIFIED MERGER CONTROL PROCEDURE

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This submission is presented to the Commission on behalf of Japan Business Council in Europe ("JBCE"). JBCE is registered in the EU transparency Register under ID number 68368571120-55.

1. About JBCE

JBCE is the European organisation representing companies of Japanese parentage operating in Europe. The mission of JBCE is to contribute to European Public Policy. JBCE membership currently consists of more than 60 multinational companies and covers a wide range of industry sectors, including air conditioning, automotive, chemicals, consumer electronics, engineering, industrial machinery, information and communication technology, medical equipment, photo and imaging equipment.

The JBCE takes an active role in enhancing the understanding of Japanese companies and their businesses in Europe and in putting forward the views of its members on legislative issues currently under debate and on the public policy issues which will shape the years to come (www.jbce.org).

2. General Comment

JBCE Members have frequently notified transactions under the current merger control regime and are pleased to be able to contribute to the Commission's consultation on the basis of their extensive experience.

JBCE welcomes the Commission's willingness to consider industry views before it sets out to revising rules that directly concern business. JBCE for its part welcomes the Commission's initiative to reconsider the procedures currently in operation with a view to extending the simplified procedures to a larger number of transactions, cutting red tape and streamlining the information requirements in the underlying notification forms. The overall objective, the Commission states, is to make administrative procedures less burdensome for business.

Under the current proposal, although it broadens the scope for the applicability of the simplified procedure (and thus the use of the Short Form CO) and thus allows the Commission to reduce its own workload, this is not mirrored by a corresponding reduction in the administrative burden placed on the notifying parties. Quite to the contrary, there appears to be a significant and burdensome increase in certain information requirements the Commission seeks to introduce.

JBCE submits that this extension of the information requirement thus falls short of the Commission's stated objective of cutting red tape and making administrative procedures less burdensome for business.

In the sections below, JBCE will address those points that it would particularly like to bring to the attention of the Commission in this context. Points of reform not addressed below are generally welcomed by JBCE or considered neutral in their application.

3. Extension of the Scope of the simplified procedure

- Increase in market share thresholds

The Commission proposes to increase the market shares that serve as the thresholds below which a transaction may qualify for simplified treatment from 15% to 20% for horizontal relationships and from 25% to 30% for vertical integration. The increase of these thresholds will most certainly lead to an increased number of cases falling within the scope of the simplified procedure.

JBCE can only support this change as it brings the present thresholds in line with thresholds relied upon in other areas of competition law (e.g. rules concerning vertical restraints and horizontal cooperation) below which there are generally speaking no major competition concerns detected. It therefore has the benefit of increased consistency and may bring within the scope of the simplified procedure certain transactions that currently are the subject of notification by means of a regular Form CO.

- Application of a concentration increment threshold

In its proposal, the Commission further increases the number of transactions that could potentially benefit from the simplified procedure by introducing a combination of two new cumulative criteria: 1) the combined market share of all parties should be (over 20% and) below 50%, and 2) the HHI delta brought about by the combination should be less than 150.

JBCE greets this as a welcome development in the Commission's thinking. After all, transactions that do not bring about a significant change in the market should qualify for simplified treatment.

However, the Commission may wish to reconsider the scope of the HHI increment threshold of 150. Simulations suggest that this threshold can be exceeded relatively easily and thus will likely bring only very few additional transactions within the scope of the simplified procedure.

- Joint ventures

The Commission clarifies in its current proposal that, with regard to the creation of joint ventures, relationships that exist only between the undertakings acquiring joint control (rather than between the JV and a parent) are not considered horizontal or vertical relationships for the purpose of applying the Simplified Procedure Notice.

JBCE welcomes this clarification, in particular because a significant number of Japanese undertakings invest in Europe by way of establishing joint ventures. Any reduction in the burden for setting up such joint ventures is highly welcomed by the Japanese industry.

Notwithstanding this positive step, JBCE sees further room for facilitating the creation of joint ventures in Europe. More specifically, JBCE encourages the Commission to consider a further broadening of the scope of the Notice on the Simplified Procedure in order to allow a larger number of joint ventures to enjoy the benefits of a simplified procedure. In this respect, the Commission may also wish to consider raising the EUR 100 million threshold in para. 5.a) of the draft Simplified Procedure Notice, which has not been reviewed in more than a decade.

4. Procedural timing

JBCE notes that the Commission does not fix a set short deadline for the handling of a simplified procedure.

JBCE realizes that the Commission may be bound by the timing of the consultation with third parties and certain internal requirements, but it would have welcomed a firm short timeframe for the clearance of simplified Phase I cases. Given the ground that is usually already covered during pre-notification discussions, it should be possible to come to an early conclusion. This is generally felt to be of great benefit to business. Sometimes the gain of only a few days for implementation of a transaction may bring significant advantages to business.

Commission practice in some cases has demonstrated that the implementation of such shortened timeframe can be achieved.

JBCE therefore requests the Commission to make an additional effort in setting itself a more ambitious target for the timing of a case decision in simplified cases.

In the same vein, the Commission should be mindful of the overall duration of the procedure, specifically in simplified procedure cases. Therefore, JBCE suggests that the Commission commits to restricting the duration of the pre-notification phase to the minimum necessary in this group of cases.

5. Proposed information and documentary requirements.

a) Form CO

i) Internal documents

The Commission is proposing to extend the scope of Section 5.4 of Form CO to include information that is currently not requested.

In the view of JBCE, the proposed extension of this information requirement of Section 5.4 is likely to bring about an additional burden on notifying parties that is not justified in the context of a simplification exercise aimed at making administrative procedures less burdensome for business.

It is rather disconcerting to learn that the Commission intends to request parties to produce documents that may be totally unrelated to a notified transaction. Particularly the Commission's proposal to request information on alternative acquisition options –whether these materialized or not- gives rise to serious concerns. Such information is not only highly sensitive and often covered by very strict non-disclosure obligations; it also concerns third parties that are not involved in the notified transaction. The Commission fails to provide a reasonable explanation for this significant expansion. It opens the door to unwarranted information gathering that elsewhere in EU competition law has been prohibited as illegitimate *fishing expeditions* for good reasons¹, as confirmed by the General Court in its Nexans judgment².

JBCE has the following specific observations on the expanded scope of Section 5.4:

- Notifying parties will have to submit minutes of the meetings of the board of management, board of directors, supervisory board and shareholders' meeting at which the transaction has been discussed

JBCE believes that particularly for transactions that have had a relatively long and slow incubation time, this means a very significant increase in the amount of documentation that the notifying parties may need to supply. Often the older information has lost all relevance to the final deal as notified.

- The Commission intends to request notifying parties to submit all and any presentations analysing different options for acquisitions, including but not limited to the notified concentration.

JBCE wishes to express its serious concerns about this proposed modification.

As already raised preliminarily above, JBCE fails to understand how this requirement fits in the Commission's simplification objectives formulated in its various statements in relation to the consultation, and how this makes administrative procedures easier on business. Indeed, the proposed expansion covers potential transactions that have not (yet) materialized for various reasons and are, as such not relevant to the assessment of the notified transaction and its impact on competition. Should the Commission see any specific need in a particular situation where this could be relevant, it could always request such information as relevant to its investigation.

¹ Article 20(4) of Regulation No 1/2003

² Case T-135/09 – *Nexans v Commission* : "... when the Commission carries out an inspection at the premises of an undertaking under Article 20(4) of Regulation No 1/2003, it is required to restrict its searches to the activities of that undertaking relating to the sectors indicated in the decision ordering the inspection and accordingly, once it has found, after examination, that a document or other item of information does not relate to those activities, to refrain from using that document or item of information for the purposes of its investigation.

First of all, if the Commission were not subject to that restriction, it would in practice be able, every time it has indicia suggesting that an undertaking has infringed the competition rules in a specific field of its activities, to carry out an inspection covering all those activities, with the ultimate aim of detecting any infringement of those rules which might have been committed by that undertaking. That is incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society"...

JBCE fails therefore to see how this could lead to an improvement of the merger control procedure that outweighs the additional burden placed on the notifying parties. It should not be forgotten that the reasons that lead companies to decide whether or not a transaction is a good fit and thus should be pursued or not, may have little to do with competitive assessment. Furthermore, any judgement passed on third companies, not party to a notified transaction is by nature extremely sensitive, not only in respect of that party, but also for the company passing such judgement.

Alternative transactions that are at the time of notification still under consideration are even more sensitive and by nature not shared among the same group of persons involved in a transaction that has moved to its final stages, which is typically the case of notified transactions.

The sensitivity of this information and the potential that any leak may have on the stock market or on the chances that a transaction may be completed cannot easily be underestimated. As such, it may not be in the interest of the Commission to have such sensitive information in its possession. Indeed, it would place an increased duty of care on the Commission that goes well beyond the handling of regular confidential data in relation to a transaction that has been announced to the public before or at the time of notification.

This duty of care extends to the handling of the information in contacts with the notifying parties themselves. It is not unlikely that members of the notifying parties' teams in charge of the notification have and are not supposed to have any access to and knowledge of any such "alternative" options. This could therefore become a serious obstacle in the exchanges between the Commission and the relevant team on the side of the notifying party concerned.

The above may become even more problematic if there is an exchange of information between the Commission and national authorities in the context of the European Competition Network (ECN). It would also have an impact on the willingness by parties to grant waivers covering the exchange with other authorities.

JBCE therefore urges the Commission to re-consider its proposed modification on this point.

- In a further broadening of the information requirement placed on notifying parties, the Commission proposes to oblige parties to submit analyses, reports, studies, surveys and any comparable documents of the last three years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions.

In many cases, where an abundance of information is available, two- or three-year old reports may no longer be relevant for the Commission's review of the transaction. In other situations, notably where there is a paucity of data available, such reports and analysis will already be provided spontaneously, as it will be the closest available to a recent analysis. In situations

where sufficient recent data is available, the blanket three year information obligation would appear to be excessive and disproportionate.

By casting the net as wide as the Commission is proposing to do, it includes any internal document that may only have a remote relevance to the notified transaction. This will only create scope for additional debate during a very time-sensitive period, where both the Commission case team and the notifying parties have to be as efficient as possible to meet the various deadlines. Hunting down information that may potentially only be of limited relevance, if any, to the competitive assessment, will not contribute to a more efficient assessment process.

ii) Quantitative economic data

The introductory remarks of the current draft of the revised Form CO contain the introduction of a requirement to provide information on **quantitative economic data** (see heading 1.8 of draft revised Form CO). The Commission has in the past always been able to request such quantitative economic data on a case by case basis where relevant to a particular case.

JBCE does not understand why the Commission wishes to make the provision of such information now standard practice for the purpose of any concentration assessment, regardless of its particular relevance.

On the contrary – JBCE is of the opinion that the old practice of requesting quantitative economic data on a case-by-case basis worked well and that there is no need to deviate from this practice by introducing another burden on notifying parties by way of making the review of quantitative economic data standard practice.

While the draft stresses that this requirement does not affect the completeness of a Form CO, JBCE notes that the introduction of such a new category of information into the text of the Form CO itself will reduce the perceived need on the part of individual case teams for an assessment on the actual relevance of the data to an individual case.

JBCE requests the Commission to remove this additional requirement from the text of the revised Form CO to avoid that the administrative burden on companies is unnecessarily increased.

iii) Contact details

The current draft of the revised Form CO contains a number of changes with regard to the requirement to provide contact details. More specifically: (i) the requirement to provide contact details for suppliers has been taken out; (ii) the Commission may request any additional contact details it may like to receive (footnote 43 of the draft revised Form CO); and (iii) “instances” of incorrect contact details may render a notification incomplete (see page 4 of the introduction to the draft revised Form CO). In addition, the categories of requested contact details remain the same.

JBCE welcomes any reduction in the number of contact details to be provided for a complete Form CO. In comparison to notifications all around the world (in particular in comparison to the US, but also to major European jurisdictions such as Germany), JBCE has noted that EU notifications consistently require a particularly high amount of contact details. JBCE thus welcomes the deletion of the requirement to provide contact details for suppliers.

JBCE, on the other hand, is concerned that giving case teams the opportunity to ask for any other contact details they may see fit and making the provision of these contact details a requirement for the completeness of the Form CO in practice could result in severe delays of submissions. JBCE thus urges the Commission to delete footnote 43 from the draft revised Form CO. Also, JBCE expects that the change in the Form CO's introduction from "multiple instances" of incorrect contact details to "instances" of incorrect contact details leading to incompleteness will not lead to a change in the current practice of common sense and produce a high number of unnecessary rejections of otherwise complete filings.

Finally, JBCE invites the Commission to consider that past discussions with case teams about the completeness of the submission of personal fax numbers (which are much less used today than at the time the Form CO was created, and sometimes are just not available) could be avoided if the requirement to provide fax numbers would be dropped altogether.

JBCE invites the Commission to reconsider its position and ensure that also in future its information requirements are proportionate to what is really necessary to the assessment of the transaction at issue and take into consideration notably the confidentiality issues raised above. The proposed extensions of the information requirements as discussed above will definitely not fit with the Commission's stated objectives of streamlining the documents and rendering the merger review process more efficient and above all less burdensome for business.

b) Short Form CO

In the context of the revised Short Form CO, the Commission's proposals include a new Section 5.3 in which it is required for the parties to submit 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"*.

JBCE submits, in line with the comments made above, that this extension appears to be out of sync with the Commission's stated objective of making the process more business-friendly by reducing administrative burden placed on business.

The simplified procedure is to cover any transactions that are deemed not to raise any competition concerns. It is not clear, therefore, why the Commission combines the broadening of the scope of the simplified procedure (e.g. by increasing the thresholds below which simplified notification is possible) while significantly extending the information requirements for any transactions that may thus benefit from a simplified notification, and even for those

transactions that would already have come under the simplified procedure without the proposed changes. The Commission does not provide any sound motivation for this expansion.

JBCE therefore invites the Commission to reconsider the additional information requirements in the true spirit of rendering the process more efficient for everyone, including for the businesses involved in the transaction.

6. Information waivers

The Commission is intending to provide further guidance on its willingness to waive certain information requirements. However, the Commission only does so in the context of its full Form CO. There is no corresponding guidance provided in respect of the Short Form CO, even if the Commission indicated that also in the context of the Short Form, certain information may not be necessary, depending on the case.

JBCE welcomes the Commission's Guidance on waivers in the context of Form CO. At the same time, it should perhaps be made clear that the guidance provided is not exhaustive and that parties can also seek a waiver from other information requirements than the ones referred to explicitly by the Commission. The Commission may wish to consider adopting a corresponding approach in respect of its Short Form CO.

While the Commission's intentions to waive certain categories of information if not required are laudable, the waiver introduced in the current draft is not helpful and might actually have the opposite effect. This is because the notifying company now faces the decision between either accepting the burdensome information requirements (even if the requested information is irrelevant for a specific case) or to engage into a further procedural step by way of formally asking for a waiver from the case team.

JBCE is also concerned by the fact that the Commission indicates that it may withdraw any waiver at any time. JBCE fears that the potentially arbitrary withdrawal of such waiver may undermine the legal certainty that the Commission seeks to provide in the form of its Guidance. Like for the granting of the waiver itself, the Commission may wish to provide clarity as to the criteria that could trigger the Commission's withdrawal of its waiver.

Again, with the time constraints that apply in merger assessment cases, it is important to provide transparency so that none of the parties is faced with arbitrary information requirements resulting from a discretionary waiver that could upset the timetables late in a case. In such situations the parties may have wished to provide the information up front, to avoid running out of time later on. Also, as the discretion of how to deal with these waivers lies with the case team and as each case team will adopt a different approach, the proposal leads to an increased uncertainty as to what is required for a complete notification.

Against this backdrop, JBCE invites the Commission to review and amend guidance provided in relation to the waivers and to in particular instruct case teams to make frequent and unbureaucratic use of such waivers.

7. Alternative market definitions and data on such markets

In Section 6 of both forms (CO and simplified CO), the Commission requires that the notifying party or parties submit, in addition to any product and geographic market definitions they consider relevant, 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).

In practice, controversy on market definitions is usually dealt with at the pre-notification stages in concert between the parties and the Commission. In fact, it is precisely controversy on relevant markets that is often the cause for significant delays in the actual filing of transactions.

If the parties will now have to provide their assessment of all plausible market definitions, regardless of the understanding reached during pre-notification also in the notification itself, this will significantly increase the burden on the notifying parties, particularly in markets in respect of which data is scarce and for market definitions that are hypothetical only. It is easy to imagine that discussion could emerge on what constitutes *plausible*. What the Commission considers plausible may be considered hypothetical by the parties given their practical experience and vice versa. This would create controversy in and by itself.

It should in this context not be forgotten that the Commission could always address a plausible alternative market definition if, despite the preliminary understanding between the Commission and the notifying party during pre-notification, an interested third party steps forward and raises legitimate doubts on the validity of the market definition proposed.

This reflects the current situation, which appears to provide sufficient safeguards as to the correctness of the market definition.

JBCE therefore invites the Commission to reconsider its proposals on this point and avoid that again the parties are faced with an increased administrative burden.

8. Local effects of JVs.

JBCE would like to attract the Commission's attention to the fact that its members have had to notify transactions that in fact had no effect in the EU whatsoever, as there was no link to the EU Market or activity foreseen that could possibly affect trade within the EU.

Currently, the jurisdictional thresholds clearly bring such transactions within the scope of the Commission's review. Given the significant burden this places on the parties to such transactions, the present review of the simplified procedure may be the ideal opportunity for the Commission to dispense of this category of transactions for review, e.g. by providing for a set of nominal review criteria.

The Commission could introduce such criteria in line with the *Gencor* case³, and only require simplified or full notification for those “extraterritorial” cases that have a *foreseeable* and *substantial effect* on competition within the EU.

If the Commission wishes to avoid legislative change on this point, it could for joint ventures that would fall within the scope of the above proposed criteria require a *nominal notification*, made on a **Nominal Form CO** that requires only a minimum of information for the Commission to assess whether the criteria are indeed met. Many off-shore joint ventures would thus no longer require notification beyond a nominal one. This would have the potential of seriously reducing the burden on the parties involved, as well as on the Commission.

JBCE invites the Commission to use this opportunity to allow for a nominal notification and assessment route available for those joint ventures that are created outside the EU that will not have a foreseeable and substantial effect on competition within the EU.

9. Exclusion of certain joint ventures from simplified treatment

The Commission proposes in its revised Article 11 of the Notice that certain joint venture transactions may be excluded by the Commission from the scope of the simplified procedure (and will thus be reviewed under the regular merger control procedure, requiring i.a. the parties to submit a full-scale Form CO), despite such transaction meeting the formal requirement for simplified treatment. The Commission states that it can do this in situations where the proposed joint venture is active outside the EEA, but its products and/or services constitute important inputs for product and/or services that are sold in the EEA, and/or where the proposed joint venture is likely to achieve significant sales, including in the EEA, in the foreseeable future.

JBCE fails to understand why this category of transactions has to be set apart from the Commission's general discretion to require a full notification and apply the regular procedural Phase I requirements if it has serious concerns about the effects of the transaction on competition.

In addition, JBCE believes that the proposed text of article 11 is vague and non-committal and therefore does not provide the parties concerned with the required legal certainty.

The Commission does not indicate in which situations it finds products or services produced by the joint venture to constitute "important" inputs. No quantitative threshold has been provided in this context.

In its current incarnation, the provision leaves the path open to situations where the inputs produced by the joint venture would very indirectly reach the EU, by incorporation into products that are subsequently produced and shipped by other parties to the EU.

³ Case T-102/96 *Gencor v Commission*, ECR 1999 p. II-753.

JBCE also requests that a not insignificant drafting mistake be corrected. Indeed article 11 says that the joint venture risks achieving significant sales in the foreseeable future "*including* in the EEA" could trigger the application of the regular procedure.

This means that any level of sales, anywhere, could trigger the full notification requirement. That must be a mistake, since it also catches situations where significant future sales outside the EEA would be caught, even in the absence of any EEA sales.

Again, the Commission seems to increase the administrative burden for business rather than reducing it. The treatment of extraterritorial joint ventures in line with JBCE's proposal for a local effects test and corresponding nominal notification requirement as per above should provide sufficient safeguards to the Commission for a proper assessment in virtually all cases concerned.

10. Minority Shareholdings

JBCE closely follows the continuous evolution of the EU merger control rules of which the present consultation forms a part.

JBCE understands that the Commission intends to hold further consultations on additional reforms of its merger control system, notably concerning the inclusion of minority shareholdings into the purview of the merger control regime.

JBCE invites the Commission to take a holistic approach to the reforms and ensure that the administrative burden and red tape negatively affecting businesses are reduced throughout its merger control regime.

JBCE has already pointed to the increase in administrative burden on businesses that will result from the present proposals, despite the Commission's stated objective. JBCE fears that with further reforms on the horizon further increasing this burden, the Commission will even distance itself further from the European Union's objective of enhancing the competitiveness of the European economy if businesses have to allocate further resources to administrative procedures.

While JBCE is fully aware that the inclusion of minority shareholdings into the scope of the merger control rules is not part of the present consultation, JBCE would like to seize this opportunity to invite the Commission already at this stage to abstain from proposing any measures, also in future, that risk further increasing the administrative burden placed on businesses, such as by way of the introduction of a new category of notifiable concentrations.

JBCE's members frequently acquire non-controlling minority shares in foreign companies which are located in Europe. Its members would thus directly be affected by the introduction of an extended concept of concentration and would bear the additional burden of making more notifications concerning transactions, which are unlikely to have an appreciable impact on market structure. The effects of such shareholdings are in any event already adequately covered by article 101 TFEU.

11. Conclusion

JBCE welcomes the general objectives set by the Commission in the present revision process to streamline procedure, cut red tape for business and its advisors and to focus the Commission's resources.

However, JBCE also believes that the proposals fall short of the stated objectives on several counts.

It is correct that the number of cases in which the Commission can issue a simplified short-form Decision are likely to increase. This will reduce the administrative burden on the Commission's services, as it will not have to issue reasoned Decisions.

However, the proposals fail to reduce the administrative burden placed upon business when confronted with a notifiable transaction. Indeed, if anything, the Commission tends to increase the amount of red tape and the corresponding administrative burden on business by requesting information that is of questionable relevance to the resolution of the simplified case at issue.

JBCE, therefore, urges to the Commission to reconsider its proposals in light of the above and mindful of its own - very laudable - objectives.

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