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To European Commission, DG Competition

From WilmerHale LLP

Re European Commission White Paper and Staff Working Document, “Towards more effective EU merger control”


[2] John Ratliff, Frédéric Louis and Cormac O’Daly are the main authors of these comments. The views expressed are personal and do not necessarily reflect WilmerHale’s views, nor those of its clients regarding any specific issue or proceeding.

[3] We have not commented on everything in the WP and SWD. Rather, we have focussed on the issues which appear most important to us, based on our Group’s experience. Our comments address the specific questions raised in the SWD and we also make some more general observations.

[4] Our main recommendations are as follows:

Minority shareholdings

- If it is decided to expand the EC’s jurisdiction to include acquisitions of non-controlling minority shareholdings, as the WP recognises, the EC must be mindful not to impose “unnecessary and disproportionate administrative burdens” on business.3

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3 White Paper (“WP”), para. 42.
- It would be useful if the EC would adopt “Guidelines on the Acquisition of Minority Shareholdings”. These should address, in particular, the EC’s potential theories of harm and the key criteria which determine whether an acquirer of shares is obliged to submit an information notice.

- We agree that there should be a safe harbour, below which no information notice is required, but we believe it should be set at a 10% shareholding, not 5% as proposed (which is too low).

- The information notice should be accompanied by the internal presentation documents usually filed as Form CO Article 5(4) documents; or, if not available, market share estimates. Publicly available information should normally suffice as estimates.

- There should not be a prescription period during which the EC can investigate an acquisition of a minority shareholding, provided the acquirer has correctly informed the EC of this transaction. The requirement that the acquirer file an information notice and the mandatory waiting period are sufficient.

- The EC should have to adopt a reasoned decision if it requires that an acquisition of a minority shareholding should be notified using Form CO.

**Referral procedures**

- We support the EC’s efforts on this important issue. The current referral landscape is disconcertingly uncertain for companies and can be both long and involve costly administrative and financial burdens. In light of the need to address these issues and the considerable progress achieved through the ECN, we suggest that it is time for the Member States and the EC to establish a more rational and efficient delineation of the competences of the National Competition Authorities (“NCAs”) and the EC.

- We support the proposed amendments to Article 22 provided some additional amendments are implemented. In particular, we think that (i) the EC’s jurisdiction should not extend beyond the Member States that would have been entitled under
their national laws to examine the concentration; and (ii) a Member State that wants to oppose referral to the EC should have to explain its reasons, so that companies and their lawyers can see; and the Member State should explain its reasons and discuss its position with the other Member States concerned and the EC, having regard to the principle that the most “well-placed” authority to investigate a case should do so and the promotion of “one stop shop” efficiencies.

- Similarly, if the requirement of a Form RS under Article 4(5) is abolished, a Member State that wants to oppose referral to the EC should have to give reasons, so that companies and their lawyers can see; and discuss its position with the other Member States concerned and the EC, again having regard to the principle that the most “well-placed authority” to investigate a case should do so and the promotion of “one stop shop” efficiencies.

- If a Member State opposes the EC obtaining jurisdiction over a concentration under Article 4(5), the Form CO submitted to the EC under Article 4(5) should be valid as a notification to all Member States entitled to review the concentration, with translations into official Member State languages as appropriate.

A. **MINORITY SHAREHOLDINGS**

A.1. **General**

[5] Our comments here focus on specific aspects and details of the EC’s “targeted transparency system”.  

[6] First, the WP and SWD propose that an information notice must be submitted when a

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4 We are not addressing whether it is appropriate for the EC to have jurisdiction under the EUMR to review acquisitions of minority shareholdings. Rather we address the EC’s proposals. These comments are therefore focused on Section 3.2 of the WP, in particular, on Sections 3.2.2 and 3.2.3, and on Section 3.2 of the Staff Working Document (“SWD”).
“competitively significant link” arises. We recommend that the words “competitively significant link” be changed to “potential competitive link” (“PCL”) to avoid a formulation which implies that the relationship between the acquiring and target undertakings is substantively significant.

[7] Secondly, we recommend that the EC adopt “Guidelines on Acquisitions of Minority Shareholdings”. These should set out the EC’s theories of potential harm in a comprehensive manner to provide the maximum legal certainty, building on the sections on this in the WP and SWD.6

[8] The Guidelines should also address certain points on jurisdiction.

- Notably, the WP states that (what we call here) a PCL could arise if the acquirer of the shares and the target are active in the same “sector”. It would be helpful to clarify better what is meant by a “sector”, since otherwise acquirers may have little choice but to err on the side of being more inclusive and informing the EC of a wide range of transactions.

- Similarly, the proposal indicates that a shareholding of 5% in tandem with “additional factors” could give rise to a PCL. These factors need defining (exhaustively) if they are to be part of a jurisdictional criterion, so that they are clear.

- Also the WP mentions accessing “commercially sensitive information”. This should be clarified. In our view, it should not cover the sort of financial information that

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5 WP, paras 46 to 48 and SWD, paras 77 and 78.
6 WP, paras 28-38 and SWD, paras 48-60.
7 WP, para. 46 and SWD, para. 88.
8 WP, para. 47 and SWD, para. 78.
shareholders typically receive, but only relate to information of a competitively sensitive nature.\[9\]

\[9\] Thirdly, we think that the proposed safe harbour, below which an acquirer would never need to submit an information notice, should be set at a 10% shareholding, not 5\%\[10\]. 5\% appears too low to us and we question whether material issues ever arise at the 5% to 10% level.

\[10\] Fourthly, we think that any provision for control of the acquisition of minority shareholdings should be included in the EU Merger Regulation (“EUMR”) itself. We add that our comments about the suggested Guidelines clarifying points on jurisdiction above are also not intended to derogate from this. The definitions need to be clear in the amended EUMR itself and then should be complemented by explanations in the Guidelines. We also think that any revision should not be the subject of an implementing act, insofar as this is a key jurisdictional issue, i.e. an essential element of the Regulation.\[11\]

\[11\] Finally, we think that DG COMP should have to adopt a reasoned decision stating why, in its view, a full merger notification is required in the particular circumstances, in order to respect the general principles of transparency, good administration and legal certainty.

A.2. The EC’s questions

(a) 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

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9 In addition, if the EC has concerns that companies are sharing competitively sensitive information, then it can investigate the companies’ behaviour under Article 101 TFEU, notwithstanding that one of the companies has a minority shareholding in the other.

10 SWD, para. 93.

11 SWD, paras 96-97.
subject to the 15 days waiting period.

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

[12] We welcome the suggestions in SWD paras 98-100 and 107. However, the concept of a “restructuring transaction” needs clarification, insofar as it is a proposed exemption to the information notice obligation.

[13] As we understand it, the core concept is that this is a temporary investment, not by a competitor/market participant, but a financial institution, assisting in restructuring of a company. In principle therefore, an information notice would not be required, save where the financial institution also has a controlling interest in a competing or vertically-related company; or the target of the restructuring is itself a competing financial institution.

(c) 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?

[14] We expect that the acquirer of the minority shareholding will often not be able to provide either as many documents as provided with a Form CO or a US Hart-Scott-Rodino filing, or as much market information as typically provided in a Form CO or a German notification.

[15] Unless the shares are acquired directly from the target undertaking, the acquirer will just have access to its own documents (and sometimes these are only limited in number or content). Similarly, although some acquirers will have market share information, this would often not be cross-checked with that of the target. Further, in the case of vertically-linked acquisitions, the acquirer may not have precise information on the markets concerned.
[16] Nevertheless, the information to be provided should not be unduly burdensome.

[17] Taking all this into account, we suggest that, when submitting an information notice, the acquirer of the shares should have to provide the documents that would be provided under Article 5(4) of Form CO (to be consistent with the EUMR system).

[18] In the absence thereof, estimates of market share should be provided. However, the latter should be just estimates and there should be no requirement to define markets, or engage in detailed assessments as in the case of a Form CO. Public information should normally suffice for these purposes. Any estimate would also be without prejudice to the possibility of revising and refining estimates if a notification is required.

(d) 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.

[19] This question is difficult to answer in the abstract. In our experience, even notifying a concentration under the EU’s simplified procedure can be costly and time consuming. Normally it should be easier to provide the documents required under Section 5(4) of Form CO than to provide market share information, which can be difficult to obtain and, by definition, requires that a view be reached on market definition. This is why it is important to limit any “market share” information to simple estimates and/or public sources.

(e) 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?

[20] Yes. However, the issue of a waiting period is linked to the risk of ex post review inherent in the additional prescription period suggested by the EC.
[21] What concerns us more is the proposed prescription period of four or six months, following the information notice, during which the EC could still investigate the share acquisition. We dislike the lack of legal certainty which this involves. We think that the EC should have either the waiting period or the prescription period, but not both. We favour the waiting period, since ex post review, with a risk of having to reverse the transaction, can be awkward and is out of line with the general EU merger control system.

B. **REFERRALS - ARTICLE 22**

[22] In general, we support the EC’s efforts on this important issue. The current referral landscape is disconcertingly uncertain and long for companies and can involve costly administrative and financial burdens. In light of these needs and the considerable progress achieved through the ECN, we suggest that it is time for the Member States and the EC to establish a more rational and efficient delineation of the competences of the NCAs and the EC.

B.1. The Commission’s questions

(a) Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?

(b) **Would such a system reduce the risk of diverging decisions by the Member States?**

[23] The risks and inconvenience of parallel proceedings at EU and Member State level can be substantial and we welcome amendments to avoid them. We therefore support the EC having jurisdiction over a concentration for all the Member States that would have been competent to review it under their laws.

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12 WP, paras 51 and 52 and SWD, paras 108 to 110.
However, we do not see why the EC should be able to review the concentration for the entire EEA. This will require time and expense for the parties to gather and submit market information for countries (i) which would not have had any power to examine the concentration under their own laws; and (ii) insofar as they set the thresholds in their laws, have already formed a view as to what should constitute a material impact there.13

Clearly the issue of a dissenting Member State remains a major concern. Most companies and their lawyers expect to see the reasons why the dissent is made. A Member State in the minority, which objects to the referral, should also be required to explain its reasons and discuss them with the other Member States concerned and the EC, with due regard for the principle that the most “well-placed authority” to investigate a case should do so14 and the promotion of “one stop shop” efficiencies for all concerned.

As for the early information notice, as the SWD recognises, many of the problems it seeks to address are not new.15 It is important that all relevant Member State NCAs learn enough about concentrations that may be referred to the EC under Article 22 to take an informed choice on referral, but we would caution against parties being obliged to provide overly detailed information on market conditions in other Member States to a NCA.16 The information notice should not become similar to a Form CO notification.

Clearly, it is also crucial that Member States that receive early information notices keep the information contained therein confidential, especially if a transaction has not yet been publicly announced. The same need for confidentiality would be required for any information circulated by the EC under the Article 4(5) procedure.

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13 WP, para. 69 and SWD, paras 145 and 148. In a similar vein, we note and welcome the proposal that only Member States that are competent under their national laws to review a concentration should be allowed to refer it to the EC.
14 See, by analogy, the Notice on Cooperation within the Network of Competition Authorities, OJ C101, 27 April 2004, p.43, para 8.
15 SWD, para. 151.
16 SWD, para. 158.
B.2. Observations on other proposed amendments to referral system

[28] The WP and SWD propose to amend the requirement under Article 4(5) EUMR that the parties must submit a Form RS to DG COMP requesting it to take jurisdiction over a concentration that does not have a Community dimension, but would be notifiable in at least three Member States.17

[29] We agree that abolishing the Form RS requirement would remove what has been a material disincentive to using the Article 4(5) procedure.18 However, we doubt whether the proposed amendments, in their current form, will achieve their goal.

[30] The drawback with the proposed approach is that parties have to prepare and notify a complete Form CO to the EC (which normally also requires weeks of pre-notification contacts), yet they could then find themselves having to “return to square one” and notify to three or more Member States, just because one Member State objects to the EC taking jurisdiction. Worse, this could happen towards the very end of the 15 working day period during which Member States must consider whether to agree to the parties’ request. (At best, the 15 working days should also be reduced to 10 working days. For companies, this all takes too long.)

[31] While Member States have only opposed requests under Article 4(5) in about 2% of cases,19 this would cause very significant costs and delay if the parties have already filed a complete Form CO with the EC and the possibility of this happening may well continue to dissuade parties from using the Article 4(5) procedure, even if a Form RS is no longer required. Moreover, it cannot be assumed that the 2% figure will remain constant.

[32] We therefore suggest two further amendments to the Article 4(5) procedure.

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17 WP, paras 65 to 68 and SWD, paras 135 to 149.
18 WP, para. 62 and SWD, para. 134.
19 WP, footnote 44 and SWD, para. 132.
First, similar to above, companies should be informed of the reasons why the Member State wants to retain jurisdiction. A Member State should also have to explain and justify its reasons to the other relevant Member States and the EC, with due regard for the principle of the most “well-placed authority” taking the case and the promotion of “one stop shop” efficiencies for all concerned.

Secondly, to avoid further delay and costs following a Member State’s objection to referral, the Form CO submitted to the EC should then be accepted as a valid notification to all competent Member States. Given that Form CO is a very detailed notification, it should contain the information that a Member State NCA would need to review a transaction. A NCA could require additional information from the parties where appropriate and a translation of the Form CO into the Member State’s official language if necessary. However, the parties should not have to start again with a new form and any requests for information should not delay the start of the Member State review. Time should run from the transfer of the Form CO.

We support the proposed amendment to EUMR Article 4(4) under which parties no longer would have to claim that a transaction may “significantly affect competition” in a market within a Member State that presents the characteristics of a distinct market. This proposal prompted our suggestion as regards “competitively significant link” and PCL, explained above.

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20 WP, para. 75 and SWD, paras 156 to 167.
C. **PLEASE COMMENT ON THE SUGGESTIONS LISTED IN SECTION 5 “MISCELLANEOUS” INCLUDING THE MORE DETAILED AND TECHNICAL SUGGESTIONS IN THE ACCOMPANYING STAFF WORKING DOCUMENT.**

[36] The proposed procedural simplifications in Section 5.1 of the SWD are very welcome.

[37] Joint ventures operating outside the EEA and having no effect in the EEA should not be notifiable to the EC merely because of their parents’ turnover exceeding the EUMR’s thresholds. Exempting extra-EEA JVs from the notification requirement would be consistent with the ICN’s Recommended Practices for Merger Notification Procedures, which require an appropriate and material local nexus to the reviewing jurisdiction.

[38] We also support the proposal to exempt concentrations that do not lead to any reportable markets from mandatory notification using Form CO.

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21 SWD, para. 180.
23 SWD, para. 182 and 183.