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## European Commission Proposes Significant Changes to the EU Merger Regulation

On June 20, 2013, the European Commission (Commission) launched a public consultation on a number of significant proposed changes to the EU Merger Regulation (EUMR). The proposed amendments relate to (i) the possible review of non-controlling minority shareholdings under the EUMR; (ii) the EU referral mechanism; and (iii) other technical improvements to the EUMR.

The consultation period closes on Sept. 20, 2013. The full text of the consultation papers can be found [here](#).<sup>1</sup> The Commission's dedicated Web page also explains how interested parties can submit comments.

### Non-Controlling Minority Shareholdings

Under the EUMR, acquisitions of non-controlling minority shareholdings (MS or "structural links") escape prior review by the European Commission, as the scope of the EUMR is limited to the acquisitions of "control." Thus, under the EUMR, the Commission cannot review the acquisition of an MS that does not confer joint or sole control. While the Commission could review an MS *ex post* under Article 101 or Article 102 TFEU, its ability to tackle MS acquisitions on that basis is limited and does not cover all types of potentially anti-competitive structural links. The proposed amendments seek to address this perceived enforcement gap in the EUMR regime.

The Commission's proposal cites as a key example Ryanair/Aer Lingus. The Commission twice has prohibited the proposed acquisition of full control by Ryanair over Aer Lingus. However, it has not been able to prevent (on the basis of the EUMR or other EU legislation) Ryanair's retention of a significant minority share of just under 30 percent in Aer Lingus.

In its consultation paper, the Commission proposes two alternative procedural options to address minority shareholdings:

- Extend the current system of *ex-ante* review to structural links under a "notification system"; or
- A discretionary review of selected acquisitions of structural links under either a "self-assessment" or a "transparency system."

### The Notification System

Under the first option, all relevant structural links would be subject to a mandatory pre-closing notification and, possibly, a bar on closing pending Commission approval. The notification is proposed to consist of limited information similar in scope to the data currently required under the EUMR "short form" notification.

### Self-Assessment System and Transparency System

Under the second option, the Commission would have the discretion to investigate selected cases involving MS. In particular:

- Under the *self-assessment system*, the Commission, relying on its own market intelligence or third-party complaints, would be able to investigate any structural

<sup>1</sup> [http://ec.europa.eu/competition/consultations/2013\\_merger\\_control/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html).

links that potentially could raise concerns. However, the parties involved would have no obligation to notify in advance.

- Under the *transparency system*, parties of a *prima facie* problematic MS acquisition would be required to file a short information notice to the Commission, which would be published on the Commission's Web site for third-party comments. The Commission could then investigate if appropriate.

Under either system, for those cases in which the Commission decides to open an investigation, it would request the parties to submit a full notification, which would trigger a suspension obligation, at least for those steps of the transaction that had not already been implemented at the time of the request, and the normal merger control review periods of the EUMR would apply. In addition, the Commission is considering whether, under either the self-assessment or the transparency system, companies should be given the option to submit a voluntary notification to obtain legal certainty, and in such case whether this option should be considered only for transactions that have not yet been implemented, and whether, if that is the case, such transactions should be subject to a suspension obligation. Last, for purposes of legal certainty, the Commission proposes to insert a limitation period for investigating structural links, and is seeking comments on possible time limits within which it could do so.

Regardless of the procedural option selected, the Commission proposes to extend to structural links the same jurisdictional thresholds and substantive test as under the current EUMR (significant impediment of effective competition).

#### *Other Proposed Adjustments*

In addition, in order to effectuate the proposed revisions to the EUMR, a number of other changes to the current merger control system would be required.

- Most importantly, the EUMR will need to define which MS transactions will be captured. Here the Commission is considering a pre-set safe-harbor threshold for structural links falling outside the Commission's scrutiny, *e.g.*, a 10 percent shareholding and/or the absence of special shareholder rights (veto rights or board representation). According to the Commission, this would provide legal certainty to companies considering an MS acquisition, at least for a number of transactions that are considered not to raise competition issues. However, in the consultation paper, the Commission suggests that if a self-assessment or transparency system is adopted, the Commission should have the power to investigate any type of transaction, even possibly without safe harbors.
- For transactions in which a company acquires a non-controlling interest in a joint venture, the Commission proposes to limit the application of the EUMR to so-called "full-function" joint ventures. Acquiring an interest in a non-full-function JV would remain subject to review under Article 101 TFEU.
- The Commission would have exclusive jurisdiction over MS acquisitions if the parties involved meet the revenue thresholds under the current EUMR. If those thresholds are not met, then companies will need to consider whether the MS acquisition could still be subject to review under the national merger control regimes of the EU member states. Currently, in the EU only Germany, Austria and U.K. have the power to review MS acquisitions.

Given its view that there is an enforcement gap, the Commission is likely to adopt one of the options described above. The resulting expansion of EU merger review is likely to prove controversial

particularly in light of the Commission's acknowledgement that there is no well-established body of empirical economic evidence relating to non-controlling shareholdings.

### Changes to EU Referral Mechanism

Under the current merger control system, if the Commission does not have jurisdiction to review a merger under the EUMR, jurisdiction passes to the national systems of the EU member states. The EUMR (Article 4(5)) allows parties to request a referral to the Commission, but the current referral procedure is burdensome and time-consuming. As a result, parties are often reluctant to approach the Commission even when the Commission would be best-placed to review the transaction.

In addition, under Article 22 EUMR, member states may request the referral of a transaction to the Commission, even if the transaction does not satisfy the EUMR notification thresholds. The deadlines under this referral system are even longer than under Article 4(5) and can create prolonged uncertainty for the parties involved.

The Commission is proposing a reform of both the Article 4(5) and the Article 22 referral procedures. The changes aim to shorten the time periods involved in the referral process (*i.e.*, before the Commission can actually start reviewing a case) and would broaden the scope of the Commission's review. For example, under the current Article 22, the Commission may review the effects of a transaction only in those member states that requested the referral. The Commission proposes to expand the scope of its review after an Article 22 referral to the entire European Economic Area (EEA).

According to the Commission, the proposed changes are designed to streamline and accelerate the referral process, making it a more palatable option for companies involved in multi-jurisdictional mergers. On the other hand, in the case of Article 22, the proposed changes would significantly broaden the powers of the Commission to review the competitive effects of transactions on an EU-wide basis instead of on a member-state basis only.

### Miscellaneous Changes

Last, the Commission also is considering a number of technical improvements to the current EUMR system. The key changes are:

- Abolition of the requirement to notify the creation of full-function JVs that have no effect in the EEA (*i.e.*, JVs located and exclusively operating outside the EEA);
- Revision of Article 4(1) of the EUMR to increase flexibility for notifying mergers that are implemented by way of acquisition of shares via the stock exchange, but without a public take-over-bid;
- Clarification of the methodology for calculating relevant turnover in JV scenarios; and
- Amendment of Article 8(4) of the EUMR to enable the Commission to require the dissolution of partially implemented transactions that have been prohibited by the Commission.

### Conclusion

The Commission's proposals concerning minority shareholdings and the referral system would significantly expand the Commission's jurisdiction. The minority shareholdings proposal, if implemented, is likely to prove controversial as it would require the Commission to undertake novel substantive analyses.

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