“TOWARDS MORE EFFECTIVE EU MERGER CONTROL”

OBSERVATIONS ON EU COMMISSION’S WHITE PAPER

October 3, 2014

Cleary Gottlieb Steen & Hamilton LLP
Observations On EU Commission’s White Paper  
“Towards More Effective EU Merger Control”

I. **Introduction**

1. These Observations are submitted by Cleary Gottlieb Steen & Hamilton LLP (“Cleary Gottlieb”) in response to the Commission’s White Paper “Towards more effective EU merger control” (the “White Paper”).\(^1\) Although the scope of this paper is limited to addressing the specific matters raised in the White Paper, it should be read in conjunction with our Observations\(^2\) on the Commission’s Staff Working Document (the “Consultation”).\(^3\)

2. We welcome many of the proposals in the White Paper, in particular the Commission’s proposed modifications to the case referral system, which we believe will improve the current system and make it more effective. Together with the efforts made over the past decade to develop a clearer analytical framework for the assessment of reportable concentrations and to make more systematic use of economic evidence, these and other measures taken to streamline the review process have improved the functioning of the Merger Regulation and the division of powers between the Commission and the National Competition Agencies.

3. We do, however, have strong reservations about the proposal to broaden the Merger Regulation’s scope of application to capture non-controlling minority shareholdings. We have four main concerns:

   i. First, we are not persuaded that the “gap” in the Merger Regulation’s scope of application is wide enough to merit a potentially burdensome expansion. As the majority of respondents to the Consultation explained, there is scant evidence in support of the need for expanding the Commission’s powers to review the acquisition of non-controlling minority shareholdings in order to effectively enforce competition law.

   ii. Second, to the extent that non-controlling minority shareholdings can raise antitrust concerns, the Commission could, at least in most cases, apply Articles 101 or 102. Indeed, the principal theories of harm that have in the past been identified as arising most commonly from non-controlling interests


are typically behavioural concerns that are ill-suited to *ex-ante* mandatory review and better suited to review under Articles 101 or 102.

iii. Third, the mechanism proposed for reviewing the acquisition of minority shareholdings does not meet the Commission’s stated objectives of avoiding an unnecessary and disproportionate regulatory burden. On the contrary, it will be complicated and time-consuming for companies to comply with the envisioned rules, including because of the inter-relationship between the regime proposed by the Commission and current (and possibly future) national merger control regimes that capture the acquisition of non-controlling minority shareholdings.

iv. Fourth, we are concerned that any expansion of the Merger Regulation’s scope of application to include the acquisition of non-controlling minority shareholdings will not meet the Commission’s stated objectives of avoiding an unnecessary and disproportionate regulatory burden. On the contrary, it will be complicated and time-consuming for companies to comply with the envisioned rules, including because of the inter-relationship between the regime proposed by the Commission and current (and possibly future) national merger control regimes that capture the acquisition of non-controlling minority shareholdings.

4. Even if one accepts the existence of (a) a “gap” in the Merger Regulation’s scope of application, and (b) practical and/or legal limitations to applying Articles 101 or 102, the White Paper does not persuasively show that there is a need to introduce a mandatory notification system with a suspensory period and penalties for failure to notify. Accordingly, should the Commission decide to proceed, we would urge it to reconsider two features of the proposed system: (a) the proposal to create a mandatory, rather than a voluntary, notification system for the acquisition of non-controlling minority shareholdings, and (b) the introduction of substantive considerations into the jurisdictional test for EU merger control. A mandatory notification system, in particular one based on substantive jurisdictional criteria, will inevitably take time to define and apply, unnecessarily increasing the regulatory burden on companies and straining the Commission’s already limited resources. If, therefore, the Commission genuinely seeks to establish a “light and tailor-made review” of non-controlling minority shareholdings, we believe it should rethink the modalities of the proposal set out in the White Paper.

II. Non-Controlling Minority Shareholdings

5. Before expanding its jurisdiction and creating new administrative burdens, the Commission should first show that any “gaps” in the Merger Regulation have been associated with anti-competitive situations that the Commission is currently unable to address. In our view, that showing has not been made. The Commission has not identified situations in which non-controlling minority shareholdings have in fact resulted in reduced competition. The principal cases identified by the Commission are *BSkyB/ITV* and *Ryanair/Aer Lingus*. In both of these cases, however, the UK Competition Commission found no evidence that competition between the parties had in fact been reduced as a result of the non-controlling minority shareholdings in question, but instead identified concerns based on fact-specific assumptions about the ways in which the voting rights associated with the acquired shareholdings could be
exercised. In any event, these are not situations that escaped regulatory review, even if they fell outside the scope of the Merger Regulation. In these circumstances, and for the reasons explained further below, we do not believe that the envisioned sweeping changes to the Merger Regulation are justified.

6. If the Commission does decide to expand the scope of the Merger Regulation, it should consider a voluntary self-assessment system in which companies could elect to notify concentrations and/or the Commission could “call in” concentrations that it believed might raise competition concerns. A voluntary system with an appropriate limitation period (e.g., four months, as exists in the U.K.) would give the Commission jurisdiction to review the acquisition of non-controlling minority shareholdings considered likely to raise competition concerns, while avoiding a time-consuming and burdensome system of mandatory control for the large majority of transactions that are highly unlikely to raise concerns. Should the acquisition of non-controlling minority shareholdings escape review under the Merger Regulation, but subsequently give rise to competition concerns, such concerns would likely be behavioural in character and could therefore be subject to Articles 101 or 102.

7. Any system of mandatory control should recognize the difficulties associated with determining whether the existing turnover thresholds are met and appreciate that imposing any additional thresholds, particularly those envisaged in the White Paper, would create an unwieldy and impracticable system that would be unfit for purpose. As to the existing turnover thresholds, two points bear mention.

i. Access to turnover data: Acquirers of minority stakes are unlikely to have access to sufficient information on the target’s turnover to allow them to assess jurisdiction; the Commission should therefore set out a methodology for assessing jurisdiction when this information is unavailable.

ii. Definition of “undertakings concerned” when calculating turnover: This concept should be limited to acquirer and target (and their respective control groups); it would typically be very difficult for potential acquirers of non-controlling minority shareholdings to obtain turnover information on other shareholders that hold minority stakes in the target.

8. Although we welcome the Commission’s efforts to limit any expansion of the Merger Regulation’s scope of application to concentrations that raise competition concerns, the Commission’s proposals envision a time-consuming, complex, and burdensome system that is inconsistent with the principle inherent in the Merger Regulation from the outset of having “bright line” rules. In particular, we believe strongly that the Commission should reconsider its proposal to introduce substantive criteria into the determination of whether the applicable jurisdictional tests are met and should abandon the concept of a “competitively significant link” (CSL”) in favour of clear, objective criteria. As to each element of the proposed test, we have the following comments:

i. “Competitor or vertically related companies”: We are concerned that companies will find it difficult to determine their competitive relationship to possible investment targets. As the Commission may be aware, it can be challenging to determine whether the applicable thresholds are met in countries where the relevant jurisdictional tests include a market share
threshold. Such thresholds inevitably require companies to define markets (quite possibly at a local, national, regional, EU and global level, depending on the extent and scope of their activities) and to calculate market shares, both of which can present conceptual and practical difficulties. The Commission’s proposals would add a level of complexity that would make it difficult for many companies, in particular companies active in many markets or holding investments in a large number of companies around the world, to comply with their obligations under the Merger Regulation. Detailed guidance would be required as to the circumstances in which a competitive relationship would be considered sufficiently proximate to trigger a notification requirement, and individual cases might well require lengthy pre-notification discussions on market definition and the extent of competitive overlap necessary to satisfy the CSL test. It goes without saying that the exercise of determining whether a given investment was reportable would need to be undertaken before a filing could even be made, thereby resulting in delay. The White Paper provides little guidance as to how the proposed new thresholds would be interpreted, but clear rules and standards would be needed to ensure a workable system. Experience over the past 25 years shows that a wide array of definitional and other issues have arisen concerning the interpretation of the application of the existing jurisdictional thresholds, which are based on “bright line” rules; given how much more complex the proposed new thresholds are, there is every reason to believe it would take time and effort to develop practicable rules – time and effort that we respectfully submit could be more productively employed.

ii. Shareholding threshold: In our view, only acquisitions of non-controlling minority stakes of 20% or more should be considered reportable on any basis. This would provide companies and advisors with a “bright line” test for notification. By contrast, the 5-20% + “additional factors” test proposed by the Commission is likely to be difficult to apply and, therefore, problematic. The “additional factors” test seems to be modelled on the “competitively significant influence” test found in Chapter VII of the German Act Against Restraints of Competition. It is widely acknowledged that this feature of German law has led to confusion and an absence of legal certainty that has taken many years to address, and is even today not free of controversy. The Commission should therefore be wary of replicating this test at an EU level. We have the following specific comments:

(A) Commercially Sensitive Information: The White Paper appears to assume that it will be relatively straightforward to determine the types of information that will be available to a minority shareholder and whether such information is “commercially sensitive.” In practice, this is not always easy and may well result in uncertainty and delay. Moreover, the Commission has not explained the approach it would take in situations where minority shareholders may request commercially sensitive information, but where the target company is not obliged to provide it.

(B) “De Facto” blocking minorities: It can in practice be difficult to determine whether a given minority shareholding is capable of
conferring a “de facto” blocking minority. As with the determination of whether a minority shareholding confers “decisive influence,” this will depend on the composition of existing shareholders at any point in time, voting patterns at general meetings, and predictions of future voting patterns (including as a result of the formation of “alliances” among existing shareholders and the acquirer). While there may be situations where this determination can be made easily (e.g., where there are only a few large shareholders), in many cases it will not be straightforward. In BSkyB/ITV and Ryanair/Aer Lingus, for example, the Competition Commission conducted detailed inquiries and was required to make a series of speculative assumptions about future voting turnout, future voting patterns, and the types of decisions that could confer “material influence” under U.K. law. Any system that required investors (for purposes of determining jurisdiction) to make similar types of assessments across the EU could potentially raise complex legal and factual issues under a wide range of national corporate governance rules.

(C) The proposed 5% threshold is extremely low and may serve to chill investments, in particular those made by companies that have diversified portfolios of controlling and non-controlling stakes in companies active in many markets worldwide. There is no sound basis for requiring companies that acquire shareholdings as low as 5% to conduct a full CSL assessment, still less to notify such acquisitions under the Merger Regulation.

iii. Finally, the Commission should be mindful of the possibility that certain Member States may use the occasion of this review of the Merger Regulation to propose introducing industrial policy considerations into EU merger control, thereby undermining one of the Commission’s goals of creating a truly level playing field and avoiding inconsistent outcomes.4

9. If the Commission decides to proceed with a mandatory system, it should rethink and revise the proposed timing and procedure:

i. 15-day waiting period: no suspensory time-period is needed, particularly since the purchase of minority stakes can in most cases be unwound without undue difficulty. If a mandatory system is adopted, notifications should only be required post-acquisition.

ii. 4-6 month limitation period: we do not see any need for a 4-6 month limitation period during which the Commission may review any completed acquisitions in the event of a mandatory system. Any such proposal would likely result in unnecessary notifications in order to secure legal certainty. The result could be a system such as the one that applied under Article 101 prior to the enactment of Regulation 1/2003 in which companies and the Commission ended up devoting considerable resources dealing with precautionary notifications of matters that raised no competitive concerns.

4 See White Paper, at paragraph 20.
10. The White Paper does not indicate whether the Commission intends imposing penalties for any failure to comply with a mandatory filing obligation. This is a problematic omission, since the risk of fines is highly relevant to enabling stakeholders to assess the pros and cons of the proposed expansion of the Merger Regulation. The implication of the White Paper, however, is that any failure to notify the acquisition of a non-controlling minority shareholding that met the requisite jurisdictional thresholds could expose the company in question to a fine. Given the issues that may in practice arise from interpreting and applying those thresholds, this risks creating an unacceptable level of exposure, particularly given the Commission’s recognition that acquisitions of non-controlling minority shareholdings are less likely to raise competition concerns than full mergers, its stated preference for a “light” system, and the possibilities that exist for unwinding such transactions relatively easily. Again, the preparation of unnecessary precautionary notifications is likely to be the result.

III. Referrals

11. Article 4(4):

i. We support the proposal to abolish the requirement in Article 4(4) to demonstrate that a proposed concentration “may significantly affect competition in a market within a Member State” and to replace it with a requirement that a proposed concentration be likely primarily to impact a distinct market in the particular Member State(s) to which the request is directed.

12. Article 4(5):

i. We agree with the Commission that the current process for pre-notification referrals from Member States to the Commission is cumbersome and time-consuming. We therefore support the abolition of the Form RS.

ii. Where, however, a concentration is referred by Member States to the Commission under Article 4(5), we suggest that the Commission’s review be limited to examining the effects of a transaction in the territories of those Member States that have jurisdiction to review the transaction under their respective national laws.

13. Article 22:

i. Article 22 was introduced at a time when a number of Member States did not have national merger control regimes. In circumstances where all Member States (other than Luxembourg) have national merger control regimes, the rationale for allowing Member States to refer mergers under Article 22 seems unclear. We would therefore encourage the Commission to consider abolishing Article 22.

ii. If the Commission decides to retain Article 22, it should not have jurisdiction to review the effects of a transaction over the entire EEA following a reference from an individual Member State. Rather, the Commission’s review should be
limited to examining the impact of the transaction in the Member States that would have jurisdiction to review the transaction under national law.

14. Article 9:

i. We disagree with the Commission’s proposal that the 65 working day deadline should run from the start of Phase II proceedings, instead of the date of notification. The current timetable for making an Article 9 referral already causes merging parties significant uncertainty and it is unnecessary to give the Commission more time in which to reach a decision on whether to refer the case or to adopt a statement of objections.