

European Commission
DG for Competition
White Paper "Towards more effective EU merger control"
B-1049 Brussels
Belgium

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More effective merger control COM(2014) 449 final

Executive summary

- **The EU merger regime should not be extended to non-controlling minority acquisitions.** That should only happen in the context of a general reshaping of the European merger control system, and provided convincing evidence and developed theories of harm demonstrate legislative intervention is warranted.
- **Even so, the administrative burden arising from the proposal is unjustifiable.** It is submitted the burden has been grossly underestimated in the White Paper by overlooking the identification and assessment work needed, as well as the ripple effects the proposal would have on national schemes. The problem of multiple filing urgently needs to be alleviated, not exacerbated.
- **The obligation to send an Information Notice should not rely on substantive assessment, but on clear-cut criteria.** The concept of a "competitively significant link" is obviously susceptible to varying interpretations in many cases, and is unfit for this purpose.
- **The delimitation criteria (5 % stake + certain rights, and 20 %, no rights required) are far too low, and would unnecessarily sweep in a substantial number of irrelevant cases.** They should be raised to, say, 15 and 25 % respectively.
- **The proposed simplifications with regard to certain JVs and cases of "no reportable markets" are welcome.** They could however be further clarified.
- **The simplifications proposed for referrals are also welcome.** However, there is scope for improvement. Under Article 4(5) the number for countries required should be reduced from three to two and the Member State veto be removed.

Extending the merger regime to non-controlling minority acquisitions

Admittedly, minority shareholdings that do not lead to "decisive influence" may, under certain circumstances, nonetheless cause unilateral or coordinated effects, restrictive of competition. The White Paper refers to some cases illustrating this phenomenon. However,

as for any legislative proposal, one needs to know the severity (harm), magnitude/frequency and permanency of the problem.

On that the White Paper is fairly thin, but the Impact Assessment (para 46) arrives at an estimated intervention rate of 1-2 cases a year. Given the data from which it has been calculated, this prognosis obviously suffers from appreciable uncertainty. The outcome also depends on which minority acquisitions would eventually be captured (criteria in addition to the overall turnover thresholds). Theories of harm and the empirical evidence are clearly less developed for this category of acquisitions. Generally, though, anti-competitive effects resulting from minority stakes are likely to be less pronounced than for acquisition of control.

Thus, it is debatable, to say the least, whether the problem actually merits legislative intervention based on the available facts. More research is obviously needed.

In the White Paper, the Commission laudably flags for a greater reform of the merger regime that would bring about "a true European Merger Area" (sections 2.2-2.3). Given the lack of convincing evidence and the likely ripple effects (see below) of the proposal on minority stakes, it should only be adopted in the context of such a general reshaping of the merger system – if indeed at all.

Even so, the question remains if the possible benefits of extending the merger control would, or could, off-set the administrative burden and other red-tape of the proposed "targeted transparency system". It is submitted that the White Paper grossly underestimates the actual administrative burden, as well as some other downsides of the proposal.

The White Paper argues that by choosing the targeted transparency option, the administrative burden will be proportionate since the scheme will only capture the relatively few, potentially problematic cases and as those will only require a simple information notice. That, however, overlooks the effect "beneath the surface", i.e. the work needed to analyze various additional minority acquisitions in order to identify those on which companies would have to submit information to the Commission.

Furthermore, the obligation to file an information notice would be triggered by the acquisition's providing of a "competitively significant link", a criterion apparently susceptible to multiple interpretations in many cases. This would introduce uncertainty and runs counter to the principle that administrative requirements, such as notifications, should not rely on substantive assessments, but on clear-cut criteria. The proposed model is likely to make acquirers seek clearance just to "be on the safe side" in a significant number of cases.

The required link appears when the acquisition is for a stake in a competitor or a vertically related company. It seems uncertain whether "competitor" is limited to actual competitors, or whether it also includes potential competitors. That should obviously be clarified, but if it were to cover potential cases it would add more difficulties to the assessment needed just to decide whether to file a notice or not.

The proposed delimitation criteria (5 % stake + certain rights, and 20 %, no rights required) seem very low, and appear to have been chosen to provide a wide margin. They would unnecessarily sweep in quite a number of irrelevant cases. It is suggested they need to be substantially raised, e.g. to 15 and 25 % respectively, should the proposal go forward.

At this stage, little is known about how facts-demanding it would be to draw up an Information Notice.

Many, if not all, EU Member States whose merger regimes do not at present cover non-controlling minority acquisitions can be assumed to introduce such schemes along the lines of, but not necessarily harmonized with, the Commission's proposal, should that be adopted. That would increase the already severe burden of multiple filing below the thresholds, yet another reason why the administrative burden is underestimated by the White Paper. Similar ripple effects may be foreseen for regimes outside the EU/EEA. The problem with multiple filing needs to be urgently addressed and alleviated, not exacerbated.

Uncertainty would also stem from the 4-6 month period after the submission of a notice during which the Commission may start an investigation of the transaction and request a full CO notification. To have a deal hanging in the air half a year just to find out if notification will be required, is simply not acceptable. Moreover, delays of this kind may adversely affect access to capital.

Although still less than perfect, a system of self-assessment would address some of the above concerns, and would hence clearly be preferable to the proposal.

Simplification – transactions without nexus with the EU

The simplifying and streamlining measures proposed for certain full-functioning JVs outside the EEA and for transactions leading to no reportable markets, are indeed welcome. However, they could be further clarified i.a. with regard to the basis for the calculation of turnover (arguably only the target turnover would be relevant).

Simplifications – referrals

The proposal to streamline procedures under Article 4(5) of the Merger Regulation is welcome indeed. The abolition of the reasoned submission will save the time (and costs) of preparation, plus 15 working days of the process. It will no doubt render this option more usable. The proposed EEA-wide jurisdiction would provide protection against national filings. However, a rule enabling the geographical scope of investigation to be limited to the Member States otherwise competent to review the deal should be considered.

If a merger is notifiable in two Member States, it is indeed cross-border. The number of countries required for referral should therefore be reduced from three to two. It is regrettable that the Member State veto is proposed to be retained. A Member State opposing the referral should have the right to put forward a reasoned opinion, but the decision should rest with the Commission.

As for Article 22, it seems right that only those Member States competent under national law to review a merger should be able to request a referral. Again, there should be an option to limit the geographical scope of investigation to the said Member States.

CONFEDERATION OF SWEDISH ENTERPRISE



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