
The Commission on Protection of Competition (CPC) welcomes the initiative of the Directorate General for Competition of the European Commission on possible amendments of Council Regulation (EC) № 139/2004 regarding the merger control between undertakings (Merger Regulation).

The dynamics of the economic environment and the ongoing processes in a range of economic sectors determine the need for expanding the scope of merger control, in order to fully assess the cases leading to potential distortions of competition.

The practice of some Member States, although in rare cases, shows that the acquisition of minority shareholdings not leading to control within the meaning of the Merger Regulation may distort or harm competition, by exercising influence on the activity of the target company. Irrespective of the definition of this influence - significant or material – the CPC agrees with the considerations expressed by the EC and the National Competition Authorities (NCAs) with experience in the field of minority shareholdings control, that such an acquisition could raise potential harm to competition, similar to that in acquiring control with non-coordinated and/or coordinated anticompetitive effects.

The CPC generally supports the initiative for amendments of the merger case referral system, in particular of Article 4, para.5 and Article 22 of the Merger Regulation. The adoption of the proposed changes would certainly lead to rationalization of the process as well as to closer cooperation and information exchange between the Commission and NCAs.

On the proposal for assessment of structural links

The Law on Protection of Competition (LPC), which entered into force on 2 December 2008, does not give the CPC the power to deal with minority shareholdings if they do not lead to control (on a legal or factual basis) within the meaning of Art. 22 of the LPC. There is no legal provision for a voluntary notification of such cases.
Furthermore, the LPC does not state an obligation to notify the CPC in case of acquisition of shareholdings above a certain threshold. However, according to the Form and Instructions for completing the Notification Form under Art. 79 of the LPC, adopted by CPC Decision of 20 January 2009, (item 3), the CPC demands information on minority interests of the participants in the concentration from companies operating in markets likely to be influenced by the concentration (active on the same relevant market, or on vertical or closely related neighbouring markets to those where the participants mainly operate).

The purpose of this information is to conduct a comprehensive analysis on the effect of the proposed transaction on the affected markets and, should potential concerns arise, the divestment of the abovementioned minority shareholding can be stipulated as an essential condition for authorizing the merger.

The EC’s proposal for assessment of certain minority shareholdings acquisition cases is related to the introduction of a new legal instrument, which obviously aims to prevent cases likely to harm competition and consumers. Via this new tool, it would be certainly possible to cover to the widest extent the cases leading to potential distortions of competition.

At this stage, however, the White Paper does not clarify enough the legal nature of the acquisition of minority shareholdings: whether it would be treated as a merger between undertakings (as in the German or Austrian legal model) or as a different transaction type that, together with mergers, falls within the scope of the Merger Regulation.

The new instrument however, would make a preliminary (ex-ante) control over the acquisition of some minority shareholdings in a manner similar to mergers when these minority shares lead to a significant influence over the commercial policy and behaviour of the target company. This influence could take form in the adoption of company and management-specific decisions, in participation in defining business objectives or substantial modifications of its core business, technology or market behaviour.

The CPC considers that the definition of structural links must include not only the amount of the equity participation in an undertaking, but also the rights attached to it. It is also necessary to ascertain whether the acquisition of the minority shareholding will be on a lasting basis, in order to be the subject of an assessment by the competent competition authority. In this respect, the merging parties should be required to provide the information necessary for proving the above.

The Bulgarian competition authority considers that each case should be assessed individually, reflecting the liaisons between the participants, the resulting rights and the purpose of the acquired minority shareholding. In assessing the existence/absence of structural links, the following factors could also be considered: distribution channels/supply, granting special rights to the acquirer (incl. management representatives nomination), access to sensitive business information, etc. Therefore, the establishment of clear rules and criteria is necessary to facilitate the application of the new regulations and to provide more legal certainty for companies to self-assess whether they fall within the scope of the Merger Regulation and when the submission of information about the intention to acquire a minority shareholding is required.
The White Paper introduces the concept of a "competitively significant link" and suggests the submission of an information notice to the Commission when the acquisition of minority shareholdings creates such a link. In principle, the CPC endorses the Commission’s proposal that the definition of "competitively significant link" should include the cumulative criteria of a competitive relationship between the purchaser and the target company and a threshold for the acquired minority shareholding accompanied by associated rights.

The CPC considers that, the offered cumulative criteria of the definition would generally encompass utmost the potential anticompetitive minority acquisitions.

However, to enable the parties to self-assess whether a transaction creates a "competitively significant link", clear rules in the form of guidelines/instructions should be elaborated, providing information in which cases the minority shareholding and the associated rights are assumed to allow the purchaser to exercise significant material impact on the company’s activity. The practice of the EC and that of several NCAs (Austria, Germany, UK, USA, Canada, Japan), which are legally authorized to assess acquisitions of non-controlling minority shareholdings could serve as a basis for preparing such guidelines. Thereby the unreasonable administrative burden on the parties to notify transactions not leading to negative effects on competition in the relevant market would be avoided.

The CPC agrees, in principle, that the “substantive test” of the Merger Regulation is an appropriate method to assess whether a structural link could lead to a significant impediment to competition.

The CPC shares the opinion, presented in the White Paper, that the "targeted" transparency system, where the parties are obliged to provide the Commission with basic information about the planned acquisition of minority shareholdings, has the most advantages. The main one is that this system allows the Commission not only to be informed about the particular acquisitions of minority shareholdings, but on the basis of the provided information, to issue a reasoned decision on the necessity to proceed with an investigation.

However, the CPC considers that the White Paper does not provide sufficient clarity on the overall concept of the favoured “targeted” transparency system. On the one hand, the proposed new tool is intended to avoid the application of the notification regime on minority shareholding acquisitions, since, as noted in the White Paper, it would lead to a significant increase in the administrative burden on businesses. On the other hand, the issue of legal certainty to be granted to business is not elucidated to a sufficient degree. In this regard, the CPC considers that upon reception of the information notice, the EC should commit to rule within a reasonable time period.

With regard to the application of the already mentioned system, the CPC considers that it should be clearly defined in which cases the Commission would have legal grounds to carry out an investigation, i.e. in which cases the undertakings will be required to submit a full notification. The CPC shares the opinion of the Commission that the notifying party should have the right to voluntarily submit a full notification, as well. This could be in cases where on the basis of the guidelines issued by the EC (guidelines on evaluation and investigation of the acquisition of minority shareholdings), the notifying party is able to self-assess that the relevant criteria are in place for an in-depth investigation to be opened. Furthermore, in order to ensure legal
certainty for the undertakings, it is necessary to regulate in the clearest possible way not only the cases where the Commission will carry out an investigation of minority shareholding acquisitions, but also the time limits within which the Commission should exercise this power.

The CPC shares the opinion of the European Commission that the information notice should include data limited by volume but at the same time this information should be sufficient not only to initiate an investigation of the case but at Member States’ discretion – for a possible request for referral of the transaction.

The CPC considers it appropriate if the information notice covers only limited, but still sufficient information concerning:

- The parties to the transaction and their activities;
- The legal form and the date of the execution of the transaction;
- The parties’ turnover for the previous financial year;
- The other owners of the share capital and the amount of their contribution, voting rights in the General Assembly, representation in the Governing bodies, agreements between the acquirer of minority shareholdings and the other partners, which enable the former to influence the decisions, the achieved quorums of General Assemblies held in the last three years and the shareholders who casted their votes;
- What is the form of the structural link;
- Markets where the parties have an activity and their respective market shares;
- If the case exceeds the boundaries of one country, information about all Member States where there is an effect of the transaction has to be transmitted.

The CPC considers that it would be useful if the information notice, which the parties submit, contains their justification/rationale on the probability that the acquired minority shareholdings will result in coordinated or non-coordinated effects, as well. The CPC is of the opinion that such a motivation would be an expression of the self-assessment of the undertaking on the influence that a future minority shareholder will have on the activity of the company and would provide the Commission with additional arguments on whether or not to start a case investigation. Moreover, the rationale of the transaction’s participants could contain useful information about the strategy of the acquirer of the minority shareholding (if this is a pure capital investment; is the main activity of the purchaser focused on manufacturing or providing services on other markets or do the products and activities of the parties to the transaction fall within different market segments).

The CPC considers it appropriate that after lodging the notice to the EC the parties should not take any action concerning the transaction before the final ruling of the Commission. In certain cases specifically defined in the Notice/Guidelines and upon explicit request by the participants, the acquisition of a minority shareholding should be authorized. From a procedural perspective, it is particularly important to determine the time limit, running after the submission of the information notice, within which the Commission has to make an assessment and eventually require a submission of a full notification and in which cases the parties may voluntarily decide to file such a notification. The CPC considers that the period of 15 working days, in which the concerned NCA has the possibility to request a case referral following the receipt of
the information notice, is also appropriate for the acquisition of minority shareholdings.

In this regard, it should be noted that, according to the White Paper, the EC will issue a decision only in those cases when based on its autonomous appraisal, the Commission decides to investigate the transaction. In other words, the inactivity of the Commission within the prescribed period after receiving the notice may be interpreted as a tacit consent to the transaction for the acquisition of a minority stake. This may create a legitimate expectation in the companies, which would proceed with the completion of the transaction. At the same time, the White Paper reserves the possibility for the Commission to investigate within a prescribed period of 4-6 months, no matter if in the meantime, the transaction has been completed or not. It is important to point out that the White Paper does not provide a satisfactory answer to what could be the possible results of the Commission’s actions following the investigation: whether to restore the position of the companies in which they were prior to the completion of the transaction or the companies will be imposed a sanction/fine. The CPC considers that, in the course of defining the legal framework, the cases where the EC, by way of exception, will have the power to conduct an investigation after the expiration of the initial period commencing from the date of receiving the information notice should be determined exhaustively and specifically.

In light of the foregoing, the CPC considers that in addition to the amendments to the Merger Regulation it is necessary to draft corresponding guidelines in order to provide clear criteria for the assessment of acquisitions of minority shareholdings, the information needed to be fulfilled in the notice or the full notification, as well as the entire procedural framework – running from the filing of the notice to the adoption of the final act of the Commission.

The competent authority to assess the acquisition of minority shareholdings which do not provide control (Commission or NCA), according to the White Paper, is determined upon the turnover thresholds, currently applicable to acquisitions of control (Article 1, para. 2 and 3 of the Merger Regulation). In this context it is necessary to determine both the companies whose turnover will be referred to the turnover of the direct participants in the transaction, i.e. "the undertakings concerned" and the method of calculating their turnover – whether it will be identical to the one in the cases of acquiring control or a different approach will be accepted (as far as the target company in acquisition of minority shareholdings cases retains its links with the economic group to which it belongs).

For reasons of legal certainty, the Commission should explicitly indicate to the parties not only a deadline for completing its investigation, but whether this deadline might be prolonged, suspended or interrupted and the circumstances demanding that. It is appropriate that the guidelines should also include an information notice template and a full notification form (as in filing the CO form). Such guidelines would be useful to both the undertakings concerned and the national competition authorities, and certainly would contribute towards establishing consistent law enforcement.
Regarding the case referral system
(Article 4, para. 5 and Article 22)

The CPC fully supports the proposed amendments of Article 4, para.5 and Article 22 of the Merger Regulation.

The simplification of the referral procedure, under Article 4, para.5 through the shifting from the present two-stage procedure, i.e. motivated request, followed by a notification towards submitting a direct notification is expedient and it would speed up the entire referral process. This approach would not only reduce the time that Member States spend in waiting for the referral of their case, but also alleviate the burden of drafting motivated requests. For the purpose of effectiveness, the CPC fully supports the EC proposal to inform Member States about the planned transaction at the moment when preliminary talks preceding the notification are conducted.

As far as the information exchange between Member States and the Commission would include referral of the initial information notice, the CPC considers it necessary that the relevant information to be included in the information notice must be clearly defined.

In the CPC’s opinion, the information provided by the participants should be of small volume, in order to limit the administrative burden over the undertakings and yet to be sufficient so that Member States are enabled to evaluate at this stage whether to oppose the referral.

It is possible that in addition to the information provided in the notification, NCAs will make use of their individual observations and practice in the relevant markets.

The CPC believes that the 15 working days’ time limit in which a Member State could submit a request for referral under Article 4, para.5 of the Merger Regulation should remain unchanged.

With regard to Article 22 of the Merger regulation, the CPC considers that the proposed amendments are in line with the principle of “one stop shop”. In such referral, the EC will be competent to evaluate the effect of the transaction over the EEA in case that no Member State opposes the referral. In this way, the risk of contradicting decisions issued by different NCAs would be avoided. In addition, the planned amendments will enable the assessment of the merger over the entire internal market. In particular, those would be cases with cross border effects, affecting several Member States or relating to markets larger than the national market, as the NCA are limited to exploring the effects of the transaction within national borders.

In general, the CPC agrees with the proposal of the EC for disseminating the preliminary information notice in the shortest possible time period to the concerned NCAs in order to avoid the problems pointed out in the White Paper. The risk of requesting a referral when an approval for the transaction by another NCA has already been granted is reduced when upon the reception of the notice national deadlines for decision-making are stopped.

Nevertheless, the CPC considers that it is possible to have a situation in which an NCA had already issued a decision on a transaction for which a referral under Art.22 had been requested.
This might occur due to the fact that a notification could take place in different times, as well as that in certain cases there is insufficient information indicating whether a transaction could have a cross border effects, or the data implying it is collected after the 15 working days time limit for requesting a referral.

In case where clear cross border transactions are evaluated, NCAs can easily decide to refer the case to the EC as the most appropriate authority to assess the concentration. In cases where the cross border effects are not clear from the outset, it is possible that in the course of the analysis new data concerning the geographic scope is acquired, and thus enlarging it over the territory or parts of other Member States. This information could be obtained for example from competitors or from statements of other regulatory authorities. Under this hypothesis, there is a possibility that the 15 working days period for establishing the necessity of a referral have expired. In view of the above, the CPC considers that regardless of the proposed amendments of Article 22 of the Merger regulation, there is a possibility that a Member State could approve a transaction within its national legislative framework, prior to the reception of a request for referral.

In these cases, it is necessary to take into account that within the 15 days time limit is it necessary to follow the national procedures. The request for referral is an official statement, which bounds the NCAs. In view of the procedural rules under the LPC, this statement should be adopted by an act of the CPC, acting as a college of members, and not by the case team, which also requires additional time.

In the CPC’s opinion, the draft of a preliminary information notice to the EC, where an NCA declares a request for referral, should contain data that unquestionably outlines the Member States concerned by the cross border effects and those countries where the transaction should be notified. We consider that the motives for the referral must be stated there too.

The information Notice would probably duplicate part of the ECA-Notice of the EC, as it remains unclear whether these forms would be dropped or completed. In conclusion, the CPC gives its support to the modifications suggested by the White Paper and the accompanying working documents for amendments in the Merger Regulation as its scope would include an evaluation of certain minority shareholdings and the efforts of the EC for a more rapid and effective referral procedure.