Confindustria contribution to European Commission’s public consultation on the White Paper “Towards more effective EU merger control”

Introduction

Confindustria is the main association representing manufacturing and service companies in Italy, with a voluntary membership of more than 147,000 companies of all sizes, employing a total of 5,416,777 people.

The association’s activities are aimed at guaranteeing the central importance of companies, the drivers of Italy’s economic, social and civil development. By representing companies and their values at institutions of all levels, Confindustria contributes to social well-being and progress, and from this standpoint guarantees increasingly diversified, efficient and modern services.

Confindustria endorses the overarching objective of the White Paper “Towards more effective EU merger control” to improve the current EU regulatory framework in the field of merger control.

In this respect, while Confindustria supports the proposal brought forward to simplify and streamline case referrals between Member States and European Commission, it deems as potentially problematic the proposal to make the acquisitions of non-controlling minority shareholdings fall within the scope of EU merger control.

The comments below, which only address the latter, may be published and do not contain confidential information.

Acquisitions of non-controlling minority shareholdings: observations

According to the Commission, the acquisition of minority shareholdings in a competitor may lead to a structural link able to give rise to several types of anticompetitive effects. Minority shareholdings, in fact: may decrease the acquirer’s incentive to compete on the same market (horizontal unilateral effects); may facilitate the ability to collude due to the acquirer’s possibility to access privileged information on the commercial activities of the
target firm (*horizontal coordinated effects*); in case of non-horizontal acquisitions, may raise competitive concerns of input foreclosure (*vertical effects*).

Furthermore, the Commission considers that the uses of Article 101 and Article 102 in this regard are limited.

In light of the above, the Commission suggests setting up a system for the control of minority shareholdings at EU level within the current EU merger control regime. Such a solution, other than being unconvincing, it is a cause for concern.

Within antitrust law, the acquisition of non-controlling minority shareholdings has already being dealt with. If on the one hand, and under specific circumstances, minority stakes may give rise to competition concerns, on the other hand their likelihood and extension is rather limited. As a result, while the existence of an *ex ante* control mechanism for the acquisitions of control is warranted, empirical evidence put forward by the Commission is not sufficient to justify a similar control mechanism for the acquisition of non-controlling minority shares.

Absent evidence, Confindustria believes that the discipline of concentrations should continue focusing on the notion of "control", as well as *ex ante* assessment should continue targeting only those structural links that may grant decisive influence on the activities of the target company, thus generating the greatest risks in terms of harm to competition.

Conversely, those structural links that can give to the acquirer some degree of influence over the target firm’s decisions, but not the ability to determine its strategy, may continue to be assessed under Article 101 and Article 102 of the TFEU. Despite the Commission’s assumption, in fact, existing *ex post* intervention instruments, aimed at targeting agreements and abuse of dominant position, can also be applied in order to limit potentially anticompetitive effects arising from the acquisition of non-controlling minority shareholdings.

In particular, most common *horizontal coordinated effects*, such as those related to information exchange, may fall within the scope of Article 101 of the TFEU. Similarly, competitive concerns of input and customer foreclosure related to non-horizontal acquisitions may be dealt with under Article 102 of the TFEU, as in order to be relevant the acquirer should be able to exert some degree of market power.

While Article 102 may not be suitable for dealing with the acquisitions of minority shareholdings that may lead to *horizontal unilateral effects*, concerns related to this theory of harm could still be addressed under company law or unfair competition law. In addition, where the legislator deems it necessary, sectoral regulations can represent a useful remedy (i.e. the introduction in Italy of the so-called “interlocking ban”).

As a general comment, although some acquisitions of non-controlling minority shareholdings giving rise to competition concerns could be left out of the control system, a case-by-case assessment risks to be disproportionate to the potential competitive harm, and thus inconsistent with President Juncker’s objective to make the EU “big on big things and smaller on smaller things”.

Extending the scope of EU merger control, in fact, would generate additional administrative burdens to be borne by the undertaking party to the acquisition, thus increasing the costs of doing business in Europe. In addition, the growing number of transactions to be assessed by
the Commission would diverted scarce resources away from the analysis of more problematic transactions in terms of competition.

Furthermore, in its analysis the Commission disregards that the acquisition of a non-controlling minority stake could also have positive effects, such as easier access to capital when the target firm is a SME or an innovative start-up. In these cases, the envisaged control system would make acquisitions more costly and slower, thus discouraging investments in R&I that both the EU2020 Strategy and President Juncker have put at the forefront of our efforts to exit the crisis.

Finally, regulatory changes brought forward by the Commission would diverge from the current approach based on a clear-cut separation between merger control and antitrust law, thus increasing legal uncertainty with regard to the compatibility of acquisitions of non-controlling minority shareholdings with EU law. This would result in greater complexity and confusion for the parties to the acquisition, as well as in the already mentioned risk to curb investment.

In light of the far-reaching intervention suggested in the White Paper, Confindustria considers worthwhile for the Commission to reconsider the issue after having provided further evidence.

In the imprudent event that the Commission decided to proceed along the direction outlined in the White Paper, Confindustria believes that, among the three procedural options proposed for the control of minority shareholding, the self-assessment system should be preferred.

The other two options put forward, the so called “notification system” and the “transparency system”, in fact, risk to increase the administrative burden on undertakings.

While an ex ante information system for the acquisitions of control is warranted also for the parties to the acquisition, who have a direct interest in assessing at an early stage the compatibility with EU law of an transaction which creates solid and long-lasting structural links, a similar system for the acquisition of minority shareholdings would be disproportionate. In the latter case, in fact, not only the potential harm to competition is far more likely and extensive, but the strength of the structural link created is weaker and easier to remove. Furthermore, as these operations are far more frequent, the parties to the acquisition of minority stakes would face a high number of notifications and high administrative costs - which would add up to a generalised slowdown of capital market transactions due to the stand-still obligation.

Further observations can be made with regard to the so called “targeted transparency system”. In particular, the obligation to submit an information notice to the Commission would only be triggered if the transaction meets two cumulative criteria, thus falling within the definition of “competitively significant link”: i) the target firm is a competitor or a vertically related company; ii) the acquired shareholding is around 20% or between 5% and 20% but accompanied by additional factors (i.e. rights which give the acquirer a “de-facto” blocking minority, a seat in the board of directors, access to commercially sensitive information of the target).
In light of the above, the parties to the transaction would be required to self-assess whether it is likely to create a “competitively significant link” and, if so, to submit an information notice.

As this self-assessment may be rather complex, for reasons of clarity and legal certainty the concept of “competitively significant link” should be anchored to pre-defined and easily verifiable parameters without the need of any substantive assessment, such as the existence between the acquiring firm and the target firm of a competitive relationship.

Furthermore, the quantitative thresholds identified by the Commission seem too low and give the Commission wide margins of discretion. In particular, the 5% threshold should be increased at least up to 10% for horizontal acquisitions and up to 15% for vertical ones.

Finally, the “targeted transparency system” foresees the possibility for the Commission to investigate a transaction within a 4 to 6 months period, whether or not it has already been implemented. However, the state of legal uncertainty that would result from it is unacceptable.

Confindustria considers that, whilst it does not represent a desirable solution, the “self-assessment system” is the less problematic procedural option among the three brought forward, as long as targeted minority shareholdings are clearly identified. Such a system, which is already operational in relation to Article 101 of the TFEU for the assessment of joint ventures, is more consistent with the approach followed within the modernisation process of EU competition law launched with Regulation 1/2003, as well as with the need for administrative simplification and cost reduction advocated for by the business community.