EC White paper on EU merger control
Comments of the Austrian Competition Authority BWB

The Austrian Competition Authority (BWB) considers that the summary of replies to the consultation on the white paper on EU merger control by the European Commission (EC) does not fully reflect the views expressed by the BWB, in particular concerning the European merger control area (recital 63), the proposal by the EC to include a possibility to revoke referral decisions based on deceit or false information (recital 59) and Article 9 referrals (recitals 39 and 53). The BWB is therefore glad to submit a short English version of its comments.

General remarks:
- Diverging decisions of national competition authorities are often appropriate as markets (and problems) are often national.
- The introduction of EU merger control rules in all national merger control regimes (European merger control area) is not supported. It would not solve existing problems. Problems for parallel decisions in practice are mainly different timing and different (level of) information.
- In order to resolve these issues we suggest the introduction of a legal basis for the exchange of confidential information between national competition authorities in merger cases. The feasibility of such a provision should be studied.

Merger control for non-controlling minority shareholdings
- Criteria defining when the EC is competent must be clear and simple. The BWB is not sure if the proposal meets these standards. In particular the question if a company is considered to be a competitor might be difficult to answer without market definition. The BWB will study the industry's comments and might come back on that issue later.
- The BWB is not in favour of the proposed system of targeted transparency. It supports a further simplified notification system.
- Reasons:
  o Reduced level of control: currently the BWB has 4 weeks to investigate a merger on the basis of full information. Under the new system it has only 3 weeks with little information to decide on a referral.
  o Low legal certainty for companies: companies would have to wait for 4 to 6 months to get clarity.
  o Undoing of mergers (due to lack of stand-still obligation during "prescription period" of 4-6 months) would be very difficult.
- **Voluntary notifications would be expected in most cases.** If this is the case, a normal notification system should be introduced avoiding all the above mentioned problems. Such a notification system could require less information than the simplified form CO and would not require the EC to take an official decision in case of approvals.

- In case of a targeted transparency system different **questions** remain to be clarified:
  - Clear criteria for the decision of the EC: conditions for full notification? timing?
  - Content of information notice
  - **Referral:** MS have only limited information. Referral mechanisms would have to be adapted.

### Case referrals
- The whole referral system has to be looked at as a closed system to guarantee that cases are investigated by the best placed authority. Changes in one part entail changes in other parts.
- **Art 22:** The BWB agrees in principle with the proposal that the EC should obtain jurisdiction for all member states or none. However, the BWB is **strictly against** the "implementation" proposal, in particular the proposed system of a **mandatory early information notice. The proposal has to be rethought completely:**
  - In Austria about 300 mergers are notified each year. More than 50 % of them also have to be notified in another MS. Austria would therefore have to send more than 150 information notices per year. If all the other agencies would only have to send 50 information notices each, a total of 1,500 information notices would be sent. The result would only be a complete overflow of information.
  - The information notice should contain information about the market situation in other member states. As in Austria there is no legal basis for requesting such information, the EC would have to ask companies for this in at least 150 Austrian cases and distribute the information to other MS.
  - An information notice would also have to be sent in cases where a MS would not like to refer the case to the EC and could thereby block the referral.
  - The legal implication would be the suspension of all national deadlines.
  - The system should facilitate the referral of cases to the EC. Since 2004 23 cases were referred, ie on average 2 per year.
  - Cost (for NCA and companies) is therefore in no relation to benefit.

- **Art 9:** There is much room for improvement of Art 9. While the EC does not mention Art 9 in the white paper, the BWB proposes that the **room for discretion** for the EC should be reduced, eg by introducing the obligation of the EC to refer cases to MS (in all circumstances of Art 9 para 2). Logically, also the proposal of the EC in the Commission Staff Working Document (see recital 174) to prolong the deadline for referral decisions is not supported by the BWB.

### Miscellaneous:
- The BWB does not agree with the proposal of the EC in the Commission Staff Working Document (see recital 200) to introduce the possibility to **revoke referral decisions** that were based on false information. This would mean that decisions
of national competition authorities would be revoked. The risk of a false investigation by a MS is not so heavy to justify such an intervention in the validity of national decisions and the consequences for legal certainty.