Introduction

Hogan Lovells welcomes the opportunity to give its views on the important changes which the Commission is considering to the EU Merger Regulation and which are described in its White Paper published on 9 July 2014 “Towards more effective EU merger control”, and accompanying Staff Working Document and Impact Assessment.

We provided a written submission on 20 September 2013 in response to the Commission's earlier consultation paper on the same topic (Staff Working Document “Towards more effective EU merger control”, published on 25 June 2013). This submission has been posted on the DG Competition website. In our submission, we commented on various systems around the world, including the US, which have a merger control regime for non-controlling minority shareholdings (“structural links”).

Our comments are focused on the proposals to extend the EU Merger Regulation to structural links and other miscellaneous changes relating to extra-EEA joint ventures and simplified merger cases. We support the proposals to change aspects of the referral system, and believe that they are likely to improve its efficiency.

Merger control for the acquisition of non-controlling minority shareholdings

No change to EU Merger Regulation recommended

As set out in our submission of 20 September 2013, Hogan Lovells considers that an amendment to the EU Merger Regulation is not the best way to deal with possible competition concerns arising from structural links. We believe that the majority of cases where structural links may lead to competitive harm can be dealt with under the existing toolkit of Article 101 TFEU and Article 102 TFEU. An extension of the EU Merger Regulation to structural links is likely to lead to significant additional costs and legal uncertainty for business. These consequences are disproportionate to the limited enforcement gap that the Commission is trying to fill.

General concerns regarding the proposed targeted transparency system

We have the following general concerns regarding the proposed targeted transparency system.
- The proposed jurisdictional thresholds for review of structural links are over-inclusive, burdensome to apply, and lead to legal uncertainty.

- The proposed notification system, by way of information notice, is unnecessarily burdensome for business.

- The overall procedure creates delays for business whilst not providing legal certainty, since it involves a notification requirement with a mandatory 15 day suspension, but still allows the Commission the ability to review a transaction within a longer prescription period of 4 to 6 months. For this reason, we believe that there is a substantial risk that notifying parties will see little benefit in filing an information notice, and instead will choose the legal certainty of a notification under the normal procedure. These "fail-safe" notifications are likely to increase the number of notifications to the Commission, and absorb Commission resources on cases raising no competition concerns.

Next best solution

If the European Commission is minded to proceed with amendments to the EU Merger Regulation, as an alternative to the proposed targeted transparency system, we recommend that the Commission adopts a self-assessment system combined with the possibility of voluntary notification. Under this system, the Commission would have the discretion within a certain time period to investigate a transaction which fell within its jurisdiction to review structural links. The opening of an investigation would trigger the full application of the EU Merger Regulation, but would not include suspension of the transaction. Parties could choose to notify their transaction voluntarily, which would lead to the EU Merger Regulation applying in full, apart from the suspension rules. We consider that this system would be less burdensome on both business and the Commission since no unnecessary notification or suspension would be required in most cases. The system has worked well in voluntary merger control regimes, such as the UK and Australia, where the authorities have been able to effectively monitor the market and act upon complaints.

Detailed comments on targeted transparency system

If the Commission is minded to implement its current proposals, namely a targeted transparency system, we have the following recommendations.

(a) Criteria for transactions creating a "competitively sensitive link"

It is critical that the criteria for identifying the creation of a "competitively sensitive link" ("CSL") are clear, easily applicable, and are not over-inclusive. We believe that the
criteria, as currently proposed, will create disproportionate administrative burden and costs, as well as legal uncertainty for business in the assessment of jurisdiction. We also believe that they are over-inclusive.

- The Commission proposes that a CSL can be created in the case of an acquisition of a minority shareholding in a "vertically related company". We consider that this requirement is unnecessarily broad for identifying transactions which may cause competition harm, and could be burdensome to apply (especially in the case of large multinational companies with a wide range of activities). We consider that a CSL should be limited to links with horizontal competitors only. If this is not the case, a CSL should at least be limited to significant vertical links, for example links that exceed only certain absolute values.

- The Commission proposes\(^1\) that when considering whether an acquirer has a competitive relationship to the target, the activities of the parties' "minority stakes" should be taken into account. We consider that this extension will unduly increase costs and risk for business. Identifying horizontal and vertical links for these minority stakes will be very burdensome, especially for conglomerates, financial institutions, and private equity houses. This burden is disproportionate given that the likelihood of competition concerns arising with these links is very small, and that there exists already an effective toolkit to treat the issues, for example with Article 101 TFEU and directors' fiduciary duties. We therefore recommend that only existing links amounting to decisive influence be taken into account.

- For minority shareholdings above 5% and below 20%, the Commission is suggesting the identification of additional elements (e.g. attendance levels at shareholder meetings, seats on the board, information rights giving access to commercially sensitive information). To avoid legal uncertainty and to reduce administrative burden, the Commission needs to define these elements precisely and exhaustively. The Commission proposes\(^2\) that one of the additional elements could be "information rights giving access to commercially sensitive information". We consider that this should not constitute one of the elements since treatment of the issue can be dealt with effectively under Article 101 TFEU, and because the actual exchange of competitively sensitive information is of relevance, not the existence of "rights" to commercially sensitive information.

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\(^1\) Paragraph 88 and footnote 67 of the Staff Working Document
\(^2\) Paragraph 92 of the Staff Working Document
• The shareholding levels that the Commission proposes are too low. 25% of capital or voting rights is the basic threshold in Germany and Austria. We suggest that the thresholds are (i) 25% or (2) between 15% and 25%, provided that the shareholding is accompanied by certain specified rights.

• The date at which the jurisdictional assessment should be made should be clarified. We suggest that it is made when the shareholding is acquired, and that a filing obligation should not arise if at some future point after the acquisition the parties become competitors (which would be a disproportionate ongoing assessment requirement).

(b) Application of the EUMR turnover thresholds

The Commission notes\(^3\) that, as part of its reform of the EU Merger Regulation, it will need to consider the turnover calculation relating to, and the definition of, the undertakings concerned. To avoid a disproportionate extension of the EU Merger Regulation, we consider that Article 5(4) of the EU Merger Regulation should apply to the calculation of turnover for acquirers of CSLs and their targets in the same way as it does for calculating turnover in an acquisition of decisive influence. We suggest that for acquisitions of CSLs, the turnover thresholds should be assessed by reference to the acquirer and target alone, without taking into account the turnover of other undertakings which have decisive influence or a CSL in the target, or will have such an interest as a result of the transaction.

(c) Content of the information notice

The Commission suggests that the information notice should contain\(^4\): “information about the parties, the turnover of the undertakings concerned, a description of the transaction, the level of shareholding before and after the transaction and any rights attached to the minority shareholding if it is below 20%”. In addition, the notice will require "some essential market information about the parties and their main competitors or internal documents that allow for an initial competitive assessment."

We believe that the information required in the notice should be kept to the bare minimum. We suggest that the parties only be required to submit a summary of the transaction and information necessary to confirm the Commission's jurisdiction (e.g. the turnover of the parties and a description of the CSL). We believe that the parties should not under any circumstances be required to provide market share information or internal documents. Provision of market share data is burdensome, and in some cases the data is

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\(^3\) Footnote 67 of the Staff Working Document

\(^4\) Paragraph 104 of the Staff Working Document
not available. Supplying internal documents absorbs resources and is very intrusive. If this information is required, and especially if the submission of this information leads to on-going questions from the Commission, there is a significant risk that the information notice will have no significant efficiency advantage over a standard notification in terms of administrative burden.

(d) Suspension and the obligation to file an information notice

The Commission indicates that the submission of an information notice will be obligatory and will trigger a mandatory suspension period. We do not believe that a suspension period is appropriate or necessary in the case of minority shareholdings. Acquisitions of non-controlling minority shareholdings are easier to undo by the sale of the holding, as opposed to acquisitions of control where synergies may already have been implemented.

The Commission also does not indicate whether it intends to fine parties for failure to file or completing a transaction prior to the end of the suspension period. We believe that failure to file an information notice should not lead to the imposition of a fine, except if there are aggravating circumstances, such as an intentional failure to identify a target as a competitor. This is because there may be legitimate disagreements about whether a target is a competitor or not, and under the proposed system the Commission will still have the power to review the transaction within the 4 to 6 month prescription period.

(e) Joint ventures

The Commission proposes\(^5\) that under the revised Merger Regulation “joint ventures which are not jointly controlled but rather have several shareholders with minority stakes who make decisions through changing majorities would also fall under the new competence as long as the joint venture is full-function in nature”. We suggest that, if this proposal is implemented, it is clarified that:

(i) these rules only apply to the creation of a newly-created full function joint venture; and

(ii) only parent companies which have a CSL in the joint venture in question are counted as undertakings concerned for the purposes of applying the turnover thresholds and assessing whether the transaction as a whole fulfils the turnover thresholds of the EU Merger Regulation.

The Commission proposes\(^6\): “Where a joint venture is newly established and two of the shareholders acquire joint control (triggering a notification) while a third shareholder acquires a minority stake without control (triggering only an information notice), the third

\(^5\) Paragraph 120 of the Staff Working Document

\(^6\) Paragraph 121 of the Staff Working Document
shareholder should also join the notification if the operation constitutes a single transaction." We suggest that it is clarified that a third shareholder should only be required to join the notification if the minority stake of the third shareholder itself creates a CSL, and if the third minority shareholder would itself, together with the target, meet the turnover thresholds of the EU Merger Regulation. We would encourage the Commission to be accommodating in dealing with any information derogation requests from the third shareholder.

(f) Delineation of competences between the Member States and the Commission

The Commission proposes that Member States which currently control the acquisition of minority shareholdings would lose the competence to review transactions above the turnover thresholds of the EU Merger Regulation. So that there is legal certainty, and no review overlap between the authorities, it will be important that the precise moment when the Commission gains competence to review a structural link is clarified.

Impact on the rest of the world

We believe that any changes that the Commission implements to the EU Merger Regulation with respect to minority shareholdings may well lead to similar changes to the merger control regimes of some EU Member States and also jurisdictions outside the EU. This is because the European Commission’s merger control policy has a strong influence on domestic merger control rules around the world. This means that the burden of an overly burdensome review system for minority shareholdings in the EU could be magnified across the world if jurisdictions outside the EU adopt similar regimes, with potential additional complications through local variation.

In view of this potential impact, particularly outside the EU, we would urge the Commission to err on the side of extreme caution in its reform.

Extra-EEA joint ventures

We support the Commission's proposal to amend Article 1 of the EU Merger Regulation so that a full-function joint venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission's competence, even if the turnover thresholds are met. We consider that the current obligation to notify these joint ventures leads to companies having to bear unnecessary burden and costs, and equally for the European Commission having to dedicate unnecessary resources.

We request that the Commission encourages the Member States to adopt a consistent approach with that of the EU on the treatment of joint ventures with no effect on national Member States. Whilst filings may not need to be made at the European Commission
level, the new system may mean that parties have to make filings at national level which could be equally or (in the absence of the one-stop shop under the EU Merger Regulation) more burdensome.

**Extension of the transparency system to certain types of simplified merger cases**

We welcome the Commission’s proposal to exempt certain categories of cases currently falling under the simplified procedure from the prior notification requirement, such as cases leading to “no reportable markets” due to the absence of any horizontal or vertical relationship between the parties. We believe that these transactions should not require any notification at all – not even submission of an "information notice". We do not believe that these transactions, in view of the limited risk of competition harm, merit a mandatory suspension requirement or the administrative burden of submitting an information notice.

3 October 2014