Ten years on from the 2004 reform of the EU merger regulation, the European Commission is submitting a White Paper for consultation entitled “Towards more effective EU merger control”. By this means, the Commission intends to tackle various issues relating to the implementation of the substantive test of “significant impediment of effective competition” and to ways of fostering convergence and cooperation between the Commission and the Member States. It is also proposing amendments aimed at making EU merger control more effective.

Its proposals relate to the following two main areas (§2):

– ensuring that the merger regulation addresses all sources of possible harm to competition, and thus consumers, caused by concentrations or corporate restructuring, including those stemming from acquisitions of non-controlling minority shareholdings; and

– how to best ensure close cooperation between the Commission and national competition authorities (“NCAs”) and an appropriate division of tasks in the field of merger control, in particular by streamlining the rules for transferring merger cases from Member States to the Commission and vice versa.”

After making several observations about the points outlined in the ‘miscellaneous’ section of the White Paper (A), AFEP will comment on the proposals on merger cases referrals (B) and raise its concerns about the issue of acquisitions of minority shareholdings (C).
Furthermore, the companies are concerned that the White Paper on merger control assumes that mergers, including acquisitions of minority shareholdings, have anti-competitive effects. We are witnessing twofold confusion:

- between the ex-ante merger control procedure (which deals with structures) and ex-post antitrust litigation procedures (which deal with behaviour); yet this distinction, which is based to date on the clear notion of ‘control’, is fundamental, both for the legal certainty of companies (which can identify the type of control that applies to their actions) and for the consistency of the entire system of EU competition law. The latter raises the legitimate question of whether, in the same way as we are seeing today with regard to acquisitions of control, the introduction of ex-ante examination of acquisitions of minority shareholdings would result in the practices which might subsequently be implemented between the target undertaking and the undertaking holding the shareholding no longer being challenged on the basis of antitrust law. Otherwise, minority shareholdings would – unusually and in a way that would reduce legal certainty for companies – be penalised by being subject to two opposed branches of competition law.

- between acquisitions of non-controlling minority shareholdings (which are not mergers) and controlling mergers (which are the only ones marking a structural increase in the power of the participating companies and therefore justify the establishment of an ex-ante examination).

An acquisition of a non-controlling minority shareholding cannot be treated as a merger (usually with no increase in the powers of the acquiring undertaking), and even less so as an anti-competitive operation.

In fact, the Commission has tools at its disposal to deal with merger cases and find a solution in cases of abuse (antitrust). The proposed approach is dangerous, since it is prompting the Commission to develop a bureaucratic system that is not suited to the economic realities.

The Commission must substantially revise its approach to the matter It is extremely important to distinguish anti-competitive practices and mergers on the one hand, and mergers and acquisitions of non-controlling minority shareholdings on the other. Far from making life easier for companies and simplifying merger control, the Commission must realise how its proposals would increase the administrative burden on companies if they were to be maintained.

(A) MISCELLANEOUS (§ 76 et seq.)

In order to streamline and simplify EU merger control procedures, and improve some provisions of the merger regulation, the Commission is of the opinion that it is necessary to amend it.

Consequently, the regulation could exclude from its scope the creation of a full-function joint venture located and operating outside the EEA (and which would not have any impact on markets within the EEA). Such joint ventures would not have to be notified to the Commission, even if the turnover thresholds are met.
The companies support this proposal, which has the merit of clarifying cases which have no impact on markets within the EU.

However, the Commission needs to clarify what is meant by “which would not have any impact on markets within the EEA”. In order to provide the best possible economic predictability, the companies suggest that the Commission should provide a clear objective threshold, such as the turnover made by the joint venture in this geographic area.¹

Furthermore, this limitation of jurisdiction should not be reserved for joint ventures but should apply to all types of mergers outside the EEA, following the example of the practices found in several Member States (Germany, Austria, Spain and Ireland).

The Commission also considers that it could “further simplify merger procedures” by exempting from notification certain transactions that normally do not raise any competition concerns. Instead, it proposes applying a procedure similar to the “targeted transparency system” envisaged for acquisitions of non-controlling minority shareholdings.

The companies support the Commission’s proposal to exempt from prior notification those transactions that do not raise any competition concerns.

However, they are of the opinion that replacing notification with the “targeted transparency system” would not lead to simplification, given the requirements for satisfying it. Similarly, they do not want to see this system applied to acquisitions of non-controlling minority shareholdings (see C below).

They propose replacing notification with a voluntary self-assessment and notification system, which would give full force and effect to the Commission’s announced simplification.

(B) CASE REFERRALS (§ 59 et seq.)

The Commission points out that the merger regulation has established a ‘one-stop-shop’ system whereby mergers with a European dimension are reviewed exclusively by itself, thus avoiding multiple control procedures at Member State level. It also emphasises that while the turnover thresholds serve as a “bright-line test” for whether or not a merger is likely to have a European or cross-border dimension, the regulation also allows for cases to be referred from the Commission to Member States and vice versa. However, it is of the opinion that the case referral system could be enhanced to better serve the purpose of departing from the results of the turnover tests where necessary. There is especially room for improvement with respect to case referrals from Member States to the Commission, both before and after notification.

¹ On the other hand, no reference should be made to a market share level. Such a threshold requires questions and the formulation of (sometimes numerous) hypotheses regarding the definition of relevant market, which is usually left open, even in sectors that have already been subject to several decisions by the Commission. With good reason, the current EU system excludes the use of such a threshold to determine the scope of merger control; the companies remain extremely attached to this fundamental and comforting characteristic of the EU system.
The companies welcome with interest the proposals developed by the Commission to simplify the system of case referrals, whilst pointing out that they do not fully meet their expectations. In fact, they lament the fact that some of the recommendations made in December 2013 by the French Competition Authority (ADLC) in its report entitled “Making merger control simpler and more consistent in Europe” have not been taken into account.

With regard to pre-notification referrals from Member States to the Commission at the request of the notifying parties, the companies:

- support simplifying referrals (abolition of the two-step procedure);
- want to be able to request the referral of cross-border merger cases to the Commission when two or more national competition authorities have jurisdiction to address them, instead of the current three or more authorities, at the very least for cases relating to interconnection markets (transport, networks, etc.).

With regard to post-notification referrals from Member States to the Commission, the companies are not opposed to most of the proposed amendments. However, the fact that accepting the referral gives the Commission jurisdiction for the whole of the EEA is problematic. While the companies recognise the need to reinforce the ‘one-stop-shop’ principle, they are of the opinion that this jurisdiction cannot entail full notification with data for all Member States of the EEA.

This latter proposal, the relevance of which is not proven, would be extremely hard for companies if:

- the merger only relates to a few Member States,
- these companies legitimately anticipated that the effects of their transaction would only be analysed in some of these States.

In addition, the fact that this wider examination is triggered simply by the Commission accepting a referral would pose a legal basis problem in cases where – for example – neither the thresholds laid down by EU law nor those of Member States had provided for any examination in the States for which the Commission would consequently assume jurisdiction.

Furthermore, the companies encourage the Commission to call on national competition authorities to apply the substantive rules laid down by EU law in all merger cases notifiable in two or more Member States.

Finally, they are in favour of harmonising the types of thresholds giving rise to the controllability of merger transactions in the EU Member States (but not their level), by only keeping thresholds expressed in terms of turnover due to the fact that they are objective in nature.

These proposals would truly help to enhance the ‘one-stop-shop’ system and clarify the rules relating to cross-border merger transactions.

(C) ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS

The Commission laments the fact that the jurisdiction granted to it by Regulation (EC) No. 139/2004 is limited to examining acquisitions of shareholdings entailing acquisitions of control over the target. On the contrary, according to harm theories, competition concerns of the same kind can arise when a non-controlling minority shareholding is acquired if certain conditions are met. In order to overcome this
shortcoming, after having abandoned two other options\(^2\), the Commission is proposing establishing a “targeted transparency” system, introducing into EU law a requirement for companies to systematically declare certain acquisitions of minority shareholdings corresponding to certain criteria\(^3\).

Without going into the details of the procedure envisaged by the Commission, the companies would like to make the following comments further to those made in the preamble:

i) the examples quoted by the Commission in the White Paper and its working document are almost all taken from isolated cases examined in the context of proposed acquisitions of controlling shareholdings subject to the application of existing merger control legislation;

ii) none of these examples clearly shows the anti-competitive effects of acquisitions of minority shareholdings. At the very most, they show that several situations made possible by certain minority shareholdings have sometimes given rise to competition concerns, which the Commission is furthermore usually capable of resolving by obtaining commitments (either as part of an antitrust procedure, or at the time of a merger).

iii) the targeted transparency system envisaged by the Commission does not meet the companies’ simplification expectations:

- the notion of “competitively significant link” is far too broad:
  - the 5% threshold is too low;
  - the accompanying “additional factors” are either too vague, offering too much discretionary power (access to commercially sensitive information of the target, \textit{de facto} blocking minority) or disproportionate (why would the simple ability to appoint a director imply a significant link?)

- furthermore, the White Paper does not provide a comprehensive list of the criteria that the Commission intends to adopt; in addition, these factors presume anti-competitive intent or behaviour, which is not suited to the logic of merger control;

- the definition of competitor or vertically related company does not refer to the notion of relevant market that is well known in the field of competition. It favours an approach based on the fact that the acquirer and the target are active in the same economic sector or geographic area, consequently allowing for diverse and opportunistic interpretations by the authority\(^4\).

\(^2\) Notification and self-assessment systems (§ 43)

\(^3\) The shareholding acquisition in question creates or strengthens a link with a competitor or a vertically related company; this “competitively significant link” would be based on the following criteria: “if the acquired shareholding is around 20%” or, alternatively, if the shareholding is “between 5% and around 20% but accompanied by additional factors such as rights which give the acquirer a “de facto” blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target”.

\(^4\) This room for interpretation would be even more penalising for diversified groups because, in the context of their subsidiary A acquiring a shareholding in enterprise B (neither of them competing or vertically related), it might be argued that B is in a (more or less significant) horizontal or vertical relationship with another of their subsidiaries C, even if the latter has absolutely nothing to do with the transaction.
the White Paper does not clarify how the turnover thresholds would be applied in the case of acquisitions of minority shareholdings; yet, as of now, the target’s turnover includes that of the majority company controlling it, which could trigger examinations of acquisitions of shareholdings, including in very small enterprises.

iv) the envisaged periods appear to be longer than those required for notifying controlling acquisitions:

- providing “limited market share information” would, in practice, require companies to produce often extensive data about all the potential relevant markets; this consequently casts doubt over the “simplified” nature of such information compared with the pre-notification work and discussions required for an ordinary notification;

- a merger notification within the ordinary framework entails (excluding the preparation period) a period of 25 working days (5 calendar weeks) to remove any uncertainty about the harmlessness of the transaction, with the transaction having to be suspended during this time;

- in the case of acquisitions of minority shareholdings, in addition to the three-week waiting period envisaged by the Commission during which the parties would not be able to conclude their transaction, the Commission would also be able to investigate for a further 16 to 24 calendar weeks, to which should be added the usual five-week investigation period if necessary, which would lead to complete uncertainty for the parties for an extremely long period.

Consequently, in order to acquire a non-controlling minority shareholding, the companies could have to endure a period of uncertainty lasting 19 to 29 calendar weeks. This period is out of all proportion given its major impact on the course of trade and the low number of problematic situations actually observed by the Commission.

The companies are of the opinion that the targeted transparency system developed by the Commission will penalise the companies pointlessly, and is based on references of acquisitions of controlling shareholdings for which it already has effective tools at its disposal. These are consequently applicable as long as this type of shareholding can disrupt the market.

The relaxation supposed to be introduced by the “targeted transparency system” would cause inappropriate additional administrative burdens for companies, at cost levels that are comparable with those for an ordinary notification.

If the Commission should nevertheless continue with its thought process, which the companies do not consider advisable given the above, the companies would suggest that it should adopt a self-assessment system.

This should be based on clear criteria providing companies with legal certainty:

- below a shareholding acquisition threshold of 15%, Regulation (EC) No. 139/2004 would not apply, following the example of the control practice for acquisitions of non-controlling minority shareholdings in the United Kingdom (safe harbour);
above this same threshold, the companies would self-assess the controllability of their transaction:

- if they choose to notify the transaction, on a voluntary basis, the Commission must give its agreement within the usual merger control periods;
- if they choose not to notify the transaction, their abstention should not subsequently be held against them as such in any way whatsoever.

This self-assessment framework advocated by the companies encourages them to be fully accountable. Consequently, if an undertaking chooses not to notify an acquisition of a shareholding of more than 15%, it can certainly carry out its closing, but the Commission will subsequently be able to consider the situation, trigger an examination (hypothetically not suspensive) and, at the end of an adversarial procedure, call for behavioural commitments or indeed disinvestment.

**With the safe harbour and this self-assessment system, companies would get back the flexibility required to conduct their affairs within a clear framework, granting them legal certainty and making them accountable. The Commission should take this direction if it nevertheless decides to embark on a process for controlling acquisitions of minority shareholdings that the companies consider, in any event, to be irrelevant.**
About Afep (French Association of Large Companies)

Since 1982, Afep is the association which brings together large companies operating in France. The Association is based in Paris and Brussels.

Afep aims to foster a business-friendly environment and to present the company members’ vision to French public authorities, European institutions and international organisations.

Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep’s core priority.

Afep’s work relies on:
- the direct participation of business leaders and their teams in defining economic and social policy directions, as well as in determining the actions to be taken for growth and employment;
- direct and sound exchanges with public authorities, which are based on analyses and well-founded proposals;
- active and constructive contributions to French and European public consultations.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility.

Afep has 111 members. More than 8 million people are employed by Afep companies; their annual combined turnover amounts to €2,000 billion.

The Association’s website (www.afep.com) provides more information on how it operates and its recent work, as well as on the role of the large companies in the French economy.

The Chairman of Afep is Pierre Pringuet, CEO of Pernod Ricard. François Soulagnon is Director General of the Association and Stéphanie Robert is Director.

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