Reference HT. 3053

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Response to Public Consultation on the European Commission White Paper “Towards more effective EU merger control”
1 INTRODUCTION

Below are the comments of LK Shields Solicitors in response to the European Commission’s White Paper entitled “Towards More Effective Merger Control”. We have confined our responses to the question of minority shareholdings.

The EU, Competition & Regulated Markets team at LK Shields welcomes the opportunity to respond to the European Commission’s Public Consultation on its various proposals for reform of the EU Merger Control Regulation. Our comments are based on the substantial experience of lawyers in advising on mergers and merger notification procedure for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every LK Shields lawyer, nor do they purport to represent the views of our clients.

Our sincere hope is that the Commission gives due consideration to the comments below and develops a business-friendly and commercially workable set of rules that still attain the competition law objectives set out in the White Paper. We note that no equivalent changes are proposed in relation to Irish merger control by the Irish Competition Authority for the time being and Irish merger control will continue only to apply to mergers, acquisitions and joint ventures which involve a change in control. However, if the proposed changes to EU merger control are adopted then an equivalent change to Irish merger control may become more likely. Imposing equivalent requirements on transactions that fall below the threshold for having an EU dimension would entail significant costs for Irish enterprises, particularly when considered relative to the size of the market being impacted. We therefore urge the Commission to take into consideration the potential knock-on effects that the proposed changes will have on the competition regimes in Member states such as Ireland.

2 MINORITY SHAREHOLDINGS

2.1 Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission’s competence or not be subject to the 15 days waiting period.

We note that systems which are quite similar to that proposed by the Commission already function with reasonable success in other jurisdictions in the EU, including Germany and the United Kingdom. In that context, we agree with the Commission that there is a need for a system along the lines of the proposed Information Notice requirement. Regarding the specific issue of restructuring transactions and the liquidity of equity markets, we are of the view that the current proposals should not unduly inhibit either, provided that the proposed 4 – 6 month review period is abandoned, as discussed below in section 2.5.

As a commercial law firm with both Irish and international corporate clients, it is our experience that capitalisation is often an issue which needs to be dealt with at fast pace, so a requirement to delay 15 days for a final closing would potentially raise problems. The impact of this delay will foreseeably become more important if, as we would expect, equivalent rules proposed in the White Paper come to be adopted at a domestic level in Member States subject to lower thresholds along the lines that exist for mandatory notification today. The proposed rules may end up requiring companies to conduct extensive and lengthy factual, legal, and economic analysis in order to determine whether they meet the notification
obligation, and to that extent they threaten to restrict the liquidity of equity markets and the
development of capital markets in Europe. The expense and burden of this process would
be amplified if applied to smaller domestic entities seeking investment from larger private
equity firms.

We note that the current proposal features considerable reliance on the market definitions
applied to the activities of the undertakings in question. While we appreciate that there is a
significant body of case law and decisional practice which has built up in this area, requiring
undertakings to make self-assessments of the market definitional issues may represent a
considerable burden on the entities involved. In light of this, we would welcome further and
ongoing guidance from the European Commission’s services regarding the market definition
of new and evolving markets, particularly in the technology sphere and other sectors which
are experiencing rapid development or globalisation.

A related point is the need for clarity on the concept of a vertical relationship and the degree
of proximity required before a proposed transaction falls within the scope of the proposed
Information Notice requirement. We note that the White Paper indicates that the term
“competitor” in this context should be interpreted broadly, rather than being limited to
competitors in rigorously defined antitrust product and geographic markets. Again, guidance
on this issue would be welcomed in order to lend clarity to the operations of conglomerate
investment companies and evolving new-media, advertising and technology markets. The
nature of the vertical relationships that would be required to be deemed a competitively
significant link should perhaps be subject to a de minimis threshold in order to avoid
unnecessary Information Notices. The Commission’s competence to examine vertical links
should be limited to exclude situations where the activities which create the vertical
relationship in question account for a small proportion of the undertakings’ respective
dealings. A caveat could be added to this to account for situations where the undertakings’
dealings relate to key inputs which mean that they are strategically more important than the
figures would suggest.

As a commercial law firm active in a country where many of our clients seek and receive
significant amounts of foreign investment, any measures which have the potential to harm
Irish businesses’ ability to attract new investment would not be welcomed. We note that
there have been significant questions raised regarding the Commission’s view that the
possible harms detailed in the White Paper would apply in situations where a vertically
related company acquire a non–controlling minority shareholding in a target firm. Any such
unnecessary regulation would pose extra burdens on business at a time when attracting
global investment is crucial for our clients and the Irish economy as a whole. We urge the
Commission to consider the efficacy of imposing such requirements in the vertical transaction
sphere, and would welcome a careful analysis of the benefits of the extra competition
oversight compared to the potential losses incurred by discouraging outside investment
which could easily be redirected to countries not covered by the EU Merger Control
Regulation.

2.2 Are there any other mechanisms that could be built into the system to exclude
transactions for investment purposes from the competence?

We agree with the Commission’s proposed approach and are of the view that the proposed
thresholds are adequate to allow sufficient scope for passive investments which do not raise
competition issues. The comments below relate to the potential for building a mechanism to
ensure investments remain passive and are excluded from the Information Notice
requirement. From a practical perspective, in the Irish context, the additional factors referred
to in paragraph 47 of the White Paper, such as rights which give the acquirer a "de-facto"
blocking minority, a seat on the board of directors, or access to commercially sensitive
information of the target, are typically provided for in individual Shareholders Agreements
which vary from transaction to transaction. By definition, each such document is unique to its circumstances and so building a mechanism to apply in all instances would be difficult. Past experience in Germany and the United Kingdom has shown that it is often unclear whether and when such “additional factors” render a transaction notifiable.

Regarding the indicative list of additional factors which could lead to a shareholding of between 5% and 20% falling within the definition of a "competitively significant link", we are of the view that the Commission would be wise to leave this list as open as possible and to perhaps include a proviso whereby such shareholding fall within the scope of the Commission's competence wherever market conditions are such that even a relatively small shareholding arrangement raises competitive concerns. This would allow the Commission scope to examine situations such as where cross-shareholdings are organised on a reciprocal basis, where a maverick firm is involved, or where the market is highly concentrated or has a history of, or tendency towards, cartelisation.

2.3 Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?

Based on our commercial and practical experience, our initial view would be to opt for a German-style system, although this is far from ideal. It is our experience from major transactions for large international entities that internal documents are not prepared with the information requirements of a Commission investigation in mind. There is also the possibility that such internal documentation could be manipulated or altered in order to present market conditions in a different light. On the other hand, the use of market share data provides a more robust and objective assessment of market conditions. However, the cost of compiling and verifying such market share data can be considerable and poses a further burden on transacting businesses. In this regard, we would urge the Commission to provide guidance on the calculation of turnover and other market information applicable to the calculation of market shares, in order to minimise the requirement for expensive input from economic consultants and to reduce the burden placed on European businesses.

While the Commission has stated that only 20 – 30 cases per year are likely to meet the requirements for an Information Notice, the reality is that the new proposed requirements will more generally slow down a larger number of transactions which will need to be assessed by the parties involved before they decide whether an Information Notice is required or not. Any assistance given to the parties to speed up this decision making process would be welcomed.

In our view it would be a reasonable approach to require the parties to submit a description of their business drawn from their annual reports or public securities filings and a short summary of the transaction. This should be sufficient for the Commission to determine whether potential competitive risks are posed by the transaction. The parties should then be able to benefit from the comfort of having complied with the Commission’s Information Notice requirements and, when the waiting period has expired without the Commission having flagged any concerns, the parties will have legal certainty. The problems raised by the waiting period are also discussed below, but a system whereby the Commission raises its concerns in a preliminary notice to the parties would shift some of the burden of uncertainty away from the parties to the transaction and would be generally business-friendly.

2.4 Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.
Each transaction would clearly have to be assessed on a case-by-case basis and the more complex situations involving significant overlap and multiple markets would lead to greater costs in terms of hours spent preparing Information Notices, delays caused to the corporate planning process due to the uncertainty involved and the cost of legal advice. We would estimate, for a straightforward transaction, that the process proposed would require a week of obtaining and preparing the data and agreeing documents between the parties. This would translate to costs of between €15,000 and €30,000 depending on the scale and complexity of the transaction and presuming no specialist economist input is required. Given the Commission’s broad definition of competitively significant links, parties may err on the side of filing Information Notices to obtain legal certainty, even in cases raising no competitive issues.

We note that no equivalent changes are proposed in relation to Irish merger control by the Irish Competition Authority for the time being and Irish merger control will continue only to apply to mergers, acquisitions and joint ventures which involve a change in control. However, if the changes to EU merger control are adopted, then an equivalent change to Irish merger control may become more likely. Imposing equivalent requirements on transactions that fall below the threshold for having an EU dimension would entail significant costs for Irish enterprises, particularly when considered relative to the size of the market being impacted. We therefore urge the Commission to take into consideration the potential knock-on effects that the proposed changes will have on the competition regimes in Member states such as Ireland.

2.5 Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?

We note the reasons behind the Commission’s proposed waiting period and agree that there is a strong argument in favour of a certain period during which the transaction is delayed pending analysis by the authorities. However, the burden that this places on business could be alleviated significantly by a practical commitment on the Commission’s part to analyse and approve more straightforward transactions where no competitive concerns are raised well within the proposed waiting period. This would incentivise parties to present the market and financial information in the clearest manner possible and means that the Commission’s resources are focussed on markets where minority shareholdings and associated transactions are most likely to have an impact on competition.

The most problematic aspect of the waiting period proposed in the White Paper is that it does not provide parties with sufficient legal certainty since, even after the parties have submitted an Information Notice and adhered to the waiting time, the Commission can still commence an investigation after the waiting period has expired. This clearly subjects parties to a substantial degree of legal uncertainty and denies them an acceptable level of comfort as to the legality of their transaction.

The 4 to 6 month period during which the Commission can intervene may act as a disincentive to such acquisitions of minority interests as the threat of retrospective review will be seen as a burden to be carried by the parties. Many of our clients are operations which rely on their agility and dynamic business models to adapt to opportunities in new market and technologies. The potential risk of an authority commencing an investigation up to 6 months following the Information Notice would possibly cause corporate venture capital investors to be discouraged from investing in the first place or would alternatively see them place restrictions on the activities of the recipients of investment during that period.
CONCLUSION

The EU, Competition & Regulated Markets team at LK Shields welcomes the opportunity to contribute to the Commission's various proposals for reform of the EU Merger Control Regulation. As noted above, if the Commission proceeds with its stated intention to extend the scope of the EU Merger Control Regulation to non-controlling interests, we strongly favour a system that minimises the burden on business. The system ultimately adopted should include requirements that are proportionate to the competition risks and should allow for jurisdictional criteria to be framed in a way that ensures that only the relevant links are caught. It is our view that imposing overly burdensome filing obligations and the 4 – 6 month review period is unnecessarily costly in terms of time, effort and legal certainty for parties involved. We would reiterate the point that, if the proposed changes to EU merger control are adopted, then an equivalent change to Irish merger control will become quite likely. Imposing equivalent requirements in the domestic context would entail significant costs for Irish enterprises, particularly when considered relative to the size of the market being impacted. We therefore urge the Commission to take into consideration the potential knock-on effects that the proposed changes will have on the competition regimes in Member states such as Ireland.

For more information or clarification on any of the views expressed above, please feel free to contact Marco Hickey, Partner and Head of the EU, Competition and Regulated Markets Unit at LK Shields Solicitors on +353 1 637 1522 or mhickey@lkshields.ie.