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WHITE PAPER

Towards more effective EU merger control

(Text with EEA relevance)

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1. INTRODUCTION

1. In this White Paper, the Commission, ten years after the major overhaul of the EU Merger Regulation[1] in 2004, takes stock of how the substantive test of "significant impediment of effective competition" (SIEC) has been applied and provides an outlook on how to further foster convergence and cooperation between and amongst the Commission and the Member States. It also puts forward proposals for specific amendments aimed at making EU merger control more effective.

2. The proposals relate to two areas in particular:

   – ensuring 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; and

   – how to best ensure close cooperation between the Commission and national competition authorities ("NCAs") and an appropriate division of tasks in the field of merger control, in particular, by streamlining the rules for transferring merger cases from Member States to the Commission and vice versa.

3. This White Paper is accompanied by a Commission Staff Working Document, which analyses in more detail the considerations underlying the White Paper and its policy proposals. It is accompanied by an Impact Assessment, which analyses the potential benefits and costs of various policy options, as well as an executive summary of that Impact Assessment. The views of stakeholders have been sought through a public consultation[2] and are reflected in this White Paper and the Staff Working Document.

2. SUBSTANTIVE REVIEW OF MERGERS AFTER THE 2004 REFORM OF THE MERGER REGULATION

4. After the adoption of the first Merger Regulation in 1989, EU merger control has become one of the main pillars of EU competition law and its basic features are now well established. The re-cast Merger Regulation, which was adopted in 2004, has further strengthened the functioning of merger control at the EU level in many ways, particularly by introducing the SIEC test as a relevant criterion for examining mergers and by enhancing the possibilities for referring merger cases from Member States to the Commission and vice versa.

5. EU merger control makes an important contribution to the functioning of the internal market, both by providing a harmonised set of rules for concentrations and corporate restructuring and by ensuring that competition and thus consumers are not harmed by economic concentration in the marketplace. Judging from recent experience, increasing globalisation of business activity and the deepening of the internal market

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[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1). The current Merger Regulation is the result of a re-cast of the original Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

[2] See Commission Staff Working Document "Towards more effective EU merger control", SWD (2013) 239 final (hereafter "the Consultation Paper") and the comments received, available at: http://ec.europa.eu/competition/consultations/2013_merger_control.

have caused EU merger control to focus even more on cross-border cases and those which have an impact on the European economy.

6. The large majority of mergers investigated by the Commission do not raise competition concerns and are cleared following an initial "Phase I" investigation. In less than 5% of cases, an in-depth "Phase II" investigation is launched based on initial concerns raised in Phase I. In about 5-8% of all notified mergers, the Commission identifies concerns that the merger may impede effective competition. In most cases, such concerns are alleviated through remedies offered by the parties (either at Phase I or Phase II). The Commission has only prohibited 24 mergers since 1990 and 6 since 2004, which is significantly less than 1% of more than 5,000 mergers notified.

2.1. Substantive assessment

7. The most important change in the 2004 Merger Regulation reform was the introduction of the SIEC test.[3] The SIEC test maintained that SIECs most prominently arise through the creation or strengthening of a dominant position. The test thereby allowed continued building upon the precedents of the Commission and the case law of the European Courts.

8. As before, when assessing the impact of a notified merger on competition, the Commission continues to examine whether or not the merger would significantly impede effective competition in the internal market or a substantial part of it. In particular, the Commission seeks to determine whether the merger would create or strengthen a dominant position.

9. In addition, the SIEC test's objective was the elimination of a possible enforcement "gap", because the previous test was not believed to clearly capture likely anti-competitive effects resulting from a merger of two firms in an oligopolistic market, where the merged entity would not have become dominant.[4] The introduction of the SIEC test eliminated this uncertainty and allowed the Commission to strengthen its economic analysis of complex mergers. The assessment uses a combination of qualitative and, where available, quantitative/empirical evidence.[5]

10. In the majority of cases, the Commission has looked at possible anti-competitive effects resulting from the merger of two undertakings active in the same market absent any coordination with other competitors ("non-coordinated effects"). Commission investigations that look at whether a merger would enhance the risk of coordination between the merged entity and other firms ("coordinated effects")[6] or whether a merger between firms active in vertically[7] or closely related markets[8]

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3 See Article 2(2) and 2(3) of the Merger Regulation.

4 See Recital 25 of the Merger Regulation.

5 There are several recent examples of cases where a range of sophisticated economic analysis was used to assess the existence of SIEC like in: COMP/M.6570 – *UPS/TNT Express*, decision of 30 January 2013; COMP/M.6458 – *Universal Music Group/EMI Music,* decision of 21 September 2012; COMP/M.6471 – *Outokumpu/Inoxum,* decision of 7 November 2012; or COMP/M.6663 – *Ryanair/Aer Lingus,* decision of 27 February 2013.

6 For example COMP/M.4980 – *ABF/GBI Business*, Commission decision of 23 September 2008.

7 Such as in COMP/M.4942 – *Nokia/NAVTEQ*, Commission decision of 2 July 2008, or COMP/M.4854 – *Tom Tom/TeleAtlas*, decision of 14 May 2008.

8 For instance in COMP/M.5984 – *Intel/McAfee*, Commission decision of 26 January 2011.

would lead to the foreclosure of competitors ("vertical effects" and "conglomerate effects", respectively) have been much more rare.

11. Since 2004, the Commission has investigated a significant number of cases using the new SIEC test. For instance, in *Western Digital/Hitachi*, the Commission looked at a proposed acquisition in the market for hard disk drives ("HDDs"). The transaction would have reduced the number of competitors active in the HDD industry from 4 to 3 and from 3 to 2 in the market for 3.5-inch hard disk drives. By analysing the combined quantitative and qualitative evidence, the Commission concluded that, under the circumstances, removing Hitachi from the market would likely have significantly impeded effective competition.[9]

12. In order to improve the transparency and predictability of the Commission's merger analysis under the new test, the Commission published two sets of guidelines providing a sound economic framework for the assessment of both horizontal[10] and non-horizontal (i.e. vertical or conglomerate) mergers[11] ("Guidelines").[12]

13. The Guidelines also explain, in line with Recital 29 of the Merger Regulation, that mergers may lead to efficiencies which counteract the merger's harm to competition and, in turn, consumers. If the merging parties claim such efficiencies, the Commission will consider them provided they are verifiable, merger-specific and likely to be passed on to consumers. For example, in *UPS/TNT Express*, competition concerns were alleviated for a number of (though not all) Member States based on, *inter alia*, efficiency considerations.[13] In *Nynas/Harburg*, the merger's efficiencies supported the conclusion that it was beneficial for consumers given the likely alternative scenario that the acquired plant would be closed.[14]

14. The past ten years have also shown that merger review can foster innovation, as competition leads to better market outcomes. It does so not only by lowering prices or increasing output, but also by improving product quality, variety, and innovation. In *Intel/McAfee*[15]*,* for example, the remedies helped preserve innovation in security software and ensure that competitors were not foreclosed.

15. In 2008, the Commission further developed its practice in the field of remedies with a revised Remedies Notice.[16] The Remedies Notice gives clear guidance on the design and implementation of divestiture remedies (such as the sale of a subsidiary or a production facility to a competitor), focussing on the effectiveness of the remedy.

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9 COMP/M.6203 – *Western Digital/Hitachi*, Commission decision of 23 November 2011, recital 1038.

10 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5).

11 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.20087, p. 6).

12 The Guidelines have also been referred to by the EU Courts as benchmarks for reviewing the substantive legality of the Commission's analysis of mergers, see for instance Case T-282/06 *Sun Chemical e.a. v Commission* [2007] ECR II-2149.

13 COMP/M.6570 – *UPS/TNT Express*, Commission decision of 30 January 2013.

14 COMP/M.6360 – *Nynas/Harburg*, Commission decision of 2 September 2013.

15 COMP/M.5984 – *Intel/McAfee*, decision of 26 January 2011.

16 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1).

2.2. Further fostering cooperation and convergence

16. The Merger Regulation has been a veritable success in terms of introducing one-stop-shop scrutiny for mergers with an EU dimension. However, Member States also play an important role in merger enforcement in the EU. A truly functional system for the scrutiny of mergers throughout the EU requires efficient work-sharing, cooperation and convergence between the Commission and the 27 Member States that exercise merger control.

17. In 2009, following a public consultation, the Commission submitted a report to the Council containing a limited stocktaking exercise which concerned the allocation of cases between the Commission and Member States ("the 2009 Report").[17] In the public consultation, stakeholders stated that diverging merger rules and practices within the European Union may add to the administrative burden on business and lead to ineffective merger control enforcement, inconsistent outcomes, and an adverse impact on the internal market.

18. Although NCAs ordinarily apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) in conjunction with their national laws, merger control at the national level is exclusively a matter of national law. The EU Merger Regulation has been a model for many national legal systems in this area, which has led to basic legislative convergence across jurisdictions, particularly regarding the substantive test to apply.[18] In addition, further convergence has been achieved on substantive and jurisdictional issues through increased cooperation between NCAs and the Commission, both in individual cases and through the Merger Working Group established in 2010.[19]

19. Despite this progress, there remains room for further cooperation and convergence, especially on the development of substantive tests for guidance documents (such as the Commission's Horizontal and Non-Horizontal Merger Guidelines) and their applications and interpretations by competition authorities and courts exercising judicial review. Among the notable points of divergence are national laws that still allow a government to overrule an NCA's competition-based decision and authorise an anti-competitive merger on the basis of other public-interest considerations.[20] Remedies and procedures, such as timeframes for merger review and stand-still rules, also frequently differ.

20. Greater convergence between the Commission and NCAs and among the NCAs is important to create a truly level playing field and to avoid inconsistent outcomes.[21] In line with suggestions from some NCAs, this can be achieved by increasing cooperation and sharing experience, using all available tools and forums such as the Merger Working Group, and by intensifying cooperation between NCAs in individual cases.

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17 Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, 18 June 2009, COM (200) 281 final, accompanied by Staff Working Paper SEC (200) 808 final/2.

18 For instance, in 2013 Germany replaced the previous dominance test with the SIEC test as laid down in Article 2(2) and 2(3) of the Merger Regulation.

19 See EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November 2011.

20 Although such interventions are rare in general, examples of Member States in which such a regime exists are France, Germany, Italy, Spain and the United Kingdom.

21 See Recital 14 of the EUMR that emphasizes cooperation and deals with referral and competence.

21. NCAs can avoid inconsistent outcomes in any event by referring cases to the Commission. The proposals to reform post-notification referrals to the Commission according to Article 22 of the Merger Regulation, discussed below in Section 4.2.2, suggest setting up a system based on an early information notice. Such a system should also facilitate practical cooperation among the NCAs in cross-border and multi-jurisdictional cases.

22. Beyond the successful "soft convergence" already achieved, which should be maintained and strengthened as outlined above, the Commission and the NCAs should consider moving towards a system where each applies the same substantive EU law, similar to the current framework for antitrust enforcement.[22] This would, however, require a more ambitious overhaul of the current system of merger control law within the European Union.

2.3. Conclusion

23. The above overview shows how merger control at the EU level was strengthened by the 2004 Merger Regulation reforms, particularly the introduction of the SIEC test. In the long run, the Merger Regulation system should be further developed into a true "European Merger Area", in which a single set of rules applies to mergers examined by the Commission and NCAs. More immediately, however, there are two main ways to improve the Merger Regulation through more limited amendments. First, the Commission considers bringing acquisitions of non-controlling minority shareholdings into the scope of EU merger control. Second, there is room to further streamline case referrals in the light of the Commission's experience with the 2004 reform.[23]

3. ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS

3.1. Why does the Commission want to have jurisdiction to review non-controlling minority shareholdings?

24. Effective and efficient competition policy requires appropriate and well-designed means to tackle all sources of harm to competition and thus consumers. As it currently stands, the Merger Regulation only applies to "concentrations". These are defined as acquisitions of control by one or more person(s) or undertaking(s) over one or more other undertakings or parts of undertakings.

25. Now, when the acquisition of a minority shareholding is unrelated to an acquisition of control, the Commission cannot investigate or intervene against it. The Commission can only intervene against a pre-existing minority shareholding held by one of the merging parties when control is specifically acquired. For example, the Commission can intervene if the undertaking in which one party has a minority stake is a competitor of the other merging undertaking. If the minority shareholding is acquired subsequent to the Commission's investigation, however, the Commission has no competence to deal with possible competition concerns arising from it despite

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22 Mario Monti, A New Strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso, 9 May 2010. See also more recently Autorité de la concurrence, Rapport au Ministre de l'Économie et des Finances. Pour un contrôle plus simple, cohérent et stratégique en Europe, 16 December 2013.

23 The present review is without prejudice to any further improvements of the Merger Regulation.

the fact that the competition concerns arising from the minority shareholding may be similar to those that arise when control is acquired.

26. The experience of the Commission, Member States' and third countries' authorities, as well as economic research, show that the acquisition of a non-controlling minority shareholding may harm competition, and thus consumers, in some instances.

27. In the European Union, Austria, Germany and the United Kingdom currently have competence to review acquisitions of minority shareholdings.[24] In all three Member States, the NCAs have intervened against such acquisitions where they raised competition concerns. Many jurisdictions outside the EU, such as Canada, the United States and Japan, are also competent to review similar structural links under their respective merger control rules.

3.1.1. Theories of harm

28. Several types of competition concerns can arise when a minority shareholding is acquired. These concerns are based on similar theories of harm to those relevant for acquisitions of control and, in general, require that the transaction significantly increase market power.[25]

29. Acquiring a minority shareholding in a competitor may lead to non-coordinated anti-competitive effects because such a shareholding may increase the acquirer's incentive and ability to unilaterally raise prices or restrict output. If a firm has a financial interest in its competitor's profits, it may decide to 'internalise' the increase in those profits, resulting from a reduction in its own output or an increase in its own prices. This anti-competitive effect may materialize whether the minority shareholding is passive (giving it no influence in the target's decisions) or active (giving it some influence over the target's decisions).

30. The acquisition of a minority shareholding may also raise competition concerns when the acquirer uses its position to limit the competitive strategies available to the target, thereby weakening it as a competitive force. The Commission and Member States have found that competition concerns are more likely to be serious when a minority shareholding possesses some degree of influence over the target firm's decisions, as in the case studies below.

31. *Siemens/VA Tech* demonstrated both the "financial incentive" theory of harm and risk created when an undertaking holds influence and voting rights in a competitor.[26] In that case, Siemens held a pre-existing minority shareholding in SMS Demag, a competitor of one of VA Tech's subsidiaries. The Commission determined that the merger would lead to a reduction of competition in the metal plant-building market due to a combination of financial incentives and information rights stemming from the minority shareholding in SMS Demag.[27]

32. Another example of a minority shareholding granting the acquirer influence over the target is when the acquirer is able to exercise influence over the outcome of special resolutions. Such resolutions may be required for approving significant investments,

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24 See Annex I to the Consultation Paper.
25 See para. 8 of the Horizontal Merger Guidelines and para. 10 of the Non-horizontal Merger Guidelines.
26 COMP/M.3653 – *Siemens/VA Tech*, Commission decision of 13 July 2005.
27 http://ec.europa.eu/competition/mergers/cases/decisions/m3653_20050713_20600_en.pdf.

raising capital, changing the product or geographic scope of the business, and engaging in mergers and acquisitions.

33. This theory of harm was at the core of the UK authorities' inquiry into the *Ryanair/Aer Lingus* case. In *Ryanair/Aer Lingus I*, Ryanair had already acquired a significant minority shareholding in its competitor, Aer Lingus, when it notified the Commission of its proposal to acquire control in 2006. The Commission prohibited the acquisition due to serious concerns that it would hurt competition by creating or strengthening Ryanair's dominant position on a number of routes.[28] However, it had no jurisdiction to review Ryanair's minority shareholding in Aer Lingus, which the UK Competition Commission proceeded to do.[29]

34. This theory of harm was also the focus in *Toshiba/Westinghouse*[30], where the Commission found that the transaction could lead to a possible elimination of competition in the market for nuclear fuel assemblies. In reaching its decision, the Commission considered that Toshiba could use its minority shareholding and veto rights in GNF, a competitor of Westinghouse, to prevent it from expanding into fields in which it would compete with Toshiba/Westinghouse.

35. Minority shareholdings in competitors may also lead to coordinated anti-competitive effects by impacting a market participant's ability and incentive to tacitly or explicitly coordinate in order to achieve supra-competitive profits.[31] The acquisition of a minority shareholding may enhance transparency due to the privileged view it offers the acquirer into the commercial activities of the target. In this way, it may also increase the credibility and effectiveness of any threat of retaliation in the event that the target deviates from the collusive behaviour.[32]

36. Finally, non-horizontal acquisitions of minority shareholdings that also provide material influence may raise competitive concerns of input foreclosure. For some minority shareholdings, foreclosure may even be more likely than when control is acquired because the acquirer of the minority shareholding only internalises a part, rather than all, of the target's profits the target lost as a consequence of the foreclosure strategy.

37. Input foreclosure was a concern in *IPIC/MAN Ferrostaal*.[33] The acquisition of MAN Ferrostaal by International Petroleum Investment Company ("IPIC") was approved by the Commission in 2009 subject to conditions. The Commission found that the transaction gave rise to a foreclosure risk regarding the only existing non-proprietary technology for melamine production in the world. The technology was owned by Eurotecnica, a company in which MAN Ferrostaal had a 30% stake. Given that IPIC already controlled AMI, one of two major melamine producers world-wide, it agreed

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28 Case COMP/M.4439 – *Ryanair/Aer Lingus I,* Commission decision of 27 June 2007, confirmed by the General Court in Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457. See also case COMP/M.6663 – *Ryanair/Aer Lingus III*, Commission decision of 27 February 2013, where the Commission declared another project of acquisition of control by Ryanair over Aer Lingus incompatible with the internal market.

29 Final report of 28 August 2013, http://www.competition-commission.org.uk/assets/competition commission/docs/2012/ryanair-aer-lingus/130828_ryanair_final_report.pdf. Ryanair has appealed the decision but the Competition Appeal Tribunal rejected the appeal on 7 March 2014.

30 COMP/M.4153 – *Toshiba/Westinghouse*, Commission decision of 19 September 2006.

31 See for example case COMP. M.1673 - *VEBA/VIAG,* Commission decision of 13 June 2000.

32 See also Annex 1 of the Consultation Paper.

33 COMP/M.5406 – *IPIC/MAN Ferrostaal*, Commission decision of 13 March 2009.

to divest its minority shareholding in Eurotecnica in order to minimize any risk of foreclosing AMI's competitors.

38. In addition, in the public consultation and recent media reports, other acquisitions of minority shareholdings on both the EU and Member State levels have emerged where the shareholding was acquired in a competitor or a vertically related company.[34]

3.1.2. Articles 101 and 102 TFEU may not be suitable for dealing with anti-competitive minority shareholdings

39. The Commission has considered whether the competition rules on restrictive agreements and the abuse of a dominant position, laid down in Articles 101 and 102 TFEU respectively, could be used to intervene against anti-competitive acquisitions of minority shareholdings. However, the uses of Article 101 and Article 102 in this regard are limited.

40. Regarding Article 101 TFEU, it is not clear whether acquiring a minority shareholding would constitute an "agreement" having the object or effect of restricting competition in all cases. For example, in the case of a series of acquisitions of shares via the stock exchange, it may be difficult to argue that the different purchase agreements meet the criteria of Article 101 TFEU. The same is probably true for the articles of association of a company, the purpose of which is generally to determine the corporate governance of the company and the relationship between it and its shareholders. In order for the Commission to intervene using Article 102 TFEU, the acquirer of the minority shareholding would need to hold a dominant position, and the acquisition would need to constitute an abuse. The circumstances under which the Commission can intervene against competitive harm arising from acquisitions of minority shareholdings are therefore quite narrow.[35]

41. Furthermore, as explained above, the theories of harm arising from acquisitions of minority shareholdings are similar to those arising from acquisitions of control, i.e. horizontal, non-coordinated and vertical effects.

3.2. Policy choices and proposed measures for reviewing acquisitions of minority shareholdings

3.2.1. Design and options – what principles should apply to the system for the control of minority shareholdings at the EU level?

42. A system for controlling acquisitions of non-controlling minority shareholdings should take into account the following three principles:

[34] See for example the minority stakes recently acquired by Telefónica in Telecom Italia, by Air France in Alitalia, by Intel in ASML, a manufacturer of lithography systems for the semiconductor industry, by Marine Harvest in Grieg Seafood or by VW in Suzuki. Regarding minority shareholdings in vertical relationships, examples include the 10% minority shareholdings of Nestlé in Givaudan (which was recently sold) or the 15% shareholding of BMW in SGL Carbon (in addition to the 29% shareholding of the Quandt/Klatten family who holds a large stake in car manufacturer BMW). Obviously, these examples only show that minority shareholdings between competitors and vertically related companies do occur, but they are mentioned here without prejudice as to whether they would have raised any competition concerns.

[35] See also Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691, in particular para. 104, and Case 6/72 *Continental Can v Commission* [1973] ECR 216.

- it should capture the potentially anti-competitive acquisitions of non-controlling minority shareholdings;
- it should avoid any unnecessary and disproportionate administrative burden on companies, the Commission and NCAs; and
- it should fit with the merger control regimes currently in place at both the EU and national level.[36]

43. The Consultation Paper put forward three procedural options for the control of minority shareholdings:

- A notification system, which would extend the current system of ex-ante merger control to acquisitions of non-controlling minority shareholdings under certain conditions.
- A transparency system, which would require parties to submit an information notice informing the Commission of acquisitions of non-controlling minority shareholdings. The information notice would enable the Commission to decide whether to further investigate the transaction, enable the Member States to consider a referral request, and enable potential complainants to come forward.
- A self-assessment system, which would not require parties to notify acquisitions of non-controlling minority shareholdings in advance of completion. The Commission could, however, initiate an investigation of potentially problematic minority shareholding acquisitions on the basis of its own market intelligence or complaints.

44. The scope of the Commission's jurisdiction relates directly to what procedure is appropriate and adequate. For example, if the Commission has jurisdiction over all acquisitions of minority shareholdings above a certain threshold, a pre-merger notification system would create a heavy burden on businesses because unproblematic transactions would also be covered. Giving the Commission jurisdiction over all acquisitions of minority shareholdings above a certain threshold might therefore be more appropriate under a self-assessment system, where the Commission is free to investigate transactions on its own initiative. On the other hand, the administrative burden imposed by a notification or transparency system would be much lower if the Commission's jurisdiction were limited to only potentially problematic transactions. The relationship between the design of the procedural system and the scope of jurisdiction arose frequently in responses to the public consultation.

3.2.2. The proposed system: a "targeted" transparency system

45. In light of the above, an alternative "targeted" transparency system may be most appropriate for dealing with acquisitions of minority shareholdings. The Commission believes that such a system would be in line with the three principles set out above. It would allow potentially problematic transactions to be targeted from the outset, namely through the identification of transactions which create a "competitively significant link", and it would ensure that the transactions thus identified can be

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[36] See Article 1(2), (3) of the Merger Regulation. It is proposed that the same turnover thresholds which currently apply to acquisitions of control would also apply to the acquisition of non-controlling minority shareholdings. The referral system would also equally apply to the acquisitions of minority shareholdings to allow for allocation of cases to the more appropriate authority.

effectively controlled by the Commission, even without the need for a full notification obligation.

46. In view of the theories of harm discussed above, a "competitively significant link" would arise where there is a *prima facie* competitive relationship between the acquirer's and the target's activities, either because they are active in the same markets or sectors or they are active in vertically related markets. In principle, the system would only be triggered when the minority shareholdings and the rights attached to it enable the acquirer to influence materially the commercial policy of the target and therefore its behaviour in the marketplace or grant it access to commercially sensitive information. However, above a certain level the shareholding itself might result in a change in acquirer's financial incentives in a way that the acquirer would adjust its own behaviour in the market place, irrespective of whether it gains material influence over the target. Only acquisitions of a "competitively significant link" would require the submission of an information notice to the Commission.

47. In order to provide parties with legal certainty, only a transaction which meets the following cumulative criteria would fall within the definition of a "competitively significant link":

- acquisitions of a minority shareholding in a competitor or vertically related company (i.e. there needs to be a competitive relationship between acquirer and target); and
- the competitive link would be considered significant if the acquired shareholding is (1) around 20%[37] or (2) between 5% and around 20%, but accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking minority[38], a seat on the board of directors, or access to commercially sensitive information of the target.

48. The parties would be required to self-assess whether a transaction creates a "competitively significant link" and, if so, submit an information notice. In the event that an information notice is submitted, the Commission would then decide whether to investigate the transaction and the Member States would decide whether to make a referral request.

3.2.3. Details of the procedure

49. Under the targeted transparency system, an undertaking would be required to submit an information notice to the Commission if it proposes to acquire a minority shareholding that qualifies as a "competitively significant link". The information notice would contain information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some limited market share information. As set out above, the Commission will decide whether further

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37 The OFT has set a threshold at 15% above which it may examine any case (see OFT, "Mergers-Jurisdictional and procedural guidance", para. 3.20). This might also serve as a clear-cut threshold above which a shareholding would be considered a "competitively significant link".

38 The UK case, *BSkyB/ITV* (2007), provides a good example of a *de facto* blocking minority shareholding (which is not enough to qualify as *de facto* control). A shareholding of 17.9% was found to be sufficient to give BSkyB material influence over ITV on the basis that it enabled it to influence ITV's strategic decision-making. The case was cleared subject to a divestiture of the shareholding down to 7.5%.

investigation of the transaction is warranted and Member States would consider whether to request a referral on the basis of this information notice. The parties would only be required to submit a full notification if the Commission decided to initiate an investigation and the Commission would only issue a decision if it had initiated an investigation. In order to provide parties with legal certainty, they should also be able to voluntarily submit a full notification.

50. The Commission could also consider proposing a waiting period once an information notice has been submitted, during which the parties would not be able to close the transaction and during which the Member States have to decide whether to request a referral. Such a waiting period could last 15 working days, for example. This would also align it with the deadline under Article 9 for a Member State referral request following a full notification. Such a system would ensure that transactions which are referred to Member States are not yet implemented and can be handled by the Member States under their normal procedure, as they might foresee a stand-still obligation and not be equipped to deal with consummated transactions. More generally, the referral system should ensure that the existing level of protection provided by the national merger regimes already capturing non-controlling minority shareholdings will be maintained and that enforcement gaps will be avoided.

51. The Commission would also be free to investigate a transaction, whether or not it has already been implemented, within a limited period of time following the information notice. Such a period could be 4 to 6 months, and would allow the business community to come forward with complaints. It would also reduce the risk of the Commission initiating an investigation on a precautionary basis during the initial waiting period.

52. In the event that the Commission initiates an investigation of a transaction which was already (fully or partially) implemented, it should have the power to issue interim measures in order to ensure the effectiveness of a decision under Articles 6 and 8 Merger Regulation. Such power could take the form of a hold separate order, for example.[39]

3.2.4. Scope of the assessment under the Merger Regulation and relationship with Article 101 TFEU

53. Any agreements entered into between the acquirer of the minority shareholding and the target remain subject to assessment under Articles 101 and 102 TFEU unless they constitute "ancillary restraints". Only ancillary restraints, i.e. "*restrictions directly related and necessary to the implementation”* of the acquisition of the shareholding,[40] are deemed to be covered by the clearance decision and are therefore not caught by Article 101 and Article 102 TFEU.

54. However, as is currently the practice for acquisitions of control, the agreements between the acquirer of the minority shareholding and the target would be taken into account during the substantive assessment of a transaction under the merger control

39 The "hold separate" obligation would require the assets to be ring-fenced, a hold separate manager to be appointed, etc. It would follow a similar practice as that which currently occurs for divestiture commitments during the divestiture periods or the conditions and obligations under Article 7(3) of the Merger Regulation.

40 By extension to minority shareholdings of Article 6(1)(b) subparagraph 2, Article 8(1) subparagraph 2 and Article 8(2) subparagraph 3 of the Merger Regulation.

rules. This is because they are relevant to the current and future market conditions (for example, the existence of long-term contracts) which the Commission takes into account as part of its substantive assessment.[41]

3.3. Conclusion on the review of minority shareholdings

55. The Commission does not currently have adequate tools for dealing with anti-competitive acquisitions of minority shareholdings. A targeted transparency system appears to be well suited to capture such transactions and to prevent consumer harm arising from them and would be in line with the three principles outlined in paragraph 42.

56. First, potentially harmful transactions would likely come to the attention of the Commission and Member States while innocuous transactions, such as those entered into for investment purposes only, would not.

57. Second, the targeted transparency system would limit the administrative burden on businesses, because the Commission would only need to be informed of a limited number of cases, namely those which create a "competitively significant link". Parties would only be required to provide the Commission with a limited amount of information regarding such transactions by way of an information notice, after which the Commission could decide whether to request a full notification.

58. Finally, the targeted transparency system would fit with the merger control regimes currently in place at the EU and national level. The information notice would be sent on to Member States to inform them of acquisitions of minority shareholdings, enabling them to request a referral at that stage. In contrast, a self-assessment system would be more difficult to reconcile with the Member State regimes, as there would be uncertainty as to whether the Commission would investigate a transaction.

4. CASE REFERRALS

4.1. Objectives and guiding principles for case referrals

59. The Merger Regulation has established a "one-stop-shop" system, whereby concentrations with a European Union dimension (as defined by the turnover thresholds laid down in Article 1) are reviewed exclusively by the Commission, thus avoiding multiple review procedures at the Member State level. While the turnover thresholds serve as a "bright-line test" for whether or not a merger is likely to have a European or cross-border dimension, the Merger Regulation also allows for cases to be referred from the Commission to one or more Member States and vice versa. This mechanism, which was made more effective by the 2004 reform, allows a case to be reviewed by the more appropriate authority if it is not already allocated to that authority by applying the turnover thresholds both before and after notifying a competent authority of the transaction.

60. The 2009 Report to the Council described above concluded that, overall, the turnover thresholds and rules on case referrals laid down in the Merger Regulation worked well. There was, however, room for improvement, given that a significant number of cases were still subject to reviews in three or more Member States (240 cases in 2007).

[41] See for instance, case COMP/M.6541 - *Glencore/Xstrata*, para. 26.

61. The case referral system could be enhanced to better serve the purpose of departing from the results of the turnover tests when necessary. There is especially room for improvement with respect to referrals from Member States to the Commission, both before and after notification.

62. Indeed, experience has shown that the current process for pre-notification referrals from Member States to the Commission under Article 4(5) by notifying parties tends to be cumbersome and time-consuming.[42] This is because it involves first the filing of a "reasoned submission" to request a referral in the first instance, and a subsequent notification once a referral has been approved. For this reason, parties may have chosen not to make a referral request in some cases that might have been good candidates for referral to the Commission. The Commission therefore suggests simplifying Article 4(5) referrals by abolishing the current two-step procedure.

63. Furthermore, the current rules for post-notification referrals from Member States to the Commission under Article 22 only grant the Commission jurisdiction for the Member States which have made or joined a referral request. In some cases, this has led to parallel investigations by the Commission and NCAs contrary to the one-stop-shop principle.[43] The Commission therefore proposes streamlining Article 22 referrals so as to give the Commission EEA-wide jurisdictions in cases referred to it and better implement the one-stop-shop principle.

4.2. The proposed measures for case referrals

64. The aim of the proposed modifications to the case referral system is to facilitate referrals in order to make the system more effective on an overall basis without fundamentally reforming the features of the system.

4.2.1. Article 4(5) of the Merger Regulation: pre-notification referral from Member States to the Commission

65. Given the low number of Article 4(5) requests that were vetoed by a Member State since 2004[44], the Commission proposes abolishing the current two-step procedure (a reasoned submission followed by a notification). This change would speed up Article 4(5) referrals and make them more efficient while maintaining the ability of Member States to veto a request in the rare event that they consider it necessary.

66. Accordingly, parties would notify a transaction directly to the Commission. The Commission would then forward the notification to the Member States immediately, giving those Member States that are *prima facie* competent to review the transaction under national law the opportunity to oppose the referral request within 15 working days. Unless a competent Member State opposes the request, the Commission would have jurisdiction to review the whole transaction.

67. In the event that at least one competent Member State opposes the jurisdiction of the Commission, the Commission would renounce jurisdiction entirely and Member States would retain jurisdiction. In such circumstances, the Commission would not have any discretion, and would adopt a decision stating that it is no longer competent. It would then be up to the parties to determine in which Member States they must notify.

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42 See e.g. paragraph 19 of the 2009 Report.

43 For instance in COMP/M.5828 – *Procter & Gamble/Sara Lee*, Commission decision of 17 June 2010.

44 Only 6 of the 261 Article 4(5) requests made since 2004 were vetoed by a Member State.

68. In order to facilitate the information exchange between the Member States and the Commission, the Commission proposes sending the parties' initial briefing paper or the case allocation request to the Member States to alert them about the transaction during the pre-notification contacts.

4.2.2. Article 22 of the Merger Regulation: post-notification referrals from Member States to the Commission

1. The procedure under Article 22 is proposed to be amended as follows:

- One or more Member State(s) that are competent to review a transaction under their national law could request a referral to the Commission within 15 working days of the date it was notified to them (or made known to them).[45]
- The Commission would be able to decide whether or not to accept a referral request. For example, the Commission may decide not to accept the request if the transaction has no cross-border effects, in line with Art. 22(1) first subparagraph EUMR. If the Commission decided to accept a referral request, it would have jurisdiction for the whole of the EEA.
- However, if one (or more) competent Member State(s) opposed the referral, the Commission would renounce jurisdiction for the whole of the EEA, and the Member States would retain their jurisdiction. The Member State would not need to give reasons for opposing the referral.

70. In order to make the above proposal work, two issues need to be addressed. First, a timing problem could arise if the referral request is made after another Member State has already cleared the transaction in its territory. In this case the Commission would no longer be able to take EEA-wide jurisdiction. Second, other Member States might not have enough information to ascertain whether they are competent and would have the right to oppose the referral, or if they were competent, to make an informed choice whether or not to veto the referral as they may not yet have received a notification.

71. In order to address these issues to the fullest extent possible, the Commission suggests that the NCAs circulate early information notices for multi-jurisdictional or cross-border cases or cases concerning markets that are *prima facie* wider than national as soon as possible after a Member State receives the notification or otherwise learns of the transaction. The NCA would indicate in this notice if it is considering making a referral request. In that case, the notice would trigger the suspension of the national deadlines of all Member States which are also investigating the case. Alternatively, if the Commission itself believes that it could be the more appropriate authority it would invite the Member State to request a referral under Article 22(5) and such an invitation would equally suspend all national deadlines.

72. Such a procedural solution should reduce the risk that an NCA makes a referral request to the Commission when another NCA has already issued a decision clearing the transaction. However, in the unlikely event that a Member State has adopted a clearance decision before a referral request occurs, the clearance decision would remain in force and the case would be referred by the remaining Member States only.

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[45] In contrast to the current system, only Member States which are competent to review the transaction under their national law could request a referral.

73. The circulation of such an information notice would also facilitate cooperation and coordination between all the agencies involved in the review process and foster convergence, even if a referral to the Commission does not take place.

4.2.3. Article 4(4) of the Merger Regulation: pre-notification referrals from the Commission to a Member State

74. The Commission proposes clarifying the substantive thresholds for pre-notification referrals from the Commission to a Member State under Article 4(4).

75. In order to encourage the use of that provision, the Commission proposes adapting the substantive test in Article 4(4) so that parties are no longer required to claim that the transaction may "*significantly affect competition in a market*" in order for a case to qualify for a referral. Show that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

5. MISCELLANEOUS

76. Finally, the Commission believes that there is room to improve and streamline some further provisions of the Merger Regulation, particularly with a view towards simplifying procedures. In the context of merger control, the Commission has always sought to limit the administrative burden on undertakings to a minimum. In December 2013, it took a major step towards making EU merger control more efficient without amending the Merger Regulation itself through the adoption of a Simplification Package.[46] This package of measures brought significantly more merger cases under the so-called simplified procedure for unproblematic mergers and streamlined all the forms prescribed for notifying mergers to the Commission, leading to a substantial net reduction in information requirements.

77. Further streamlining and simplification of EU merger procedures, beyond the achievements of the 2013 Simplification Package, and improvement to certain provisions of the Merger Regulation require amending the Merger Regulation itself. The Staff Working Document accompanying this White Paper discusses these proposals in detail, but two points are worth highlighting here:

- 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. Thus, such joint ventures would not have to be notified to the Commission, even if the turnover thresholds of Article 1 are met.
- In order to further simplify merger procedures, the Commission could be empowered to exempt from notification certain categories of transactions that normally do not raise any competition concerns (such as those transactions which do not involve any horizontal or vertical relationships between the merging undertakings and are currently dealt with under a simplified

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46 Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 (OJ L 336, 14.12.2013, p. 1) and Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5, corrigendum: OJ C 11, 15.01.2014, p.6).

procedure) from mandatory prior notification. Such cases might be subject to a procedure similar to the "targeted transparency system" envisaged above for dealing with acquisitions of non-controlling minority shareholdings.

6. CONCLUSION

78. Overall, the revised Merger Regulation adopted in 2004 provides a good framework for effectively protecting competition and thus consumers from anti-competitive effects of mergers and acquisitions in the internal market. The framework provides for such protection whilst allowing the large majority of unproblematic transactions to be cleared quickly. The introduction of the SIEC test in 2004 also enabled the Commission to review non-coordinated effects of transactions where the merged entity would not acquire a dominant position. Finally, improvements to the case referral system have significantly contributed to allocating cases to the more appropriate authority.

79. However, as set out above, there is room to further improve EU merger control.[47] In particular, this White Paper proposes expanding the Commission's jurisdiction to include review of potential anti-competitive effects resulting from acquisitions of non-controlling minority shareholdings using a targeted and non-intrusive transparency system, and making the case referral system more efficient and effective by streamlining the Article 4(5) procedure and amending Article 22 so that it enhances adherence to the one stop shop principle.

The Commission invites comments on this White Paper. The Commission would in particular invite comments on the proposals and the questions raised in the White Paper and in the Staff Working Document accompanying the White Paper. They may be sent by Friday 3 October 2014, either by e-mail to:

comp-merger-registry@ec.europa.eu

or by post to:

European Commission
Directorate-General for Competition, Unit A-2
White Paper "Towards more effective EU merger control"
B-1049 Brussel/Bruxelles.

It is standard practice for DG Competition to publish submissions received in response to a public consultation. However, it is possible to request that submissions, or parts thereof, remain confidential. Should this be the case, please indicate clearly on the front page of your submission that it should not be made public and also send a non-confidential version of your submission to DG Competition for publication.

[47] The scope chosen for this White Paper is without prejudice to additional evaluations of other important aspects of EU merger control by the Commission. The Commission will consider appropriate topics for an ex-post evaluation of some of its practices in merger control.