Consultation response to Commission White Paper
'Towards more effective EU merger control'
Transparency register number 38020227042-38
Introduction

This is a response to the European Commission's public consultation on its White Paper 'Towards more effective EU merger control'.

The Law Society (‘the Society’) is making its comments to the proposal on extending the Commission's jurisdiction to review acquisitions of non-controlling minority shareholdings only.

In the response we provide our comments on how we believe the proposed transparency system would work in practice. We however maintain that in practice the number of cases where acquisitions of minority shareholdings give rise to competition concerns remain rare. Therefore, should the Commission decide to move forward with its plans to extend the Merger Control Regulation, we would recommend a significantly less administratively burdensome system than what is envisaged in the White Paper.

As elaborated below, we would recommend a model based on self-assessment with voluntary notification. This would significantly reduce the compliance burden on companies and would still permit DG Competition to examine those cases where competition concerns could arise.

Review of non-controlling minority shareholdings

1. Extending EU merger control to include control of acquisitions of non-controlling minority shareholdings in a horizontal or vertical competitor would bring EU merger control in line with national rules in the UK, Germany and Austria as well as key non-EU countries.

"Targeted" transparency system

2. We agree with the premise in the Commission White Paper that there should be no formal requirement to seek clearance in every case when an undertaking acquires a minority holding in a competitor. In our view significant uncertainty remains around the theories of harm contained in the White Paper and Staff Working Document and consequently, we would urge the European Commission to resist making any wide-sweeping changes requiring materially more notifications of benign transactions, particularly at the current time when equity markets continue to recover.

3. On this basis, and against the apparent intention in the White Paper, we query whether the proposed "targeted transparency system" would in fact not create a form of a formal notification requirement.
4. According to the Staff Working Document, the information notice would be required to contain 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 would have to contain some essential market information about the parties and their main competitors or internal documents that allow for an initial competitive assessment’ (para 104 Staff Working Document).

5. Compiling such an information notice would create a significant additional burden on undertakings. We do not believe this level of detail is necessary if the intention merely is for the notice to serve as information that a transaction has or will occur. This level of detail should be limited to those transactions where the Commission, or a NCA, finds reasons to investigate further.

6. The main concern with the information being asked is the requirement to include ‘some essential market information’. The definition of such information is very expansive and it would demand significant resources of the company concerned to establish such information. We believe that the names of the parties, the deal structure and the NACE codes should suffice.

7. In addition, the transparency system would in our view create a form of formal notification requirement if the Commission were to proceed with the possibility to introduce a 15 days waiting period from submission of the information notice before any such transaction would be permitted to enter into force (para 50 of the White Paper and 105 of the Staff Working Document. As acquisitions can be dispensed of we see no reason why a transaction should not be permitted to proceed, in particular considering it would be the parties themselves bearing the cost of any subsequent divesture of the acquisition.

8. If the Commission decides to proceed with a form of ex-ante review we strongly urge it to revisit the level of detail envisaged for the information notice and the foreseen standstill period. Our preferred option remains an ex-post review in line with the UK system where an undertaking does not have to get CMA consent before a transaction enters into effect. The CMA then has four months from any acquisition (whether of material influence, de facto control or a controlling interest) becoming public to start an investigation (see further details in para 14-16).

‘Competitively significant link’

9. As regards the scope of a Commission jurisdiction to review minority shareholdings, it is critical that the criteria chosen are clear in the interests of legal certainty.

10. The 25% of capital or voting rights criteria applied as the basic threshold in e.g. Germany and Austria is helpful for companies and financial institutions in terms of legal certainty. However, mandatory notification also exists in Germany for acquisitions of less than 25% where so-called “plus factors” exist. These plus factors are far from clear.
11. The thresholds envisaged by the Commission of around 20%, and between 5% and around 20% in case of additional factors are comparably lower. If the Commission does proceed with a threshold system, we would therefore suggest that the notice obligation kick-in for all acquisitions of stakes in competitors or vertically related companies meeting the EU merger turnover thresholds where the acquisition:

a. meets or exceeds 25%, OR

b. is between 15% and 25%, provided the share holding is accompanied by certain specified rights (such as the right to nominate a member of the board, legal or de facto blocking rights, or rights to obtain access to the target's competitively sensitive information).

12. This would help ensure that the notification system only captures those stakes which go beyond mere financial investment. At the same time, it provides legal certainty for the acquirer as a crucial element to be able to self-assess and not "over-notify" out of fear that even minor acquisitions may still be captured by the Commission.

13. A notification system that captures too wide a range of transactions, and thus leads to "over-notification", would also increase the administrative burden for the Commission and national competition authorities, potentially preventing the competition services from applying a targeted approach only focussing on the potentially problematic cases. In our view such a system would not lead to more effective enforcement of competition law.

**Self-assessment system**

14. In the alternative, we believe the Commission should reconsider a self-assessment system where undertakings do not need to notify acquisitions but where the Commission nonetheless would have the power to initiate an investigation into the acquisition based on its own intelligence or complaints.

15. The benefit of such a system is that it limits the administrative burden for both companies and authorities and enables a targeted approach on those transactions that are more likely to pose competition concerns. Further, as there is no requirement to notify or obtain clearance prior to the completion of a transaction, the definition of which transactions can be investigated can be based on qualitative factors on a case-by-case basis rather than quantitative thresholds.

16. We note in this regard the UK Enterprise Act 2002 and CMA's jurisdiction to review any acquisition, controlling or non-controlling, based on the material influence test. Through the material influence test the CMA will examine any acquisitions not only based on the percentage of shares or voting rights acquired but whether the acquisition de facto enables the acquiring company to influence the competitor company. This analysis for instance examines the shareholder base, voting and attendance patterns, special voting rights and board representation.
Conclusion

17. In conclusion, as the administratively least burdensome and more flexible control system (being able to capture any transaction regardless of threshold values), we would prefer a full self-assessment system where the Commission can review acquisitions ex post. In the event that the Commission decides however to proceed with the "targeted" transparency system, it is crucial that the thresholds are clearly defined, do not capture too wide a range of acquisitions including even minor holdings and that the information notices are only required to contain certain limited details. The standstill period should also be excluded. Otherwise we believe the system would become too burdensome for both undertakings and competition authorities and would not lead to more effective control but merely create a tick the box approach.

Other issues: public interest exemptions

18. The Commission in its White Paper also briefly touches upon the issue of the public interest exemption in some Member States' national competition regimes as a key point of divergence between national competition laws (para 19). We are aware of the debate around the scope for public interest exemptions, in particular in the wake of the Pfizer bid for Astra Zeneca and recognise that such debate is likely to reoccur in future around similar bids.

For further information please contact:
Cate Nymann (EU Policy Adviser) or
Mickael Laurans (Head of Office)
E: cate.nymann@lawsoociety.org.uk / mickael.laurans@lawsoociety.org.uk
T: 0032 (0)2 473 85 85