Ten years on from the 2004 reform of the EU merger regulation, the European Commission is submitting a White Paper for consultation entitled “Towards more effective EU merger control”. By this means, the Commission intends to tackle various issues relating to the implementation of the substantive test of “significant impediment of effective competition” and to ways of fostering convergence and cooperation between the Commission and the Member States. It is also proposing amendments aimed at making EU merger control more effective. Its proposals seeks to ensure that “the merger regulation addresses all sources of possible harm to competition, and thus consumers, caused by concentrations or corporate restructuring, including those stemming from acquisitions of non-controlling minority shareholdings”.

1. **An extension of the scope of the EU Merger Control does not appear relevant:**
   1.1 Acquisition of minority shareholdings is a positive factor for European competitiveness:
   According to the Commission, the acquisition of a minority shareholding seems suspicious by nature. Under such proposal, corporate venture capital will be caught although a key feature for the financing of euro-based start-ups and innovative companies. The facilitation access to finance is among the key objectives of the EU, the potential anti competition effect of such operations, if any, should be mentioned. This calls on the reconsideration of this proposal in order to ensure better alignment of the various EU Objectives and initiatives.

   1.2 There is no problematic enforcement gap in the EU merger control regime:
   The White Paper and the Staff Working Document refer to the theories of harm in order to demonstrate that competitive concerns might arise from non-controlling acquisitions, enabling the shareholder to significantly influence a competitor’s strategy. The examples mentioned therein since the implementation of the EU merger control cannot justify the creation of an additional instrument for non-controlling minority shareholdings. The procedure would add a significant burden on companies, while increasing legal uncertainty.

   The vast majority of potential anticompetitive affects arising from the acquisition of certain minority stakes can be addressed by the Commission in a satisfactory manner with the existing tools (Art 101, 102 TFEU).

2. **The definitions of non controlling minority shareholdings to be caught be the EU merger control are too broad**

   The obligation to submit an information notice the Commission would apply if the transaction meets two cumulative criteria, thus falling under the definition of “competitively significant link”:
   - The target firm is a competitor or a vertically related company
   - The acquired shareholding is around 20% or between 5% and 20% but accompanied by additional factors.

   2.1 Notions of “competitor” and “vertically related company”.
   To identify a “competitor”, 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. This definition is too broad and would lead to legal uncertainty.
   The notion of “vertically related companies” should also be clarified, at the minimum by specifying that only companies which have direct contractual links with the acquirer are concerned.
2.2 Criteria to define a “significant” competitive link

The notion of significant competitive link is far too broad and the thresholds set by the Commission seem arbitrary and not suitable.

A threshold between 25% and 30% would be more justified than a threshold around 20%. As matter of fact, 33% often represents the blocking minority under corporate law in many European jurisdictions. 25% would at least ensure coherence between EU and national rules.

The threshold of 5% is too low, it should be raised to 10% and the additional factors required are either too vague or offering too much discretionary power or are disproportionate. The Commission mentions a few clues such as “de facto” blocking minority rights (e.g. the right to nominate a member of the board, access to sensitive information of the target). In practice however, it is difficult to distinguish a “de facto” blocking minority right from negative sole control. Moreover, additional factors may be taken into account by the Commission, generating substantial legal uncertainty.

2.3 Details of procedure

The level of information contained into the information notice is too high. Drafting such notice would necessarily be a thorough and time consuming process, mobilizing internal resources as well as external advice. The Commission seems to overlook the work needed to analyze various minority acquisitions, in order to identify those which should be submitted to the Commission. A quasi-notification system is set up, with significant costs for companies very similar with a merger notification.

The envisaged periods appear longer than those required for notifying controlling acquisition. In addition to the three weeks waiting period during which the parties would not be able to conclude their transaction, the Commission would also be able to investigate for a further 16 to 24 calendar weeks to which should be added up the usual five-week investigation period if necessary.

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If the Commission should continue with the thought of implementing such control, the adoption of a self-assessment system would be a more balanced solution. The self-assessment bears the clear advantage of minimizing the administrative burden as it does not imply systematic notification or information notice.

For the purpose of legal certainty, a self-assessment should be based on clear criteria: above certain thresholds (e.g. 15%) the companies would have to self-assess whether their acquisition should be notified to the Commission. If they do not notify, the Commission would be empowered to open an investigation.

Such a proposal would not be consistent with the Better Regulation process that the Commission has demanded to follow and is a priority of the new Commission.