ROADMAP			
TITLE OF THE INITIATIVE	Towards improving EU merger control		
LEAD DG – RESPONSIBLE UNIT	COMP/A-2	**DATE OF ROADMAP**	12/12/2013
This indicative roadmap is provided for information purposes only and is subject to change. It does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.			

A. Context and problem definition

(1) What is the political context of the initiative?

(2) How does it relate to past and possible future initiatives, and to other EU policies?

(3) What ex-post analysis of existing policy has been carried out? What results are relevant for this initiative?

(1) The initiative consists in a possible amendment of Council Regulation (EC) No 139/2004 (OJ: L24 29.1.2004, p. 1 ("the Merger Regulation")), focussing on the issues presented in the Staff Working Paper "Towards more effective EU merger control" which has been published for comments on 20 June 2013. In light of the comments received by stakeholders in the consultation, the Commission has decided that the next step to advance the initiative will be a White Paper to be adopted in 2014.

The initiative should be seen in the context of the Commission's commitment to regularly review the functioning of existing legislation under the new Regulatory Fitness and Performance Programme ("REFIT-programme") launched in December 2012.[1] As the Merger Regulation was last overhauled in 2004, with the recast of the original Merger Regulation (Council Regulation (EC) No 4064/89)[2], it is time to take another look whether merger control on the EU level can be made even more effective in the interest of European businesses and consumers. The effectiveness of EU merger control may in particular be enhanced by its application to certain potentially problematic transactions involving the acquisition of non-controlling minority shareholdings. At the same time, the initiative aims at streamlining and simplifying the referral process, dealing with issues which require a revision of the Merger Regulation. The initiative thereby goes one step further than the recently adopted Merger Simplification Package that simplifies procedures for unproblematic mergers within the framework of the current Merger Regulation.

The initiative, as set out in more detail in the Staff Working Paper "Towards more effective EU merger control", consists primarily in addressing two issues regarding the application of the Merger Regulation:

- whether to apply merger control rules to certain acquisitions of non-controlling minority shareholdings in order to capture anti-competitive effects stemming from such acquisitions;
- the effectiveness and smoothness of the case referral system to transfer cases from Member States to the Commission both before and after notification.

First, the initiative considers the possibility of extending the application of the Merger Regulation to a new category of transactions, namely acquisitions of non-controlling minority shareholdings (hereafter "structural links") in order to be able to deal with such transactions substantively under merger rules. Effective competition policy requires having the appropriate means to tackle all sources of harm to competition and consumers. Significant harm to competition and consumers can occur not only from acquisitions of control, but also from structural links, in particular if minority shareholdings are acquired in a competitor or in a vertically related undertaking.

Until now the Merger Regulation is limited to "concentrations" defined as acquisitions of control and the Commission has only the possibility to take pre-existing minority shareholdings into account if it is competent to

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Regulatory Fitness, COM(2012)746 final.

[2] The Merger Regulation was first adopted as Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Council Regulation (EEC) No 4064/89 was later amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1). The re-casting of the Merger Regulation in 2004 led to the adoption of Council Regulation (EC) No 139/2004, the current Merger Regulation.

analyse the effects of a separate acquisition of control. If, however, the acquisition of the minority stake had succeeded the acquisition of control, the Commission would have had no competence under the Merger Regulation to deal with the competition concerns arising, even though the competition concerns would have been exactly the same. This situation seems arbitrary and unsatisfactory.

In the European Union, Austria, Germany and the United Kingdom currently have national merger control rules that also give them the competence to review structural links. In addition, in a number of other countries outside the EU, such as Canada and the United States, structural links are also subject to competition review under merger control rules.

Second, this initiative aims at assessing whether the Merger Regulation should be amended to improve the effectiveness and smoothness of the case referral system without fundamentally reforming the basic features of this system or the allocation of competences between the Commission and Member States. The 2009 Report to the Council on the operation of Regulation No 139/2004[3] found that although the existing thresholds and referral mechanisms lead to an appropriate allocation of cases in most instances, a significant number of cross border cases are still subject to multiple review in several Member States (240 cases in 2007). In some cases, where the Commission might have been the more appropriate authority, companies may also have opted against a referral to the Commission in order to avoid the Commission's jurisdiction for reasons of "forum shopping". In addition, the initiative aims at simplifying the procedures for referring certain cases from Member States to the Commission while respecting the principle of subsidiarity, which infers that no referral shall take place when a competent Member State vetoes the referral.

Finally, this initiative also aims to implement, if need be, several possible further technical improvements to the Merger Regulation.

(2) On 27 March 2013, the Commission had launched a public consultation regarding proposals to simplify certain procedures under the Merger Regulation (http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html), in order to simplify procedures and reducing administrative burden within the framework of the existing Merger Regulation. Following this consultation, the Commission adopted a Merger Simplification Package on 5 December 2013. It is estimated that around 60-70% of all merger cases will be treated under the simplified procedure.

(3) DG Competition has in particular carried out an ex-post analysis of the decisional practice of the Commission regarding the scrutiny of structural links in the context of merger notifications and the decisional practice of some national competition authorities that do review structural links. The objective of this analysis was to obtain indicative examples of past merger cases where the Commission found that structural links led to a negative impact on competition and therefore played a decisive role in the assessment of past transactions, next to obtaining examples of transactions scrutinised by the national competition authorities. On the basis of this review, it can be concluded that there are a number of problematic cases but their number would be limited.

DG Competition also conducted a review of the relevant economic literature to identify scenarios where the legal definition of control and "decisive influence" under the EU Merger Regulation would not be met, but where the acquiring company of a structural link nevertheless may still be able to exert material influence over the target firm with potentially significant anti-competitive effects.

As regards the objective of updating the case referral system, as already mentioned in 2009 the Commission reported to the Council on the application of the Merger Regulation, after having carried out a public consultation. The current initiative aims at addressing certain issues raised by stakeholders during the public consultation and spelled out in the Commission's Report on the functioning of Regulation No 139/2004.[4]

What are the main problems which this initiative will address?

The initiative should be seen in the context of the REFIT-programme. A potential amendment of the Merger Regulation would address:

- the problem that the Commission does not have competence under the Merger Regulation to deal with competition concerns arising from certain structural links;

[3] Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004 Brussels, 18.6.2009, COM(2009) 281 final ("2009 Report").

[4] Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004 Brussels, 18.6.2009, COM(2009) 281 final ("2009 Report").

- concerns voiced by stakeholders that the Commission's case referral procedures are time-consuming and too cumbersome.

Who will be affected by it?

Structural links

Undertakings that acquire a non-controlling minority-shareholding, as well as customers and competitors of these undertakings.

Case referrals

Parties to transactions which might qualify for a case referral, national competition authorities as well as customers and competitors of the merging parties.

Is EU action justified on grounds of subsidiarity? Why can Member States not achieve the objectives of the proposed action sufficiently by themselves? Can the EU achieve the objectives better?

Under the Merger Regulation, the EU has exclusive competence to examine mergers with an EU dimension on the ground that only the Commission is able to adequately analyse the impact of certain large mergers on competition in the single market. Mergers below the jurisdictional thresholds remain within the exclusive competence of national competition authorities, in line with the principle of subsidiarity. The possibility of referring cases from the Commission to Member States or vice versa ensures that a case may be attributed to the better placed authority, where this does not appear to result from the application of the jurisdictional turnover thresholds.

The present initiative is set in the framework of the Commission's existing exclusive competence under the Merger Regulation. As regards structural links, it proposes to extend that competence to certain minority share transactions of a similar size as mergers currently falling under the Merger Regulation but as yet not covered by the definition of a concentration. As regards the referral system, the initiative aims at simplifying the procedures for referring certain cases from Member States to the Commission but maintaining the rule, based on the principle of subsidiarity, that no such referral may take place where a Member State competent under its national law to examine a transaction opposes the referral.

B. Objectives of the initiative

What are the main policy objectives?

The initiative aims at making European competition policy more effective and more efficient. For this purpose, several options are explored that would imply to extend the scope of the Merger Regulation in order to give the Commission the option to intervene against anti-competitive structural links. In addition, options are explored to update and streamline the current Merger Regulation, especially concerning the case referral system from Member States to the Commission.

Do the objectives imply developing EU policy in new areas?

The objectives with respect to structural links would imply a limited extension of the scope of the existing EU policy in the field of merger control.

C. Options

(1) What are the policy options (including exemptions/adapted regimes e.g. for SMEs) being considered?
(2) What legislative or 'soft law' instruments could be considered?
(3) How do the options respect the proportionality principle?

(1) The following policy options are being considered at this stage:

- With respect to the objective to extend the scope of the Merger Regulation to give the Commission the option to intervene against anti-competitive structural links, the following two options may be explored:
    - A "notification system" where the current system of ex-ante merger control would be extended to structural links. This implies that all relevant structural links would have to be notified in advance and could not be implemented before the Commission has cleared them.
    - A "selective system" where the Commission has full discretion to investigate only those structural links that could potentially harm competition and consumers. This could either be achieved by a self-assessment ("self-assessment system") or by a short information notice

("transparency system"). The first option implies that the parties to a structural link are not obliged to notify the transaction in advance and can proceed without prior approval of the Commission and the Commission would rely on own market intelligence or complaints to become aware of structural links that may raise competition issues. The transparency system implies the obligation of filing a short information notice to the Commission, which would be published on the Commission's website in order to make third parties and Member States aware of the transaction.

Depending on the basic design options, further choices with respect to a number of other parameters would need to be made. These choices notably relate to (a) the scope of the Commission's power to examine structural links, including possible safe harbours, (b) the relationship between the Commission and national competition authorities and (c) procedural issues.

- With respect to the objective to update and streamline the case referral system to transfer cases from Member States to the Commission, the following may be explored:
    - To abolish the requirement for merging parties to submit a separate "reasoned submission" for a pre-notification referral from Member States to the Commission. The parties may notify directly to the Commission but the Commission only maintains jurisdiction to examine the case if no competent Member State opposes the referral within a certain time period.
    - To provide that only competent Member States may propose a post-notification referral to the Commission and that, in case the Commission decides to accept the referral, the Commission could acquire jurisdiction for the whole of the European Economic Area (EEA) while maintaining the right of other Member States to oppose the referral.

(2) If the initiative goes forward, it would be carried out by amending the Merger Regulation.

(3) The options considered fully respect the proportionality principle.

The impact of the different options will be limited and they are proportionate for achieving the objective sought. In addition, the same jurisdictional turnover thresholds as for mergers currently covered by the Merger Regulation would apply, meaning that only transactions involving large companies with a potentially significant impact on competition would be caught. Moreover, to the extent that structural links are currently subject to merger control in several Member States, the different options would actually ease administrative burden on businesses by applying the "one-stop-shop" principle of the Merger Regulation to these transactions to the extent that they are above the turnover thresholds.

The two options regarding the case referral system do not impose additional burden on businesses but streamline and simplify the current referral procedures and therefore would reduce the burden on businesses.

D. Initial assessment of impacts

What are the benefits and costs of each of the policy options?

Structural links

The benefits of extending the scope of the Merger Regulation to structural links are aimed at preventing anti-competitive effects as a result of certain structural links. Significant harm to competition and consumers can occur not only from acquisitions of control, but also from structural links. These effects from structural links are likely to be less pronounced than in case of acquisition of control. However, at the same time the potential efficiencies from structural links are likely to be more limited. Consequently, although quantifying the magnitude of these effects is difficult, structural links may lead to a significant net loss of consumer welfare (innovation, growth, offer, prices, etc.).

The options will lead to a limited amount of additional cost to parties envisaging a structural link transaction relating to the possible filing obligations and if applicable the participation in the administrative procedure. For the option of a "selective system", additional costs would only have to be borne by the parties to the small number of transactions that would actually be examined by the Commission (apart from the small additional costs of filing a short information notice under the hypothesis of the "transparency system"). Under the option of the "notification system", costs will be higher, although likely to be less than the costs involved in the notification and examination of full mergers (since structural links are less likely than full mergers to necessitate an extensive competition scrutiny).

The different options chosen will also have a limited impact on the Commission's resources. On the basis of the data currently available, the number of potential cases seems small. If a "selective system" is chosen, the

Commission would carry out an investigation only in an even smaller number of cases. The impact on the workload of the Commission would thus be limited. Under the option of a "notification system", the expected limited numbers of cases to be notified would infer an increase in the workload of the Commission. Nevertheless, this increase would still seem marginal compared to the overall number of merger notifications that the Commission receives each year.

Given the above, the potential benefits of extending merger control to certain cases of structural links are likely to substantially outweigh the additional cost on businesses and the Commission alike.

Case referrals

The benefits of revising the case referral system would be to simplify the procedure and reduce administrative burden for merging companies, without decreasing the effectiveness of EU or national merger control for cases which raise concerns. For this purpose, the initiative aims to make case referrals more efficient without fundamentally reforming the features of the system or the allocation of competences between the Commission and Member States. Since this part of the initiative focusses on reducing administrative burden without fundamentally changing the Merger Regulation, there are no direct costs involved.

Could any or all of the options have significant impacts on (i) simplification, (ii) administrative burden and (iii) on relations with other countries, (iv) implementation arrangements? And (v) could any be difficult to transpose for certain Member States?

Structural links

(i) - (ii) Reference is made to what has been said under "proportionality" and "benefits/costs" above.

(iii) To the extent that the Commission would be competent to examine transactions not currently falling under the Merger Regulation, there may be additional cases requiring cooperation between the Commission and the competition authorities of third countries. It should be noted that some important partner countries of the EU, such as Canada and the United States of America, currently apply merger control rules also to minority shareholdings.

(iv) In case the option of a "notification system" were chosen, no additional implementation arrangements would be needed as the procedure would be the same as for mergers currently falling under the Merger Regulation. However, if the options of a "self-assessment system" or a "transparency system" were chosen, appropriate implementation arrangement would have to be made.

(v) Since the options would be implemented by way of a regulation, no transposition in national law would be required.

Case referrals

(i) – (ii) The options considered will have a positive impact on simplification and reducing administrative burden (see above under "proportionality" and "benefits/costs").

(iii) No.

(iv) Since the options would be implemented by way of a regulation, no transposition in national law would be required.

(1) Will an IA be carried out for this initiative and/or possible follow-up initiatives?
(2) When will the IA work start?
(3) When will you set up the IA Steering Group and how often will it meet?
(4) What DGs will be invited?

(1) Yes.

(2) The IA started after the launch of the public consultation on 20 June 2013.

(3) The group was set up as soon as the public consultation was launched. It met three times.

(4) Secretariat General, Legal Service, DGs ENTR, MARKT, ECFIN, SANCO, CNCT.

(1) Is any option likely to have impacts on the EU budget above € 5m?
(2) If so, will this IA serve also as an ex-ante evaluation, as required by the Financial Regulation? If not, provide information about the timing of the ex-ante evaluation.

(1) No.

(2) Not applicable.

E. Evidence base, planning of further work and consultation

(1) What information and data are already available? Will existing IA and evaluation work be used?

(2) What further information needs to be gathered, how will this be done (e.g. internally or by an external contractor), and by when?

(3) What is the timing for the procurement process & the contract for any external contracts that you are planning (e.g. for analytical studies, information gathering, etc.)?

(4) Is any particular communication or information activity foreseen? If so, what, and by when?

(1) DG Competition has in particular analysed past merger cases in order to obtain indicative examples where the Commission found that structural links led to a negative impact on competition and therefore played a decisive role in the assessment of past transactions. According to this ex-post analysis, at least 53 merger cases of the European Commission since 1990 have been identified as cases where structural links were relevant for the competitive assessment of the transactions. Furthermore, structural links were found to create competition problems in at least 20 of these cases (leading to divestitures or other remedies as a condition for clearance of the merger). The analysis also revealed the limitations of the Merger Regulation to deal with situations in which the acquisition of a minority stake succeeds the acquisition of control and therefore the Commission has no competence under the Merger Regulation to deal with any competition concern that these structural links might lead to. The evaluation of past cases can be found in the documents of the public consultation (Annex II of the Consultation Paper).

As regards case referrals, the initiative is based on the 2009 Report and feedback from stakeholders gathered at that time.

(2) Apart from the on-going public consultation, no further information needs to be gathered. The Commission has discussed the different elements of the initiative with the Member States and will continue to do so in the framework of the Working Group with the Member States.

(3) Not applicable.

(4) A public consultation based on a Commission Staff Working Document outlining the issues and possible options was launched on 20 June 2013. In light of the comments received by stakeholders in the consultation, the Commission has decided that the next step to advance the initiative will be a White Paper to be adopted in 2014.

Which stakeholders & experts have been or will be consulted, how, and at what stage?

The initiative has been announced in various speeches to the business and legal community and discussed with stakeholders at dedicated conferences and meetings, such as *inter alia* the Conference on Competition Policy, Law and Economics (Cernobbio, November 2012), 41. FIW Brüsseler Informationstagung 2012 (Brussels, November 2012), American Chambers of Commerce Belgium Conference (Brussels, December 2012) 46. Innsbrucker Symposium des FIW (Innsbruck, February 2013), Arbeitssitzung der Studienvereinigung Kartellrecht (Brussels, March 2013), 50 years celebration of the CNC (Madrid, June 2013), GCLG conference "EU Merger control in review- Taking stock" (Brussels, July 2013) and Bruegel Workshop "Competition Policy Lab: Minority shareholding in merger control" (Brussels, July 2013), OFT Roundtable (September 2013). The initiative has also been discussed with national competition authorities at several meetings of the Merger Working Group. A public consultation of all interested stakeholders has been launched on 20 June 2013.