

European Commission Issues Merger Reform White Paper Regarding Minority Shareholdings and Member State Referrals

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On July 9, 2014, the European Commission published its proposal (White Paper) outlining the approach it intends to adopt with respect to the application of the EU Merger Regulation (EUMR) to the acquisition of minority shareholdings. The White Paper also sets out proposals to streamline the member state referral system under the EUMR, as well as miscellaneous amendments. These proposals are based on the results of the public consultation launched by the Commission in June 2013.¹

The full text of the White Paper and its accompanying Staff Working Document (which explains the proposal in more detail) can be found [here](#). The consultation remains open until October 3, 2014.

Review of Non-controlling Minority Shareholdings

The White Paper proposes a “targeted transparency system.” The acquisition of non-controlling minority shares with a EU dimension would be subject to the submission of an information notice (as opposed to a full-fledged FORM CO notification) when the acquisition qualifies as a “competitively significant link.” Notice of the filing would be published to alert third parties, and the EU member states would be informed so that they can request a referral.

Pursuant to the White Paper, an acquisition would create a “competitively significant link” if (i) it involved the acquisition of a minority shareholding in a competitor or vertically related company (thus excluding conglomerate transactions); and (ii) the acquired shareholding is (A) approximately 20 percent or (B) between 5 percent and around 20 percent but accompanied by certain plus factors such as *de facto* blocking minority rights, a seat on the board of directors or access to commercially sensitive target information. The Commission’s proposal mirrors the existing practices in the three EU member states that subject minority shareholdings to merger review (Austria, Germany and the U.K.). In addition, the notion of a “competitively significant link” strongly resembles the definition of “material influence” and of “competitively significant influence” under the U.K. and German merger control systems, respectively.

The White Paper proposes a 15 working-day waiting period following the submission of the information notice during which the parties would be precluded from completing the transaction. The Commission would use the period to determine whether to open an investigation (in which case it would require a full notification), and member states would use it to determine whether to request a referral of the transaction.

The proposal also suggests that the Commission be provided a four- to six-month window to investigate a transaction following the submission of the information notice, regardless of whether it has been implemented. This period is designed to reduce the

¹ See our previous article, “[European Commission Proposes Significant Changes to the EU Merger Regulation](#)” (June 21, 2013).

risk that the Commission starts precautionary investigations during the initial 15 working-day period so as to avoid being barred from investigating in case of complaints put forward later on. If the Commission decides to open an investigation during this window and the transaction already has been (at least partially) implemented, the Commission cannot unwind the transaction but would have the power to issue interim hold separate measures to prevent any further integration until a decision is issued.

The proposals relating to minority shareholdings will inevitably raise the administrative burden on businesses compared to the current system.

- First, the parties will be required to conduct a self-assessment as to whether a transaction creates a “competitively significant link.” While this can be a straightforward exercise in some cases, companies will need (i) to determine whether their activities compete or are vertically related, and (ii) to identify whether this link is “significant.” The latter will require an analysis of the rights and powers attached to the acquisition of the shares to verify whether those rights may amount to a level of material influence as defined in the White Paper. Experience under the U.K. and German merger regimes suggests that this analysis often can result in widely varying interpretations and disagreements between the parties and the antitrust agency.
- Second, the parties will be subject to a (limited) filing obligation. In the information notice the acquiring firm will need to provide information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and certain limited market share information. The Commission will publish a notice about the transaction with an indication of the parties involved. The procedure will therefore require public notice of acquisitions that parties may otherwise prefer to remain confidential. The parties also may be required to submit a full FORM CO notification if the Commission decides to initiate an investigation.

The publication of the White Paper acts as an invitation from the Commission for comments. After considering any comments received, the Commission will decide whether to adopt legislative measures to effect any or all of the proposed changes outlined in the White Paper. Any such changes also would require amendments to the EUMR by the Council of Ministers, which means that the adoption of the new measures may not proceed as swiftly or exactly in the manner as envisioned by the Commission.

Amendments to EU Merger Referral System

The White Paper also proposes some welcome changes to the EU referral system that promise to make it easier and faster to refer a member state notified merger to the Commission under Article 4(5) and Article 22 of the EUMR, and vice versa (Article 4(4)).

Article 4(5)

Under the current system, if a merger does not satisfy the EU turnover thresholds, the parties may submit a reasoned submission (FORM RS) requesting a referral of the transaction to the Commission from the member states with jurisdiction. The competent member states have 15 working days to oppose the referral. In the absence of any opposition, the Commission becomes competent to review the transaction for the entire EEA and the parties are required to submit a FORM CO notification to the Commission. The requirement for two separate notifications and the 15 working-day consultation period is burdensome and time consuming.

The White Paper proposes abolishing the requirement for a reasoned submission and replacing this procedure with a system under which the parties seeking a referral would only have to provide a FORM CO notification to the Commission. The Commission would immediately forward the FORM CO to all member states, and member states competent to review the transaction under their national regimes would have 15 working days to oppose the referral request. Absent member state opposition during that time period, the Commission would review the transaction instead of the competent member states. This new procedure would effectively shave 15 working days to the process, not to mention the time required to prepare the reasoned submission.

Article 22

Under Article 22 EUMR, one or more member states may request a transaction be referred to the Commission, even if the transaction does not satisfy the EUMR turnover thresholds. If accepted, the Commission only takes jurisdiction for the territory of the member state(s) requesting (or supporting) the referral request, which lead to parallel review of the same transaction by the Commission and by member states contrary to the “one-stop-shop” principle.

Under the White Paper, the Article 22 procedure would be amended to provide that only the competent member state(s) have the right to request a referral to the Commission. If the Commission accepts the request it would have jurisdiction for the whole of the EEA. If any of the member states with jurisdiction over the transaction opposes the referral, all competent member states would retain their jurisdiction and the transaction would continue to be subject to the national regimes.

Article 4(4)

The White Paper also proposes changes to the system for prenotification referrals from the Commission to a member state under Article 4(4) of the EUMR. To encourage the use of this provision, the Commission proposes modifying the substantive test in Article 4(4) so that parties would no longer be required to claim that the transaction may “significantly affect competition in a market” for a case to qualify for a referral, but would need only to show that the transaction is likely to have its main impact in a distinct market in the member state. The Commission believes that removing this perceived “element of self-incrimination” may lead to an increase in the number of Article 4(4) requests.

Miscellaneous

Last, the Commission is proposing a number of other changes, including eliminating filing obligations altogether for transaction with no effect on EU competition, which are currently dealt with under the simplified merger procedure. These include (i) the creation of a full-function joint venture located and operating totally outside the EEA and (ii) transactions with no horizontal or vertical relationships between the parties.

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