
29 September 2014
1. INTRODUCTION

This submission is made by the law firm of Van Bael & Bellis in the context of the European Commission’s public consultation on certain proposed changes to EU merger control, which are set out in the Commission’s White Paper of 9 July 2014 and accompanying documents.

Van Bael & Bellis appreciates the opportunity to submit these comments, which draw on the experience of the Van Bael & Bellis team in merger control law and practice in the European Union and other major merger control jurisdictions across the globe. Van Bael & Bellis hopes that its comments will contribute constructively to the debate on how best to improve the EU merger control rules.

As the Commission’s White Paper carries forward proposals of the Commission’s Staff Working Document of 25 June 2013 and consultation entitled “Towards more effective EU merger control” (“2013 Consultation Document”), many of the comments made in this submission draw from our previous submission to the Commission in the context of the 2013 consultation.

In fact, some of the same comments had already been made as early as 2011 – well before the 2013 consultation – in an article published by Van Bael & Bellis partners Jean-François Bellis, Porter Elliott, and Johan Van Acker, which set out ten areas of EU merger control where improvements could be made. We are pleased to see that the Commission is now taking steps to make improvements in some of these areas, especially to the extent that our article contributed to – or perhaps even served as a catalyst for – some of the changes being proposed in the White Paper.

The Commission’s White Paper contains three main sections: (1) the proposed application of EU merger control to certain acquisitions of non-controlling minority shareholdings; (2) proposed improvements to the system for referring concentrations between the Member States and the Commission; and (3) “miscellaneous” proposals. The present submission follows the same structure as the White Paper.

In summary, and as explained in greater detail below, Van Bael & Bellis considers that if EU merger control is to be expanded to cover certain acquisitions of non-controlling minority shareholdings, this needs to be done in a way that provides sufficient legal certainty for companies while minimising the burdens placed on them. To this end, we wish to make certain observations regarding what transactions would fall within the requirement to give notice, the content of that notice, the amount of time the Commission would have to open an investigation, and the need for guidelines on the assessment of these transactions.

As concerns case referrals, Van Bael & Bellis considers that the Commission’s proposals are a significant improvement over the current system, although a more thorough overhaul of the referral system would have been welcome.
Lastly, Van Bael & Bellis in principle sees merit in the Commission’s “miscellaneous” proposals but considers that these proposals still require further development and should therefore be explained in greater detail in order to allow stakeholders to provide more meaningful comments.

2. THE PROPOSED APPLICATION OF EU MERGER CONTROL TO ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS

2.1 General observations

Van Bael & Bellis considers that if EU merger control is to be expanded to cover certain acquisitions of non-controlling minority shareholdings, there are certain considerations that should be taken into account.

First, Van Bael & Bellis reiterates that, to the extent that a gap in the Commission’s enforcement powers currently exists, that gap is very small. Indeed, notwithstanding the Commission’s doubts expressed in the White Paper, we believe that only rarely an acquisition of a non-controlling minority shareholding could not be scrutinised under either Article 101 or 102 of the Treaty on the Functioning of the European Union (“TFEU”), or indeed under the EU Merger Regulation (“EUMR”) as it currently stands (as at least some of the examples of competitive harm in the White Paper would arguably qualify as situations where decisive influence, and hence control, is in fact being acquired). The limited size of the enforcement gap should therefore be taken into account when considering what costs and burden are reasonable to impose on companies in order to close this perceived gap, in particular by bringing acquisitions of non-controlling minority shareholdings within the scope of EU merger control.

Second, certain acquisitions of non-controlling minority shareholdings only make business sense if they remain completely confidential to the outside world. This is the case, for example, for many strategic investments in innovative start-up companies. Publicising such investments raises significant risks both for the investee company and the investor. Regarding investees, many innovative companies operate in “stealth mode” initially so that they can protect the next generation product or service that they are developing. Any publicity would therefore risk lessening or even completely eradicating their competitive advantage. Regarding investors, publicising the investment may reveal the investor’s business strategy to competitors; and, as the investor by definition does not control the target company, other parties may take the opportunity to acquire control of the target once they become aware of its value to the investor. Because of these risks, the requirement to publicise an acquisition of a non-controlling minority shareholding by submitting an information notice to the Commission could have an undesired chilling effect on such minority investments, resulting in reduced access to capital for start-ups that desperately need it. The risk of this chilling effect makes it especially important that no more acquisitions than
absolutely necessary are subject to the requirement to give such notice to the Commission.

With these and other considerations in mind, Van Bael & Bellis submits that any “transparency system” for review of acquisitions of non-controlling minority shareholdings should be based on the following three basic principles: (1) the notice requirement should not catch the majority of acquisitions of minority stakes that are highly unlikely to raise competition concerns, so as not to overly burden companies and the Commission with unnecessary notices; (2) the requirements of the transparency notice should be limited to what is absolutely necessary to carry out an appropriate review, and should not impose excessive burdens upon companies; and (3) it is important that companies benefit from as much legal certainty as possible.

Applying these principles to the proposals in the White Paper, Van Bael & Bellis has concerns regarding: (1) the thresholds defining the transactions for which there would be a duty to give notice under the transparency system; (2) certain elements of the proposed content of the information notice; (3) the proposed time limit within which the Commission can open its investigation; and (4) the absence of a proposal carrying forward the idea of guidance on the assessment of acquisitions of non-controlling minority shareholdings. Each of these concerns is set out in more detail below.

2.2 Thresholds for the duty to give notice under the transparency system

Van Bael & Bellis considers that the proposed “targeted” transparency system for “competitively significant links” is the only option proposed in the 2013 Consultation Document that is workable. Indeed, of these proposed options, the combination of a short notice for a limited class of transactions with a reasonable limitation period for the Commission to begin an investigation reaches the best available balance of the objectives of maximising legal certainty while minimising the burden and chilling effect of giving notice. We furthermore support the Commission’s proposal to implement a voluntary notification system for parties seeking greater legal certainty. Likewise, Van Bael & Bellis agrees with the Commission’s view that the notice requirement should not apply in the absence of a competitive or vertical relationship.

However, Van Bael & Bellis has concerns that the thresholds defining “competitively significant links” may be broader than what is needed to capture potentially problematic transactions. In particular, it is our view that, even in the presence of “additional factors”, the Commission’s principal theories of harm – material influence and anti-competitive financial incentives – are very unlikely to transpire in the context of a non-controlling shareholding of less than 15%, whereas the Commission’s proposal catches transactions where the acquired shareholding is between 5% and around 20% (provided there are “additional factors”). In light of the burden that such a low threshold would impose and the potential chilling effect that making an investment public may have on certain types of transactions, Van Bael & Bellis would
urge the Commission to raise its safe harbour for minority share acquisitions of less than 5% to shareholdings of below 15%.

In addition, Van Bael & Bellis notes that the “additional factors” that would subject the acquisition of a 5 to 20% shareholding to the notice requirement must be adequately and clearly defined. To give but one example where further clarification is needed, a threshold defined by the additional factor of a “de facto’ blocking minority” runs the risk of creating an opaque standard that is difficult to apply, thus undermining companies’ legal certainty.

2.3 **Content of the information notice**

Van Bael & Bellis considers that the proposed transparency system would only work if the amount of information companies need to provide in the notice is minimal. Requiring too much information in the notice would impose unnecessary burdens disproportionate to the scale of the problem the Commission has identified.

In this regard, it must be kept in mind that the purpose of the information provided under the transparency system is not to perform a Phase I investigation, but rather to determine whether or not one should be initiated. The information notice should therefore require a level of information that allows acquirers to fill out the notice quickly, with relatively little effort and minimal assistance from counsel, while providing enough information for third parties about the basics of the transaction so they can inform the Commission of any concerns they might have.

Van Bael & Bellis appreciates that the Commission’s proposal reflects a clear desire to minimise the burden that the information notice imposes on companies. Most elements of the notice indeed appear calculated to ensure that the Commission is alerted to those cases where an investigation is necessary without overburdening the parties giving notice.

However, Van Bael & Bellis considers that the Commission's proposal to require “some limited market share information” imposes burdens beyond what is necessary to identify acquisitions of non-controlling minority shareholdings into which further investigation is needed. Providing market share information necessarily means defining the relevant product and geographic markets, and the burden of performing this analysis should not be underestimated. As we have stated previously, in our experience, this is often one of the more difficult and time consuming aspects of preparing a merger notification.

Moreover, Van Bael & Bellis considers that providing market share information in the information notice should be unnecessary given that transactions falling within the notice thresholds would be made public and third parties would be given the opportunity to comment and alert the Commission to their concerns. In potentially problematic cases, these comments would provide the Commission with a sufficient...
sense of potential concerns to allow the Commission to determine whether a Phase I investigation is warranted. In our view, this makes requiring an expensive and time consuming market definition analysis in every case overly burdensome for the limited purposes of the transparency system.

Van Bael & Bellis also notes that the alternative mentioned in the Commission’s Staff Working Document, which would require parties to provide “internal documents that allow for an initial competitive assessment” would likewise create a disproportionate burden on companies.

Van Bael & Bellis therefore urges the Commission not to require market share information as part of the information notice and not to pursue its alternative proposal that parties disclose internal documents.

2.4 Time limits for the opening of an investigation

Van Bael & Bellis supports the Commission’s proposal to provide a limited period of time following the submission of the information notice within which the Commission may open an investigation. We consider that a reasonable prescription period is essential to providing critical legal certainty. Furthermore, the use of a transparency system, and in particular the opportunity for third parties to alert the Commission to potential competition concerns, makes a short prescription period reasonable.

While the Commission has not yet firmly proposed the length of this prescription period, we believe that its suggestion of a four to six month period is excessive. Legal certainty is paramount in the context of mergers and acquisitions, and having a potential merger review hanging over the parties’ heads for six months after the transaction is concluded greatly undermines that certainty. It also seems unnecessary to subject acquisitions of non-controlling minority shareholdings to a longer period of legal uncertainty than that encountered in many acquisitions of control, which can often be notified and approved in less than six months.

Van Bael & Bellis considers that the requirement of a notice justifies having a shorter prescription period. As the Commission would publish the notice and third parties would have the opportunity to submit their comments, the Commission would be alerted to any concerns. Moreover, it should again be noted that the Commission would not need to review the acquisition in detail during this prescription period but would only need to determine whether to open a Phase I investigation.

In our view, these factors make a prescription period of three months more than sufficient, and we would urge the Commission not to subject all transactions meeting the notice thresholds to a longer period of uncertainty than this.
2.5 Guidance on the assessment of acquisitions of non-controlling minority shareholdings

The Commission’s 2013 Consultation Document stated that the Commission might “at a later stage” consider issuing guidance on its assessment of acquisitions of non-controlling minority shareholdings. However, the White Paper makes no mention of this guidance, and the accompanying Staff Working Document refers to a guidance document only as one possible manner of legislative implementation for the definition of a “competitively significant link”.

Given the novel nature of the changes the Commission is contemplating, Van Bael & Bellis considers that such guidance will be critical in order for companies and their advisors to understand what the concept of “competitively significant links” does and does not comprise, how the Commission will assess such links, as well as the Commission’s procedure for such assessments.

Furthermore, it will be important for the Commission to provide further guidance on the distinct theories of harm presented in the White Paper. We note, for example, that it is at present not fully clear how and to what extent the concept of “material influence” differs from that of “decisive influence” within the meaning of the concept of control. Indeed, at least some of the theories of harm set forth in the White Paper as reasons why acquisitions of non-controlling minority shareholdings should be covered under the EUMR seem to come quite close to the concept of “decisive influence”, to the extent that one might question whether these theories of harm could not already be addressed under the existing EUMR, simply by taking a somewhat broader view of what constitutes “decisive influence”.

For these reasons, Van Bael & Bellis considers that such guidance should be issued at the outset, not “at a later stage” as suggested in the 2013 Consultation Document.

3. Proposed Measures to Modify the Case Referral System

The Commission’s White Paper proposes amendments to three types of referrals of merger cases: (1) pre-notification referrals from the Member State level to the Commission at the request of notifying parties under Article 4(5) EUMR; (2) post-notification referrals from the Member State level to the Commission at the request of a Member State under Article 22 EUMR; and (3) pre-notification referrals from the Commission to the Member State level at the request of notifying parties under Article 4(4) EUMR.

Van Bael & Bellis generally supports the Commission’s proposals to improve these referral mechanisms and has provided comments on the proposed amendments to Article 4(5), Article 22, and Article 4(4) referrals in, respectively, sections 3.1, 3.2, and 3.3 below. While the Commission’s proposals are a significant step in the right
direction, we would advocate going even further, as explained in section 3.4.

3.1 Proposed modifications to Article 4(5) referrals

Van Bael & Bellis welcomes the Commission’s proposed amendments to Article 4(5) as a significant improvement on what is currently an unnecessarily burdensome and time-consuming process.

At present, parties seeking referral under Article 4(5) must go through a number of steps (preparing and consulting with the case team on a draft Form RS, waiting out the referral period after the final Form RS has been submitted, and preparing and consulting with the case team on a draft Form CO) before they can even start the Phase I Commission review, assuming the referral is successful. These steps can easily take one month or more (and inevitably a lot of work), and if a single Member State objects to the referral, all this work and time will have been for nothing. In our experience, these burdens, delays, and risks result in the option of seeking an Article 4(5) referral not being invoked as frequently as it would be if the system were more efficient.

Van Bael & Bellis considers that the proposed amendments are certainly a step in the right direction, as they should allow for speedier procedures by cutting out the 15 working days the Member States currently have to examine the Form RS, plus the time needed to prepare and consult the Commission on the Form RS, which can certainly be an additional few weeks. Effectively, the Commission’s proposal could allow Form CO to be submitted more than a month earlier than is currently possible, which is especially welcome in cases where there is no realistic risk of a Member State objecting to the referral.

However, Van Bael & Bellis reiterates its concern that, in the relatively rare cases where there may be a significant risk of one or more Member States objecting to the referral, the proposed amendments may actually be worse for parties than the current system. Parties might conceivably spend weeks or even months preparing Form CO and in pre-notification consultations with the Commission before the final Form CO is filed and sent to the Member States. This means that a great deal of work would have been done (and money spent) before a Member State objects to the referral and the parties are forced to start from scratch with national notifications. In such a case, the Commission’s time would also have been wasted.

Mindful of this risk, the Commission has highlighted the need for an early information exchange with the Member States and has encouraged the parties to contact the relevant Member State authorities at an early stage. While, as the Commission notes, this could reduce the time and resources spent on a case which might ultimately be reviewed by a Member State, in our view this does not solve the problem. Member State authorities may be understandably unwilling to promptly take a firm position on the referral request during such early informal contacts, which
would fail to provide the legal certainty needed in order to invest the time and money necessary for preparing a full Form CO notification.

Van Bael & Bellis therefore reiterates its suggestion that parties should be given the option to make a Form RS referral request prior to filing Form CO should they so wish. In most cases, doing away with the requirement to complete Form RS and wait for the Member States to be consulted will save significant time and reduce substantial burdens on notifying parties without adding an unacceptable degree of legal uncertainty. However, for the few situations where there may be a high risk of Member State opposition to a referral, the option to resolve the possibility of Member State objections prior to filing Form CO will ensure that the parties and the Commission do not waste time and resources on a Commission review.

3.2 Proposed modifications to Article 22 referrals

Van Bael & Bellis appreciates that the Commission’s proposed amendments to Article 22 EUMR would reduce the significant legal uncertainty these referrals create. It is our experience that, while Article 22 referral requests are rare, their occurrence is difficult to predict and can wreak havoc on the transaction, even if that transaction does not raise any significant competition concerns. Moreover, Article 22 requests can be made at a relatively late stage of the transaction, as such requests are possible three weeks after notification or, in Member States where no notification is required, three weeks from the date on which the transaction was “made known” to the authority. This places the entire European merger review process in limbo pending the Commission’s decision and can require the parties to start the notification process from scratch, possibly in parallel with national review, in the event the request is successful.

Van Bael & Bellis therefore supports the proposal that only Member States that are originally competent to review a transaction can request a referral of that transaction under Article 22. This should not only limit the number of Article 22 referral requests being made but should also give the parties additional legal certainty as, once the 15 working day deadline after notification to the competent Member States has lapsed, the case can no longer be referred to the European Commission.

Van Bael & Bellis also supports the proposal to grant the Commission jurisdiction for the entire EEA once a case is referred under Article 22, provided no Member State objects to the referral. This is a very positive change that will avoid the potentially significant burden for notifying parties of concurrent reviews before the Commission and in Member States that did not join the referral. While there remains the possibility that a Member State could already have adopted a clearance decision before a referral request occurs, this will be rare and the proposed procedures for information-sharing among Member State authorities should be adequate to address the risk.
However, while the Commission’s proposed amendments to Article 22 would be a significant and much-needed improvement, in our view greater changes are appropriate, as discussed in section 3.4 below.

### 3.3 Proposed modifications to Article 4(4) referrals

The Commission has proposed to clarify the substantive thresholds for pre-notification referrals from the Commission to a Member State under Article 4(4) EUMR by altering the language of this article. Parties would no longer be required to claim that the transaction may “significantly affect competition in a market” but rather that it is likely to have its main impact in a distinct market in the Member State in question.

Van Bael & Bellis welcomes this proposal, as it eliminates language that deters parties from requesting an Article 4(4) referral out of concern that doing so could be perceived as an admission that the deal is anti-competitive.

### 3.4 A more thorough overhaul of the referral system is called for

Van Bael & Bellis considers that the Commission’s efforts to improve the Article 4(5), 22, and 4(4) referral mechanisms are significant improvements on the referral system. However, as discussed in our submission in the context of the 2013 consultation, these adjustments fall short of the overhaul of the referral system that we would prefer. In particular, Van Bael & Bellis would suggest that further changes could be made to Articles 4(5), 9, and 22 to commit more fully to the one-stop shop principle and reduce the legal uncertainty facing notifying parties.

The referral procedures of the EUMR were conceived at a time when certain Member States did not have their own merger control laws and when the EU merger control system was still nascent and unproven. This meant that a delicate balance had to be struck in allocating the power to review merger cases between the Member States and the European Commission, and certain delays, burdens, and legal uncertainty were simply the price to pay to strike this balance.

Today’s landscape is completely different. Currently, all Member States (other than Luxembourg) have merger control regimes. It is no longer the case that a Member State may need to refer a transaction that impedes competition within its borders to the European Commission because it is powerless to do anything to prevent the deal itself. Moreover, there can no longer be any questioning of the Commission’s experience or ability to review any transaction. Indeed, the Commission is widely recognised as one of the leading merger control enforcers in the world. It has the resources and the tools to be sufficiently well placed to review any deal in Europe that meets the EU thresholds.
Simply put, the European merger control system, both at the Commission and Member State level, is much further advanced than it was when Articles 9 and 22 were first introduced almost 25 years ago (and even compared to when Article 4(5) was introduced 10 years ago). Van Bael & Bellis considers that this significant change in the European merger control landscape also requires an overhaul to the referral mechanisms that goes beyond what the Commission is currently proposing, as many of the safeguards and residual powers that were considered necessary when these referral mechanisms were created are no longer needed today. In today’s more integrated European Union, the referral mechanisms should more robustly commit to a one-stop shop merger review, while eliminating the unnecessary administrative burden and legal uncertainty that accompany the safeguards that were believed to be necessary under the old regime.

Van Bael & Bellis therefore reiterates its proposal of three simple, but far-reaching, changes to the referral mechanisms:

First, as concerns Article 4(5), if a transaction does not have a Community dimension but is capable of being reviewed in three or more Member States, the parties should have the right to choose either to notify the transaction in the various Member States that have jurisdiction or to notify to the European Commission without the possibility for the Member States to object to Commission taking jurisdiction. In today’s environment, this would ensure that every sizeable transaction is subject to a thorough review while eliminating the delays and risks of time and money wasted in case the referral request is rejected, which are currently part and parcel of making a referral from the Member State level to the European Commission and would still exist (albeit to a lesser degree) under the Commission’s current proposal to eliminate Form RS. It is simply no longer plausible to suggest that Member States must safeguard their interests in such a way that prevents the Commission from reviewing a concentration that is otherwise capable of being reviewed by the competition authorities of at least three Member States. The Commission is perfectly capable and well-placed to review such transactions, and if the parties wish to take advantage of the one-stop shop by asking the Commission to do so, there should be no need to give Member States the opportunity to oppose the referral.

Second, Van Bael & Bellis would propose to eliminate the possibility of Article 22 referrals altogether. Article 22 is essentially a holdover from the original Merger Regulation, intended to allow Member States without merger control law, such as for instance – at the time – the Netherlands, Greece, and Denmark, to refer cases to the European Commission for review. Now that all Member States (other than Luxembourg) have experienced merger control authorities and effective merger control regimes, Article 22 no longer serves its original purpose. Instead, as explained above, the exercise by Member States of Article 22 creates too much legal uncertainty for a modern merger control regime.
And third, Van Bael & Bellis would also propose to eliminate the possibility of Article 9 referrals. Like Article 22, Article 9 is a relic from another era when the European Commission was untested in the field of merger control and Member States felt that they should be able to take over a merger review from the European Commission if their national market was particularly affected by a transaction. With the Commission being one of the most advanced merger control regulators in the world, this procedure no longer has a meaningful role to play in the European merger control regime but merely creates significant legal uncertainty for notifying parties.

In summary, the Commission should be applauded for its attempts to make the case referral system simpler, quicker, and less burdensome on the business community, and the measures the Commission is proposing would certainly help significantly in this respect. However, in our view, the best way to simplify, expedite, and facilitate EU merger control, while still ensuring effective review, would be to eliminate altogether Articles 22 and 9, which are antiquated and highly problematic for businesses, and to allow for an option of automatic referral to the Commission whenever a concentration would be capable of review in at least three Member States.

4. MISCELLANEOUS PROPOSALS

Van Bael & Bellis wishes to underscore the importance of the proposals mentioned under “miscellaneous” in the Commission’s White Paper and accompanying Staff Working Document. We note that the White Paper has provided further clarification regarding some of the proposals that were mentioned in the 2013 Consultation Document, but that it has left important questions unanswered.

The White Paper has, for example, clarified that it proposes to amend the EUMR specifically 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. In principle, Van Bael & Bellis would favour such a change.

However, the Commission’s language referring to whether the joint venture would “have any impact on markets within the EEA” continues to raise the question of how one should define “any impact”. Often, it may not be clear until after the joint venture has started operating whether or not it will sell to an appreciable extent in the EEA. Would it be a sufficient reason not to notify a joint venture located outside the EEA that the joint venture is created for the purpose of selling into non-EEA territories, without eliminating the possibility that it might occasionally sell into the EEA? What about joint ventures that have no plans at all to sell into the EEA but whose creation could indirectly affect prices in the EEA, for example because the joint venture will sell an input used in a product that will be sold into the EEA? Presumably, such hypothetical or indirect “impact” would not be sufficient to make the joint venture
subject to an EU filing requirement, but this should be clarified.

The Commission has also suggested that it be empowered to exempt from notification certain categories of transactions that normally do not raise any competition concerns, possibly by subjecting them to the transparency system proposed for the acquisition of non-controlling minority shareholdings. In particular, the White Paper mentions that transactions “such as those … which do not involve any horizontal or vertical relationships” might be candidates for such an exemption. In principle, Van Bael & Bellis would favour this change as well (as transactions not involving horizontal or vertical relationships are typically unlikely to raise competition concerns) but, again, important details must be worked out. For instance, does this spell the end of the “conglomerate effects” theory? Moreover, the White Paper’s use of the words “such as” suggests that the Commission may be considering other types of transaction for exemption from notification. It would be helpful to know what these are.

In conclusion, given their importance and the limited extent to which their content has been discussed in the White Paper and the 2013 Consultation Document, all of the Commission’s proposals grouped under “miscellaneous” require further development. Van Bael & Bellis would therefore encourage the Commission to consider opening a separate public consultation in which more detailed versions of these proposals could be provided. This would ensure that these proposals are given their due weight and are not lost amongst the two key proposals of the White Paper, namely minority shareholdings and case referrals. Moreover, a separate and more detailed public consultation on these proposals would allow stakeholders to provide more meaningful comments in order to better assist the Commission’s services in deciding whether or not to go further with these proposals.