Consultation on the Commission’s White Paper

“Towards more effective EU merger control”

Contribution of MEDEF

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EXECUTIVE SUMMARY

• In MEDEF’s view, there is no problematic “enforcement gap” from a competition law perspective. The creation of a new regime to review the acquisition of non-controlling minority stakes would add an excessive and disproportionate burden on companies. Consequently, MEDEF recommends a status quo on this issue; any legislative proposal along those lines should be abandoned.

• Conversely, we believe that other subjects in the merger control regime should be touched upon, beyond those addressed in the White Paper, such as the multi-jurisdictional control of cross-border mergers and the failure of EU merger control to effectively regulate the digital economy.

• Should the Commission nonetheless introduce a new mechanism dedicated to the review of acquisitions of non-controlling minority stakes, MEDEF rejects the “targeted transparency system” as construed by the Commission, considering that it would be extremely burdensome for companies, raise legal uncertainty and overall harm Europe’s competitiveness.

• As a fall-back position, MEDEF would rather recommend a self-assessment system, based on clear criteria and combined with a safe harbour. We believe that this is the only solution that would strike an acceptable balance between the purported need to set up a review mechanism and the principle of proportionality.

• Last, we welcome the exclusion of full-function joint ventures located and operating totally outside the EEA (and which would not have any impact on markets within the EEA) from the scope of EU merger regulation.

1. FOREWORD

MEDEF, the French Business Confederation, encourages the Commission’s initiative in launching a public consultation on the possible improvements of the EU Merger Regulation laid down in its White Paper. We note that this document has taken into account some of the comments made by stakeholders following the previous consultation held in 2013.

Before addressing the issues raised by the Commission, particularly concerning the acquisition of non-controlling minority shareholdings, MEDEF would like to insist on two preliminary aspects.

1.1. Simplification, better regulation and competitiveness proofing shall be taken into account as paramount principles

For many years already MEDEF has kept voicing the call for simpler and clearer legislation at both EU and national level, implying less red tape for businesses and administrations alike. We are therefore pleased that “for the first time, there is a
Commissioner dedicated to a Better Regulation agenda, guaranteeing that every Commission proposal is truly required”\(^1\). MEDEF fully supports this approach.

The European Council has also repeatedly underlined that “industrial competitiveness concerns should be systematically mainstreamed across all EU policy areas and be part of impact assessments in view of getting a stronger industrial base for our economy”, and that “this should go together with competitiveness proofing”\(^2\).

However, neither the White Paper nor the accompanying Staff Working Document contain such true and pragmatic “competitiveness proofing”.

**MEDEF believes that the proposal to review the acquisition of non-controlling minority shareholdings runs contrary to the objectives of simplification and competitiveness. It would undoubtedly create disproportionate bureaucratic burdens on companies, undermine the attractiveness of the EU for investors and make it a less attractive location for innovative companies.**

In our view, the legislative initiative contemplated by the Commission should be listed among those which must be removed\(^3\).

It should also be borne in mind that other authorities, in the EU and beyond, would certainly follow the Commission’s initiative. This would in practice multiply the costs incurred by companies, especially since NCAs (some less mature than the Commission) would face difficulties when implementing such a complex mechanism.

**1.2. A true review of Regulation n°139/2004 shall address other issues as well than those raised in the White Paper**

The opportunity to review Regulation n°139/2004 should be taken up to address all kinds of issues which, according to businesses, may be streamlined – be they tackled in the White Paper or Staff Working Document or not.

For example, MEDEF submits that the inherent **weaknesses in the multi-jurisdictional control of cross-border mergers** may be an issue worth addressing, contrary to that of minority stakes. Companies conducting multinational merger deals unfortunately still have to face excessive administrative costs, the risk of conflicting decisions, etc. thus creating a high level of legal uncertainty. In this regard, we refer to the **Zivy report** “Making merger control simpler and more consistent in Europe”\(^4\), which makes valuable suggestions to overcome these difficulties in practice.

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\(^{1}\) Press release of the Commission dated 10 September 2014: “The Juncker Commission: A strong and experienced team standing for change”.

\(^{2}\) See the conclusions of the Competitiveness Council of March and September 2014.

\(^{3}\) We recall that Mr. Timmermans has been entrusted by Mr. Juncker with “a mandate to identify, together with the Parliament and the Council, “red tape” both at European and at national level that could be swiftly removed as part of my Jobs, Growth and Investment Package”.

Furthermore, MEDEF considers that the failure of EU merger control to regulate the digital economy is also a key issue which should not be overlooked.

The traditional notion of dominance appears ill-suited to the rhythm of successive innovations which characterize the digital economy. At the same time, many major deals with a truly international and “structuring” dimension fly under the radar, because the value and significance of a company on digital markets is hard to assess and is in no way connected to the turnover⁵. Therefore, MEDEF believes that in the digital area turnover cannot be the sole backbone of a market analysis and advocates that it should be supplemented by other criteria. Failing this, European competition authorities may well miss most future major “digital deals”.

2. Comments on the Possible Review of Minority Shareholdings

The main issue in the Commission’s White Paper relates to the potential introduction of a minority shareholdings review mechanism. MEDEF will focus its comments on this aspect, which is of utmost importance for businesses.

2.1. An irrelevant proposal

2.1.1. The acquisition of minority stakes is a positive factor for European competitiveness

It seems that, according to the Commission, the acquisition of a minority shareholding is suspicious by nature. Philosophically speaking, MEDEF disagrees with this approach. Without disregarding the theories of harm, we strongly believe that, on the contrary, the acquisition of minority stakes should be encouraged – with regard in particular to the dynamics at play in the digital economy.

It turns out that corporate venture capital funding is a key feature, a truly strategic tool for the financing and growing of Europe-based start-ups and innovative companies. They also form the starting point for fruitful partnerships, thanks to which these start-ups are able to blossom and reach new customers. Introducing additional hurdles on such transactions proves therefore highly inappropriate: small venture capital investments might become unattractive because of the administrative burden and the financial costs for corporate investors⁶.

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⁵ The cases O2/EPlus (in Germany) and O2/Hutchison (in Ireland) for example triggered an in-depth scrutiny by the Commission, even though the effects on competition were only domestic... while Facebook’s bid for WhatsApp ($ 19 billion) did not meet the criteria of EU merger control, although the world’s biggest social network and messaging service were concerned. In this particular case, the Commission eventually had jurisdiction but almost luckily as the deal had to be notified in three EU Member States (among which Cyprus and Malta...), which accepted a referral to the Commission. Clearly, there is something wrong in this situation!

⁶ In addition, as Business Europe points out “European investments would be discriminated against non-European investments and corporate investors would be discriminated against financial
MEDEF understands that **facilitating access to finance** is among the key objectives of the EU. This also calls for a reconsideration of this proposal in order to ensure better alignment of the various EU objectives and initiatives.

### 2.1.2. There is no problematic « enforcement gap » in the EU merger control regime

In MEDEF’s view, the opportunity to complement the Commission’s toolkit in order to control the creation of “structural links” depends on whether or not there is an enforcement gap today that needs to be bridged.

The White Paper and the Staff Working Document refer to the theories of harm in order to demonstrate that, in a few instances (e.g. Ryanair / Aer Lingus), it is arguable that competitive concerns might arise from non-controlling acquisitions, enabling for example the shareholder to significantly influence a competitor’s strategy. **However, MEDEF believes that such cases are very marginal and do not justify the creation of an additional instrument for non-controlling minority shareholdings in general, which would be disproportionate.**

The acquisition of a minority stake may stem from various strategies implying a number of complex economic factors, so that each structural link shall be assessed on a case-by-case basis. But in any event, one can assert that **the vast majority of structural links do not raise any competitive concerns at all.**

Considering that, on the one hand, the number of cases likely to trigger the Commission’s scrutiny would be extremely limited and that, on the other hand, a new review procedure would add a significant burden on companies while increasing legal uncertainty, **MEDEF argues that a balance needs to be struck, showing that ex ante review by the Commission of structural links is not relevant.**

In any event, MEDEF considers that **the vast majority of potential anticompetitive effects arising from the acquisition of certain minority stakes can be addressed by the Commission in a satisfactory manner with its existing tools**, namely Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU),

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7 **Concerning Article 101 TFEU**, it is striking to note that whilst the Commission believes there is an enforcement gap, such gap would result from the very fact that « even where a share purchase agreement exists, these transactions are on the face of it competition-neutral, which makes it in most cases legally difficult to prove an anti-competitive object or effect » (see the latest Commission’s *Competition policy brief*). But if there is no potential anti-competitive effect, one may wonder why such transactions should be scrutinized in the first place!
as well as the provisions on remedies contained in Regulations n°1/2003 and n°802/2004.

The existing set of rules governing the EU merger control regime shall therefore not be supplemented. In other words, MEDEF supports a status quo – which oddly enough does not appear as a valuable policy option in the White Paper! In this regard, the latest Competition policy brief issued at the beginning of October gives the unpleasant impression that “the die is cast”, regardless of the stakeholders’ positions – although we feel that the business community is unanimous in rejecting a new system for reviewing the acquisition of minority shareholdings.

2.2. Specific comments to the White Paper and the Staff Working Document

In the event that, despite the overarching necessity of supporting EU competitiveness, the Commission were to introduce a new mechanism dedicated to the control of acquisition of non-controlling minority shares, MEDEF would support a self-assessment system, which would enable to tackle the issues identified by the Commission in a proportionate way. As a matter of fact, the Commission’s preferred option (the “targeted transparency system”) raises serious concerns for companies.

2.2.1. MEDEF’s comments on the “targeted transparency system” as devised by the Commission

- § 47 – Notions of “competitor” and “vertically related company”

Paragraph 47 reads that the first of the two cumulative criteria in order to define a “competitively significant link” is the “acquisition of a minority shareholding in a competitor or vertically related company”.

According to the Commission, the “concept of “competitor” would not require a detailed antitrust analysis of the relevant markets”. The Commission would take into account whether the undertaking is active in the same sector and the same geographic area and whether the acquirer has a competitive relationship to the target. In MEDEF’s view, this definition of “competitor” is too broad and would lead to legal uncertainty. In order to ensure at least coherence with the merger control regime, the assessment shall be conducted pursuant to the well-known notion of “relevant market”. Otherwise, the “competitively significant link” may likely be met by every investment made by a large undertaking in its sector.

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10 Paragraph 3.2.4.1 of the Commission Staff Working Document (point 88).
Additionally, the notion of “vertically related company” should be clarified, at a minimum by specifying that only companies which have direct contractual links with the acquirer are concerned – thereby preventing that the whole supply chain falls within the scope. A safe harbor could also be designed here, e.g. by stating that the sales of the target shall represent at least 10% of the overall purchase of the buyer.

- **§ 47 – Criteria to define a “significant” competitive link**

MEDEF is skeptical about the threshold of “around 20%”, which seems somehow arbitrary. Such threshold would lead to circumvention strategies by the companies willing to avoid the red flag...

Arguably a threshold between 25 and 30% would be more justified, in an attempt to bring about greater convergence between competition and corporate law. As a matter of fact, 33% often represents the blocking minority under corporate law in many European jurisdictions. Alternatively, 25% would at least ensure coherence between EU and national competition rules, with regard to the thresholds set in other jurisdictions (e.g. Austria) to cover non-controlling minority shareholdings.

The fact that the Commission might review 5% shareholdings is problematic. This threshold is actually lower than what is usually applied in other jurisdictions and shall be raised at 10%, for the safe harbour to be meaningful.

Furthermore, the additional factors required when the minority shareholding is between 5% and 20% are not clearly defined. The Commission mentions a few clues such as “de facto” blocking minority rights, the right to nominate a member of the board or access commercially sensitive information of the target. In practice however, it is difficult to distinguish a “de facto” blocking minority right from negative sole control, and the sensitive nature of information exchanged between competitors may be hard to identify – by definition, both players have a common and in-depth knowledge of the market. Moreover, the list of criteria suggested is given on an indicative basis only, so that any other “additional factor” may well be taken into account by the Commission to considerer that a notification/information notice is required, generating substantial legal uncertainty.

Finally, requiring companies to identify and describe possible anti-competitive factors in connection with a minority shareholding makes little sense. To give an example, when a minority shareholding might give rise to the exchange of commercially sensitive information, it is common practice for companies to alleviate the risk by setting up firewalls. Under the “targeted transparency system”, what would companies be expected to do? Informing the Commission of the transaction would be tantamount to recognizing that such firewalls are insufficient...
Details of the procedure

§ 49: content of the information notice

Companies are worried by the level of information contained into such notice and regret that it very much resembles a short Form CO. Drafting such a notice would necessarily be a thorough and time-consuming process, mobilizing internal resources as well as external advice not least to work out the relevant markets and assess market shares. This kind of task requires an exhaustive and burdensome analysis; if legitimate for the purposes of a merger notification, one can doubt its relevance when it comes to minority stakes.

Besides, the Commission seems to overlook the work needed to analyse various minority acquisitions, in order to identify those which should be submitted to the Commission.

It turns out that the Commission is de facto setting up a quasi-notification system, with significant costs for companies very similar to those linked with a merger notification. Especially since acquirers may prefer to seek clearance just to “be on the safe side” in a significant number of cases.

Having said that, with regard to question c) raised by the Commission’s Staff Working Document MEDEF considers that the US system, which relies on internal documents, must be avoided. A regime modeled on the German system would be preferable, with a requirement to give limited market share information.

§§ 50-51: waiting period and period of time to investigate a transaction

During the 15 working days waiting period which follows the submission of the information notice, companies would not be able to close the transaction. Furthermore, the Commission suggests introducing a limitation period from 4 to 6 months during which it could decide to open an investigation – whether or not it has already been implemented. Such a period would be intended “to allow the business community to come forward with complaints”.

As a result, companies which have duly submitted their information notice will keep facing the risk that, once the 15 working days standstill period has expired, the transaction will be investigated. This is highly problematic, bearing in mind that any later resale of minority stakes can incur strong losses for the seller.

In any event, the Commission would have to accept limited information such as estimates, and refrain from demanding unnecessary and burdensome complementary details.

Paragraph 3.2.3 of the White Paper (point 50).

Such costs are linked with the potential change in the company’s governance, with other shareholders being affected, or else with fluctuations in the company’s quotation.
The proposed standstill period, combined with the possibility for the Commission to open an investigation for up to 6 months, means that minority shareholders would be in a more uncomfortable position than parties in a classic “concentration” case! These provisions would create significant legal uncertainty in a disproportionate manner, considering the very small number of problematic cases foreseen by the Commission.

All things considered and for the sake of legal certainty, MEDEF would favour a regime involving a 15 working days stand-still period, which we deem to be sufficient in order to allow other undertakings to complain and eventually the Commission to decide whether an investigation should be initiated or not. Yet, once the suspension period has expired, the Commission should not be able to open an investigation (ie. the idea of period from 4 to 6 months should be abandoned).

- § 52 - Interim measures

In the event that an investigation is initiated on a transaction which was already (fully or partially) implemented, the Commission wishes to have the power to issue interim measures, such as a hold-separate order. Such practice already occurs for divestiture commitments under Article 7(3) of the merger regulation, but here the measures would take place ex-post, possibly several months after the closing. MEDEF contends that such possibility would bring about a disproportionate burden on companies, let alone issues about its feasibility in practice.

In this respect, the Commission itself considers that it would be unfair to apply Article 101 TFEU to the minority acquisition as such procedure “would affect parties to the agreement who have not pursued any anti-competitive objectives, such as the seller of a shareholding or the other shareholders of the target company”\(^\text{14}\). Such statement holds equally true for ex-post measures: in addition to the financial risk that minority shareholders will need to bear should they need to resell their stake, shareholder agreements will require re-opening, possible partnership arrangements renegotiation, etc.

- Conclusion: as a fallback position, a self-assessment system would be more appropriate

In view of the above, and bearing in mind our preference for a status quo solution, we consider that a self-assessment system would be a more balanced solution. This sort of worst-case scenario was already our position in our contribution from 2013.

Under such regime, it appears that the interests of public enforcement would be protected. The parties would necessary conduct a thorough evaluation of the potential harm to competition resulting from the structural links, and only complete those operations which are considered harmless.

\(^{14}\) See the latest Competition policy brief, op. cit.
From a business perspective, the self-assessment system bears the clear advantage of minimizing the administrative burden as it does not imply systematic notification or an information notice. Since the entry into force of Regulation 1/2003, *ex ante* review by the Commission has become the exception to the rule according to which the parties must assess themselves the conformity of their practices and agreements. Introducing a self-assessment system would therefore be in line with the global trend driving modern EU competition law and the shared objective to cut red tape.

As a fall-back position, for the purposes of legal certainty the self-assessment system that MEDEF would deem to be acceptable would have to be based on clear criteria:

- **Above certain thresholds, companies would have to self-assess** whether or not their acquisition should be notified to the Commission:
  - if they decide to voluntarily notify, the Commission would be bound to give its clearance within the time-frame set in the merger regulation;
  - if they decide not to notify, the Commission would be empowered to open an investigation subject to limitation periods. The absence of a notification may not be considered as an aggravating factor.

- **Identification of a safe harbour** (see our comments on the thresholds above, page 7), inspired by the UK regime on non-controlling minority stakes\(^\text{15}\).

**2.3. Specific comments to the Commission’s questions (page 53 of the Staff Working Document)**

a) **Would the “targeted transparency system” alleviate the concerns that a competence to control the acquisition of minority shareholdings might inhibit restructuring transactions and the liquidity of equity markets?**
   No. See 2.1.2 and 2.2. above, pages 5 to 9.

b) **Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?**
   An exemption for such transactions may be provided for. Generally speaking, we believe that the Commission should underline the need for stakes to be acquired on a long-lasting basis for them to qualify for merger control, regardless of their nature.

c) **Scope of the information notice under the transparency system.**
   See above, page 7.

d) **Estimation of the time and cost associated with preparing a notice.**
   See above, page 7.

e) **Is a waiting period necessary or appropriate?**
   See above, page 8.

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\(^{15}\) Additional safe harbours should be provided for transactions taking place between undertakings with limited market power, defined in terms of market shares as currently provided under existing block exemptions, and for transactions carried out so as to facilitate specific infrastructure or R&D projects.
3. **Another issue raised in the White Paper: the exclusion of full-function JVs located and operating totally outside the EEA from the scope of the ECMR is welcome**

Paragraph 77 of the White Paper states that the Merger Regulation "could be amended so that the creation of a full-function joint venture located and operating totally outside the EEA (and which would not have any impact on markets within the EEA) would fall outside its scope". MEDEF welcomes such proposal.

**This provision raises a few questions nonetheless** as to the undertakings concerned by the deal (ie. those whose turnover would have to be taken into account for the purposes of the calculation of turnovers):

- The buyer or the target company only? MEDEF suggests that the latter's turnover only be taken in consideration.
- Or the buyer and all companies which control the target company (as when there is the change of joint control over an existing joint business)? Such option would automatically broaden the scope of the procedure.

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**About MEDEF**

Mouvement des entreprises de France (MEDEF), the French Business Confederation, is the leading network of entrepreneurs in France. It represents 780,000 companies of all sizes and sectors of business, including industry, commerce and services. About 15 million persons are employed by MEDEF members.

**It is a privileged partner in the dialogue with decision-makers.** With complete openness, MEDEF is permanently engaged in lobbying all decision-makers at local, regional, national and European levels, in order to make sure that the point of view of business is heard as well as to relieve its fiscal and regulatory burdens: professional-tax reform, apprenticeship, company consumer and competition law, environmental law, public procurement, etc.

**It is an essential partner in the social dialogue.** Legally empowered to negotiate on behalf of all France-based firms with government and unions, MEDEF conducts all the important inter-professional negotiations, such as the National Inter-professional Agreement of 11 January 2013. It devotes special effort to fostering an effective job market and a modern, efficient welfare system.

**It is an ever-present spokesman on behalf of business.** More than 20,000 authorized agents promote and defend entrepreneurs in all arenas of economic and working life, and at every level. It has a strong commitment in promoting good corporate governance for listed companies, with the AFEP/ MEDEF Code "Corporate governance Code of listed corporations".
It is a determined force for changes. MEDEF dialogues with all protagonists of civil society, even those who are traditionally far removed from the world of business, such as the younger generations, teachers, journalists, magistrates, local councillors, artists. In partnership with other actors, it launches many concrete initiatives aimed at “getting things moving”, such as the Education-Business Challenge which assembles teachers with the corporate world.

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