Comments on the White Paper “Towards more effective EU merger control”
and the accompanying Commission Staff Working Document

1. Assessment of the EU system and proposals to improve its effectiveness

The White Paper acknowledges that the EU merger control system has worked reasonably well since its establishment in 1989. Under the Merger Regulation, concentrations with an EU dimension benefit from a one-stop shop scrutiny and the assessment of notified mergers is carried out through transparent procedures and within strict deadlines. Moreover, the relevant notions and the substantive criteria for assessment have been clarified over time through Commission guidelines and the case-law of the Court of Justice, thus increasing predictability for undertakings.

The 2004 reform broadened the substantive test so as to cover significant impediments to effective competition also in mergers not involving dominant companies and refined the mechanisms for referring cases from Member States to the Commission and viceversa. In the White Paper the Commission evaluates the functioning of the system in the last ten years and makes some proposals for its further improvement.

In our view, any proposed change of the current system, from minor refinements to major overhauls, should be assessed keeping in mind that the EU system is considered a model worldwide and therefore any reform may provide inspiration for similar changes not only in Member States but also in extra-EU jurisdictions. Under this perspective, attempts to simplify and streamline the system so as to ensure the reduction of administrative burdens and the implementation of the one-stop shop principle, certainly go in the right direction.
Things are slightly different for proposals aimed at broadening the scope of merger control, such as the proposal contained in the White Paper to extend EU merger control in order to cover acquisitions of non-controlling minority shareholdings. This kind of proposals would entail new costs for undertakings: companies would have to make a prior assessment of the likely compatibility of non-controlling minority acquisitions with competition rules, would bear costs related to the transmission of information to the Commission and would have to comply with a waiting period before completing the transaction. The relevance of these costs for undertakings should be assessed taking into account that it is highly likely that a similar system would be subsequently imitated by Member States (only Austria, Germany and the UK already have a similar system) and by other jurisdictions. Any EU legislative measure based on these proposals would be justified only if the overall costs which would result from the new scope of EU merger control would clearly be compensated by the resulting benefits in terms of protection of competition.

On the other hand, we strongly encourage the Commission to further elaborate on how to make the EU and Member States merger control systems more integrated, with the aim to create a true “European Merger Area” in the Internal Market. The Staff Working Document acknowledges that “diverging merger rules and practices create administrative burdens on businesses and may also impact the internal market”, but the White Paper seems to postpone consideration of legislative measures aimed at addressing the problem to a vague “long run”.

2. A true European Merger Area in the Internal Market

A major reform will take time, therefore it is important to start working on it as soon as possible. The importance and complexity of the project should not deter the Commission from taking a political commitment: the successful story of the ambitious modernization of the application of antitrust rules, which led to the adoption of Regulation 1/2003, shows the way to proceed. Far-reaching legislative measures may be elaborated while continuing to promote, under the current rules, stronger cooperation and soft convergence between the Commission and NCAs and among the NCAs.

The main objective of the reform, as suggested in the White Paper (§22), should be the harmonization of substantive merger control law, i.e. the establishment of a system
whereby the Commission and the NCAs apply the same substantive EU rules to mergers with cross-border effects, similar to the current framework for antitrust enforcement. Currently, apart from the (few) remaining formal differences in substantive rules among Member States, divergences in the way in which even similar rules are interpreted and applied represent an obstacle to the attainment of an effective Single Market. An enhanced EU merger control framework would be crucial to achieve a more uniform approach, due to the direct role which might be played by the Commission to ensure consistency, and to the binding value of the case-law of the Court of Justice with reference to the interpretation of the common substantive rules.

More uniform and predictable EU substantive merger control rules, indicating when a merger may raise competition concerns and when it may be prohibited or approved conditional on the adoption of remedies, will increase the strength of the EU system as a benchmark at the international level. Therefore, the reform would help to reduce the risk of lack of transparency and political interferences in merger control worldwide, which currently represent a serious problem for undertakings and competition.

As for procedures, in order to streamline and simplify the current European system the priority should be the approximation of information requirements, standstill rules and time frames for merger review.

As for the thresholds triggering the competence of national competition authorities, the Staff Working Document rightly acknowledges that it is difficult to justify a EU legislative intervention; however, use of market share based thresholds at the national level should be strongly discouraged, following the ICN best practices, since it entails unjustified uncertainty for the parties.

The allocation of cases between the Commission and national competition authorities might be based on a refined version of the current rules of the Merger Regulation (thresholds for the competence of the Commission, referrals), aimed at further promoting a one-stop shop scrutiny.

1 Staff Working Document, §37.


3. Minority shareholdings

3.1 Should we extend the Commission jurisdiction to non-controlling minority acquisitions?

As anticipated, a legislative initiative aimed at granting the Commission jurisdiction to review acquisitions of non controlling minority shareholdings would be justified only if its benefits in terms of competition clearly exceed the resulting costs. With reference to the analysis contained in the Staff Working Document and in the Impact Assessment we respectfully submit the following comments:

- a realistic policy objective should be to endow the Commission with appropriate and well designed tools to tackle not any possible source of harm to competition, but significant sources of harm to competition. The issue is where to set the dividing line between what is significant and what may be considered of minor importance. So far, under EU merger control, only acquisitions of control were considered significant enough to justify a prior scrutiny by the Commission; the same approach was followed in 24 Member States. Only Austria, Germany and UK, similarly to some important non-EU jurisdictions like the US, Japan and Canada, chose a different significance criterion and review also acquisitions of non-controlling shareholdings;

- in order to support a proposal which extends EU control to acquisitions of non-controlling minority shareholdings, the Commission has to show that the current gap raises serious competition concerns, according not only to theories but also to empirical evidence. The White Paper and the Staff Working Document provide a complete survey of the economic theories indicating under which circumstances the acquisition of a minority shareholding may result in a restriction of competition. Among these theories, the more concretely relevant from a policy perspective are the ones whereby the non-controlling minority shareholder has the ability and incentive to actively hamper the competitive strategy available to the target and the theories based on access by the shareholder to sensitive information. As for empirical evidence, the White Paper reports some cases where a minority shareholding raised competition concerns. The number of these cases, however, is very small. The White Paper also reports a number of recent acquisitions of non-controlling shareholdings in competitors or vertically-
related sectors in the EU, expressly stating that no clear evidence of competition concerns is available. Overall, the analysis contained in the White Paper and in the Staff Working Document shows that there may be some benefits for competition in reviewing also acquisitions of non controlling shareholdings, but their overall economic significance is uncertain;

- the costs of the proposal, in terms of administrative burdens and waiting periods for undertakings, are underestimated. The impact assessment considers only the consequences at the EU level, foreseeing that the proposal would involve 20-30 transactions a year. Since it is likely that the system, if adopted, will be imitated in 24 Member States and in an indefinite number of extra-EU jurisdictions, the indirect costs for undertakings may be much higher than what is considered in the documents;

- the alleged asymmetry of the current regime - allowing the Commission to intervene against a pre-existing minority shareholding held by one of the merging parties when control is specifically acquired, but not if the minority shareholding is acquired subsequent to the Commission’s investigation - does not provide sufficient ground to justify a change of regime. The same asymmetry exists, for instance, for pre-existing long term contracts, but this does not justify widening the scope of the Merger Regulation so as to ensure prior control of long term contracts.

These considerations suggest that, although the model proposed for control of acquisitions of minority shareholdings (so-called targeted transparency system) seems reasonable, the underlying choice to extend the scope of the Merger Regulation to acquisitions of non controlling shareholdings should not be taken for granted, but deserves further examination before submitting a legislative proposal.

### 3.2 Comments on the targeted transparency approach

Should the Commission decide to make a legislative proposal, the level of shareholdings considered relevant in the White Paper (not only above 20% but also between 5% and 20% if accompanied by additional factors, such as a seat on the board of directors) should be evaluated taking into account that the model adopted by the EU will be widely imitated.
As for the **scope of the information notice** under the transparency system, probably the German approach (a limited market share information) would be more in line with the European tradition than transmission of internal documents to competition authorities.

The suggested **waiting period** of 15 days once the information notice has been submitted is reasonable, also to allow Member States to consider whether to request a referral.

On the contrary, we consider unacceptable the additional proposal whereby, if the Commission has not decided to initiate an investigation in the 15 days period, although the parties are allowed to complete the transaction the Commission still has a period of 4-6 months during which it may initiate an investigation. Reference to the UK system, which provides a limitation period of 4 months during which the competition authority may decide to intervene, is misleading, because in the UK undertaking are not obliged to provide competition authorities with prior information on their acquisitions.

The additional period of 4-6 months would entail disproportionate uncertainty for undertakings: reverting to the status quo is costly and may be a difficult task also in case of non controlling shareholdings\(^2\). This uncertainty may lead undertakings to prefer voluntarily submitting a full notification. The result would be a heavier administrative burden than the one contemplated under the transparency model. If the Commission truly aims at establishing a “business-friendly” targeted transparency system, the Commission and complainants (which would be informed of the transaction by a Commission notice\(^3\)) should be allowed to **raise objections within the 15 days waiting period; no further limitation period should be provided** (except for cases of incomplete or false information).

The Staff Working Document rightly addresses the important issue of how to avoid that the envisaged transparency system results in unjustified obstacles to the **activity of financial institutions**. In order to address this concern, an adaptation of the banking clause in art. 3.5 of the Merger Regulation is necessary: the exception currently provided for concentrations under art. 3.5.a should be extended, by analogy, to acquisitions of non controlling shareholdings. The exception should also expressly cover restructuring transactions (including debt-for-equity swaps).

\(^2\) Impact Assessment, §65.

\(^3\) Staff Working Document, § 102.
The current rules of the Merger Regulation on acquisitions of control on the stock market should be adapted to include, by analogy, acquisitions of non controlling shareholdings (i.e. no waiting period, but a temporary limit on the exercise of voting rights).

4. Referrals

The referral system, which has already been reviewed in 2004, may be further refined so as to ensure a better application of the one-stop shop principle, with the associated reduction of administrative burdens. The White Paper rightly emphasizes that a high number of cases (240 cases in 2007) are still subject to review in three or more Member States.

**Article 4.5**

For pre-notification referrals from Member States to the Commission on the initiative of the parties (art. 4.5), we strongly support the proposal to abolish the current two-step procedure allowing the parties to notify directly to the Commission. Moreover, the parties should be allowed to request the referral also in cases where the transaction falls within the jurisdiction of **two Member States** (instead of 3 Member States as in the current formulation). **In the pre-notification phase, exchanges of information** between competition authorities **should be limited** to what is strictly necessary, in order to minimise the risk of leaks of sensitive information.

**Article 22**

For post-notification referrals to the Commission, we generally agree with the approach suggested in the White Paper, including the establishment of an **information system amongst the Member States and the Commission in order to ensure a better coordination.**

With reference to the scope of the Commission jurisdiction in case of referral, we draw the attention on the fact that, differently from referrals under art. 4.5, referrals under art. 22 are not requested by the parties. Therefore, in the context of art. 22 the proposal to give the Commission competence for the entire EEA, including Member States which would not have jurisdiction under national law, may be controversial. Undertakings would not be able to know in advance the geographical area in which the
impact of their operation will be assessed under competition rules: the area would depend on whether or not Member States decide to refer the case to the Commission.

**Article 4.4**

For pre-notification referrals from the Commission to a Member State under art. 4.4, we agree with the proposal to eliminate the requirement that the transaction may “significantly affect competition in the market”: a more neutral formulation (the transaction is likely to primarily impact a distinct market in a Member State) is likely to allow a more effective use of the instrument.

**5. Miscellaneous**

The simplification proposals contained in White Paper under the “miscellaneous” heading would be welcome improvements of the current system. We refer in particular to:

- the proposal whereby a **full-function joint venture located and operating outside the EEA** and without any impact on markets within the EEA would fall outside the scope of the Merger Regulation;
- the proposal to **exempt from notification certain categories of transactions** such as transactions which do not involve any horizontal and vertical relationship between the merging parties (which are currently dealt with under a simplified procedure). A transparency system, with only a 15 days waiting period, would represent a simplification.

Finally, the proposal to provide **effective sanctions against the use by private parties and their advisors of confidential information** obtained during merger proceedings deserves full support.