European Commission
DG Competition, Unit A2

Submission by the Finnish Competition and Consumer Authority to the
European Commission's Public Consultation: “Towards more effective EU
merger control”

The Finnish Competition and Consumer Authority (“FCCA”) welcomes the
opportunity to make a submission to the European Commission
(“Commission”) on the White Paper “Towards a more effective EU merger
control”. The White Paper proposes to extend the scope of EU merger
control to non-controlling minority shareholdings as well as suggests some
changes to the case referral system between the Commission and the
national competition authorities of the Member States (“NCA's”). The
following sets out the views of the FCCA on the Commission's proposals.

Non-controlling minority shareholdings

In the White Paper, the Commission explains that the current framework of
competition legislation in the EU leaves an enforcement gap with regards to
acquisitions of non-controlling minority shareholdings. Such transactions do
not fall within the jurisdiction of the EU Merger Regulation (“EUMR”) nor
can they be consistently examined under Articles 101 and 102 TFEU.
However, under some circumstances such ownership can result in harm to
effective competition. Non-controlling minority shareholdings can affect the
competitive behaviour of both the acquirer and the target as well as provide
for market conditions conducive to coordination. The FCCA considers as
well-founded the Commission’s arguments on the existence of the
enforcement gap and the potential anti-competitive effects of non-
controlling minority shareholdings.

In the White Paper, the Commission proposes to bring non-controlling
minority shareholders under the jurisdiction of the EUMR with the so-
called targeted transparency system. This would require filing an
information notice to the Commission for transactions which create a
“competitively significant link”. This link exists when minority shareholding is
acquired between companies that are competitors or active in vertically
related markets. The FCCA finds that the targeted transparency system is
the most expeditious of the different options. However, the FCCA would like
to draw attention to the difficulties of defining the concept of “competitors”,
especially in the context of potential competition. Particularly, as failure to
notify transactions to the Commission is sanctioned, it is crucial that the
Commission provide sufficient guidance in this respect.

The Commission describes the procedure of the targeted transparency
system in the White Paper. An information notice shall be submitted to the
Commission, containing information relating to the parties, their turnover, a
description of the transaction, any rights attached to the minority
shareholding and some limited market share information. A 15-day waiting period would follow during which the Parties would not be able to close the transaction and during which the Member States must decide whether to request a referral. The Commission would be able to investigate a transaction within a limited period following the information notice. The White Paper proposes 4 to 6 months. The Parties would also have the option of filing a full notification to the Commission from the outset if they choose. The FCCA finds this procedure largely suitable for the purposes of handling minority shareholdings. However, the FCCA considers that the 4 to 6 month period for the Commission to investigate the transaction is lengthy. A shorter period would suffice for the business community to voice any potential concerns and would give less incentive for the parties to submit a full notification merely for the sake of legal certainty.

Case referrals

In addition to minority shareholdings, the Commission’s White Paper also presents suggestions to facilitate the system of case referrals between the Commission and the NCA’s. The FCCA supports these proposals. The removal of the two-step procedure under Article 4(5) EUMR will simplify and expedite the review of such transactions. As the Member States will retain the right to veto these referrals, the principle of the best placed authority will be maintained. The FCCA also welcomes the Commission’s proposals for Article 22 EUMR and eliminating the possibility of partial referrals. In the event that the Commission has competence to review non-controlling minority shareholdings in the future, clear rules should be set out for referral requests under Article 9 EUMR by NCA’s who do not have competence under national legislation to review non-controlling minority shareholdings.

Conclusion

The FCCA commends the Commission for its efforts for a more effective EU merger control system. Notwithstanding the minor adjustments presented above, the FCCA largely supports the changes presented in the White Paper. However, as the example of the substantive merger control test shows, the Commission’s policy choices have considerable impact on other merger control systems. Thus, as the Commission advances with its proposal, the FCCA would also welcome a wider impact assessment as to the effects of possible dissemination of the control of minority shareholdings.

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