

THE EC WHITE PAPER “TOWARDS MORE EFFECTIVE MERGER CONTROL”

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1. INTRODUCTION

On July 9th 2014, the European Commission published the White Paper “Towards more effective merger control”, which assesses the practical outcomes of the major overhaul of the EU merger review regime brought about by Regulation 139/2004/EC on its tenth anniversary, and encouraging stakeholders to put forward their views on a number of policy proposals.

The main changes envisaged by the Commission include the introduction of an *ad hoc* review procedure for the acquisitions of non-controlling minority shareholdings and the simplification of the case referral system between the EC and the NCAs. The Commission proposals are further detailed and explained in the staff working document attached to the white paper.

2. MINORITY SHAREHOLDINGS

In its current version, Regulation 139/2004 is only applicable to transactions entailing a lasting change of an undertaking’s structure of control, as a result of a merger or an acquisition. The Commission considers that such regime should be extended to encompass some acquisitions of shareholdings not conferring control, which at the moment fall outside the remit of the Regulation.

The competitive significance of minority shareholdings ultimately depends on their potential impact on the dynamics of the affected markets. Indeed, minority shareholdings in competing firms may lead to unilateral effects, since vested interests in competitors’ profits create or strengthen incentives to raise prices and limit output. Moreover, minority shareholdings could facilitate tacit collusion, increasing

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market transparency as well as the ability to detect and deter departures from co-operative commercial strategies.

Accordingly, in the enforcement practice of the Commission, pre-existing minority shareholdings have been frequently assessed in the context of merger review and have in some instances attracted corrective measures.

However, it could be argued that EU law does not provide a solid legal basis to address potentially anti-competitive acquisitions of minority shareholdings which are not linked to a change in the structure of control, i.e. absent a notifiable merger. Whereas the contractual arrangement leading to the acquisition of a minority shareholding could in principle be construed as an agreement pursuant to article 101 TFEU, at least in some cases the scope of application of articles 101 and 102 TFEU may indeed prove ill-suited to effectively tackle potentially anti-competitive acquisitions of minority shareholdings. This applies, in particular, to acquisitions implemented through incremental stock-exchange transactions, where it may be difficult to pin down the agreement subject to antitrust review.

Therefore, the Commission suggests to widen the scope of Regulation 139/2004 with a view to including some acquisitions of minority shareholdings, as is already the case in some Member States, notably Austria, Germany and the UK. Accordingly, the White Paper proposes the introduction of a targeted transparency system whereby the parties are required to file with the Commission a short information notice for all transactions involving the acquisition of a minority shareholding which would create a competitive significant link between the undertakings concerned.

Such a competitive significant link would arise whenever shareholdings above 20% are acquired in a competitor or a vertically-related undertaking. The relevant threshold is lowered to 5% if the minority shareholding in question confers the right to appoint a member of the board, to access sensitive information or otherwise to exert material influence on the target.

The notice required from the undertakings would contain some data concerning the parties as well as an indication of the rights resulting from the acquisition and limited market share information. The Commission envisages the information notice to trigger a 15 days standstill obligation, after which the parties could freely proceed with the transaction. However, the Commission would reserve the right to intervene and open an investigation into the transaction – whether or not it has been implemented – for a period of four to six months following the information notice. In such a case, the parties would be required to file a full notification, automatically suspending any further implementation arrangements. In order to safeguard legal certainty to the greatest possible extent the parties could also opt for immediate notification *in lieu* of the information notice, thus prompting a Commission's decision within the ordinary deadlines.

While the White Paper does not explicitly discuss the issue of jurisdictional thresholds, it is arguable that only the acquisition of minority shareholdings having a Community dimension within the meaning of Regulation 139/2004 would be caught by the Commission's powers of review. Finally, as far as the

substantive test is concerned, the White Paper suggests that the acquisition of minority shareholdings should be subject to the same standard applicable to the acquisition of control, i.e. the significant impediment to effective competition test.

3. CASE REFERRALS

In sharp contrast with the system of parallel competences for the enforcement of articles 101 and 102 TFEU, merger review regimes are based on a rigid turnover-based jurisdictional division between the European Commission and NCAs. Accordingly, *ad-hoc* procedures of case referral were already enshrined in Regulation 4064/89/EEC, with a view to ensuring that mergers were assessed by the best placed competition agency. Although such procedural tools have been significantly bolstered by the 2004 reform, a considerable number of transactions are still subject to notification obligations in three or more Member States.

For this reason, the White Paper proposes to simplify and streamline the current case referral system in order to alleviate the administrative burdens on undertakings in the context of multi-jurisdictional filings and lower the risk of NCAs adopting diverging approaches vis-à-vis the same transaction.

First of all, the Commission intends to facilitate the pre-notification transferal of merger cases from the Member States to the Commission pursuant to article 4(5) of Regulation 139/2004. This objective would be achieved through the abolition of the reasoned submission form, which the parties are currently required to file prior to notifying their transaction to the Commission instead of several NCAs. In the future, merging parties would be allowed – if they so wish – to notify directly to the Commission any transaction which is subject to review in three or more Member States. Upon receipt of the notification, the Commission would forward it immediately to the competent NCAs, which would have 15 days to express their objection to the referral. If no objection is raised within the deadline, the Commission would exert full jurisdiction; otherwise, the objection of any Member States would oblige the parties to notify the transactions before the competent NCAs.

Secondly, the White Paper proposes to amend the rules governing post-notification referrals to the Commission of transactions which do not meet the EU jurisdictional thresholds, in accordance with article 22 of Regulation 139/2004. At present, such referral requests may be formulated or joined also by NCAs that are not competent to review the transaction pursuant to national law. Indeed, when article 22 was drafted in 1989 several Member States had not yet enacted a merger review system: accordingly, the ability to refer a merger irrespective of its being subject to review at national level enabled the Commission to assess the impact of transactions which might otherwise adversely affect competition while falling short of EU turnover thresholds.

In the present context, where the vast majority of NCAs enjoy merger review powers, such safeguard clause is no longer justified, as it may lead to the somewhat paradoxical outcome of the Commission's reviewing transactions which fall outside of both EU and national jurisdictions. Accordingly, the White Paper suggests that article 22 referral requests may come exclusively from NCAs which would otherwise be competent to review the transaction under national law.

Under the amended article 22 procedure, NCAs could formulate a referral request within 15 days from notification. If the Commission decides to accept the request, it would then exert EEA-wide jurisdiction. However, if the referral is opposed by any competent NCAs, the Commission cannot accept the request and all Member States retain their jurisdiction.

Diverging procedural frameworks and timeframes for merger review at national level may appreciably hinder the effective functioning of the referral system. In fact, when a competition agency considers whether to make an article 22 request, other NCAs may have already cleared the transaction, or may not dispose of sufficient information to ascertain their competence or establish whether there are reasons to object to the request. Such timing problem can be worsened by tactical notification planning, whereby merging parties may hamper the possibility of a successful referral.

The White Paper proposes to address these issues through a codification of the current early information exchange system for multi-jurisdictional filings, concerning markets which are *prima facie* wider than national in scope, which has been informally developed in the ECA context. Such information notice would trigger an automatic suspension of applicable national deadlines, thus reducing the risk that NCAs issue decisions clearing the notified transaction before a referral request occurs.

Nonetheless, the Commission is aware that such risk is not eliminated by the mentioned procedural arrangement. Therefore, it suggests that clearance decisions issued before a referral request should remain valid, but would not prevent the case being referred to the Commission by the remaining NCAs.

Finally, the White Paper envisages a relatively minor amendment of article 4(4) of Regulation 139/2004, which currently binds the parties wishing to request a pre-notification referral from the Commission to a Member State to argue that the transaction might significantly affect competition in a national market. As merging parties have shown some reluctance to make such a committing statement, the Commission proposes to amend the wording by allowing the undertakings concerned to ground their referral request simply on the statement that the notified merger is likely to have its main impact in a distinct market within a Member State.

4. THE PUBLIC CONSULTATION

The White Paper attracted a considerable deal of attention and several stakeholders took part in the consultation launched by its publication. The Italian Competition Authority also submitted its contribution on the Commission's proposals.

In principle, *ex ante* review of competitively relevant acquisitions of minority shareholdings might deserve support. Indeed, the significance of competition constraints arising from non-controlling interests in other market players – at least in specific circumstances - is not seriously disputed in economic doctrine. Whether or not such concerns can be effectively and comprehensively addressed through existing antitrust rules, *ex ante* control would still be preferable to *ex post* intervention in terms of legal certainty.

Of course, any extension of the merger regulations scope to cover minority shareholdings is bound to place additional burdens upon undertakings. Therefore, the review system should be devised so as to ensure that only potentially problematic cases are caught and key concepts are clearly defined to minimize interpretative doubts.

The proposed target transparency system, whereby the parties inform the Commission of any transaction creating a competitively significant link, strives to strike an appropriate balance between legal certainty and proportionality. However, as many stakeholders underlined, the content of such information notice should be strictly limited to what is necessary for the Commission to decide whether to request a full notification. Moreover, undertakings might be tempted to err on the side of caution and proceed with a full notification, if they are otherwise required to self-assess rather vaguely defined notions such as the competitively significant link, with particular reference to vertical relations.

According to the contribution of the Italian Competition Authority, the principles of proportionality and legal certainty also suggest further reflection on the proposed rule allowing the Commission to take up a case for a period of four to six months after the information notice has been served. Indeed, even a partial reversal of a transaction several months past its completion might involve complex legal issues and considerable costs for the parties, and should be considered only in exceptional circumstances.

As regards the envisaged reform of the case referral system, further streamlining of existing procedures might facilitate the assessment of cases by the most appropriate authorities and limit the risk of diverging outcomes at national level. In particular, the proposed overhaul of post-notification referral procedures from the NCAs to the Commission, whereby the latter would be granted EEA-wide jurisdiction once a referral request is accepted, could avoid any unpredictability presently stemming from the concurrent exercise of merger control competences by the Commission on the one hand and non-requesting NCAs on the other.

Accordingly, the White Paper envisages that if any competent NCA opposes the referral, all Member States would retain their jurisdiction. However, the Commission's proposal partially departs from this principle, inasmuch as it envisages that if a clearance decision is adopted by a NCA before a referral request is formulated such decision would remain valid, yet the Commission might carve out the relevant Member State and accept jurisdiction for the rest of the EEA.

At a more general level, however, the policy initiatives envisaged in the White Paper appear to address only in part the problematic issues stemming from multi-jurisdictional filings and to significantly reduce the risk of NCAs adopting conflicting approaches when assessing the same transaction.

According to available data the number of multi-jurisdictional transactions notifiable in the European Union may range between 230 and 240 per year. Each of these transactions needs to be notified to more than three NCAs on average. The case referrals system cannot provide a comprehensive solution to legal certainty issues arising from multiple filings: since the entry into force of the revised Merger Regulation in 2004, only 269 requests for pre-notification referrals have been formulated pursuant to article 4(5), while application of article 22 has remained largely anecdotal at just 30 requests in 24 years.

Regulatory fragmentation, which may dramatically increase the length, the uncertainty and the costs of merger clearance, cannot be contrasted through mere technical improvements of referral rules; rather, it calls for the adoption of a more ambitious and far-reaching normative strategy, paving the way towards a genuine European merger area.

Indeed, European competition agencies have already managed to ignite a process of soft convergence of merger review systems, prompted by voluntary interactions and exchanges of information within the European Competition Network framework. Whereas a common theoretical and economic understanding of merger control has emerged across Europe, further spontaneous convergence is possibly hindered by peculiar aspects of national laws, which cannot be overcome by administrative authorities.

Some NCAs as well as several qualified stakeholders have recently called for deeper convergence of substantive and procedural regimes of multi-jurisdictional mergers across Europe, as a pre-condition to foster a genuine level playing field. The industry recurrently pleads to amend existing jurisdictional rules, with a view to allowing the Commission to review any cross-border mergers.

However, the extent and quality of the regular contacts between European Commission and NCAs, and the *de facto* communitarisation of the merger discourse across European jurisdictions suggest that a satisfactory alignment of enforcement outcomes in multi-jurisdictional mergers may be attained by simply requiring competent NCAs to apply EU rules when assessing such transactions, thus replicating in this area a decentralized enforcement system loosely modeled on Regulation 1/2003.

In fact, the European Commission itself seems sympathetic to these considerations, as the staff working document accompanying the White Paper states that "a move towards a system similar to the current enforcement framework of Articles 101 and 102 TFEU could be appropriate for transactions

in the Single Market with cross-border effects, which are increasing in number. It could further reduce the risk that NCAs dealing with the same case will reach conflicting outcomes and could simplify the administrative burden for parties in multi-jurisdictional filings”.

The NCAs’ ability to apply directly substantive EU merger control provisions to cross-border transactions falling short of the relevant jurisdictional threshold has also been authoritatively advocated by the former Commissioner Monti in his 2010 report “A new strategy for the single market”.

Existing administrative burdens on undertakings could not however be significantly mitigated without bolder efforts to harmonise procedural rules applicable to multi-jurisdictional filings. Divergent deadlines, information requirements and investigative powers would nullify any benefits flowing from common substantive standards. Therefore, the application of Regulation 139/2004 at national level should *ipso facto* extend to the relevant procedural framework, enabling all NCAs competent to review a cross-border transaction to refer to the same set of norms.

Direct applicability of Regulation 139/2004 to cross-border mergers would allow NCAs to provide early notices and engage in timely exchanges of information with other NCAs, as well as providing mutual investigative assistance in merger cases by deploying the cooperation instruments tested in antitrust matters. The envisaged merger control system would bring tangible benefits for undertakings, whose multi-jurisdictional filings would be reviewed through uniform substantive and procedural rules. On the other hand, NCAs could co-operate and handle their resources more effectively.

As European economic integration progresses, the number of transactions having a cross-border dimension is expected to increase. Most of these transactions are likely to have pro-competitive effects and bring tangible benefits for the European consumers. They should no longer be discouraged or prevented by an overtly complex web of loosely corresponding national merger control regimes.