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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

WHITE PAPER

Towards more effective EU merger control

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1. INTRODUCTION

1. The aim of the EU merger control system is to ensure effective competition in the internal market. Since 1989, the EU Merger Regulation has been regularly reviewed to improve the system and to take into account evolving practices. Almost a decade after the most recent reform, and following the Commission's 2009 report evaluating the operation of the Merger Regulation ("the 2009 Report"), the Commission considers it appropriate to reflect on possible further improvements.

2. On 20 June 2013, the Commission published the Staff Working Document entitled "Towards more effective EU merger control" ("the Staff Working Document"). A number of amendments to the Merger Regulation were proposed, focussing in particular on minority shareholdings and the case referral system. The Commission received feedback to the proposals from a large number of stakeholders, including Member States. The White Paper further explores the proposals, taking this feedback into account, but also looks more broadly at how EU merger control has worked during the ten years since the 2004 reform of the Merger Regulation, with a particular focus on the development of the substantive assessment of mergers applied by the Commission, as well as on fostering the level playing field, cooperation and convergence between the Commission and NCAs in the field of merger control.

2. ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS

2.1. Problem definition

3. An effective and efficient competition policy requires appropriate tools that are well-designed for tackling all sources of harm to competition and consumers. The Merger Regulation currently only applies to “concentrations”, that is acquisitions of control. The Commission has exclusive jurisdiction to review such concentrations, provided that they meet certain turnover thresholds, in order to assess whether they may lead to a significant impediment of effective competition.

4. The experience of the Commission, the Member States and third countries, as well as economic research, all show that in some instances the acquisition of a non-controlling minority shareholding can harm competition and consumers. The theories of harm associated with such acquisitions are, in general, of a similar nature to those associated with acquisitions of control. Namely, the acquisition of a minority shareholding may:

   – lead to horizontal unilateral effects due to an increase in the parties' ability and incentive to unilaterally raise prices or restrict output (see e.g. case *Siemens/VA Tech*).

   – enable the acquirer to gain a competitive advantage in the market by increasing its rival’s costs.

   – enable the acquirer to use its position to limit the competitive strategies available to the target firm, thereby weakening it as a competitive force (see e.g. *Ryanair/Aer Lingus* and *Toshiba/Westinghouse*).

– enhance the ability and incentive of market players to coordinate in order to achieve supra-competitive profits (due to increased transparency and threat of retaliation).

– lead to foreclosure, particularly input foreclosure, given that the acquirer only internalises a part, rather than all, of the loss in the target firm's profits (see e.g. *IPIC/MAN Ferrostaal*).

5. The Commission is currently only able to review pre-existing minority shareholdings held by one of the merging parties to a notified concentration.

6. The public consultation showed that stakeholders generally agree that non-controlling minority shareholdings may lead to competitive harm. Although many stakeholders suggested that Articles 101 and 102 TFEU be used to tackle such harm, these tools would only capture acquisitions of minority shareholdings in limited circumstances.

7. Within the European Union, Austria, Germany and the United Kingdom all have jurisdiction to intervene against acquisitions of minority shareholdings. Equally, many jurisdictions outside the EU have such jurisdiction under their merger rules, such as Canada, the United States and Japan.

8. Using information from Member States and the Zephyr database, it is roughly estimated that on the basis of a targeted competence around 20-30 acquisitions of minority shareholdings would meet the EU turnover thresholds per year.

2.2. Objectives of the EU initiative

9. The objective of the proposal is to increase the effectiveness of EU merger control by preventing harm to competition and consumers resulting from acquisitions of non-controlling minority shareholdings. The system should be designed to:

– catch only the potentially problematic cases;

– avoid any unnecessary administrative burden; and

– fit with the existing EU and Member State merger control regimes.

2.3. Policy options

10. The following policy options are assessed against the baseline scenario of no action.

11. Option 1 – self-assessment system: The parties could proceed with an acquisition of a minority shareholding without prior approval from the Commission. The Commission could investigate a transaction on the basis of its own market intelligence and complaints. Parties would be able to voluntarily submit a notification in order to achieve legal certainty.

12. Option 2 - targeted notification system: The existing system of ex-ante merger control would be extended to potentially problematic acquisitions of non-controlling minority shareholdings. An acquisition would be considered potentially problematic if the shareholding is:

– acquired in a competitor or a vertically related company; and

– either (i) above a certain higher level of, for example, 20% or (ii) 5% or more and accompanied by rights such as board representation, the right to block special resolutions and information rights.

13. The normal standstill obligation would apply.

14. Option 3 – targeted transparency system: The parties would be required to submit an information notice for potentially problematic transactions (using the criteria set out in paragraph 15). The information notice would enable the Commission to decide if it wants to further investigate the transaction and Member States to decide whether to request a referral. These decisions would be taken within a waiting period of, for example, 15 working days. After that, if neither the Commission nor a Member State will investigate the transaction, the parties may proceed with its implementation. In the interest of legal certainty, parties would be able to proceed voluntarily to full notification.

15. The following table presents an overview of the three options.

Overview of the options on minority shareholdings			
Parameter	Option 1 Self-assessment	Option 2 Targeted notification	Option 3 Targeted transparency system
Scope of the Commission's jurisdiction	Any acquisition of a minority shareholding above safe harbour of 5%	Acquisition of a minority shareholding in a competitor / vertically related company above 20% or 5% with rights	Acquisition of a minority shareholding in a competitor / vertically related company above 20% or 5% with rights
Obligation to submit a full notification	no	yes	No
Obligation to submit an information notice	no	n/a	yes
Voluntary notification available	n/a	n/a	yes
Stand-still obligation	no	yes	no
Waiting period	no	n/a	yes
Obligation of the Commission to issue a decision	No, only in the event that the Commission initiates an investigation	yes	No, only in the event that the Commission initiates an investigation
Possibility for Member States to request a referral	yes	yes	yes

2.4. Assessment of impacts and comparison of options

2.4.1. Assessment criteria

16. In line with the objectives set out above, the impact of the policy options has been assessed against the following criteria:

- preventing harm to competition and consumers;
- legal certainty;
- administrative burden on business;

– public enforcement costs;

– consistency with the current EU and national merger control regimes; and

– allocation of cases to the more appropriate authority.

2.4.2. Comparison of options

17. The table below sets out a comparative overview of the different policy options against these assessment criteria.

Comparison of minority shareholding options			
Criteria	**Impact compared to baseline scenario (- - - to +++)**		
	Option 1	**Option 2**	**Option 3**
	Self-assessment system	**Targeted notification system**	**Targeted transparency system**
1. Preventing harm to competition and consumers	+	+ + +	+ + +
2. Legal certainty	+ +	+ +	+ +
3. Administrative burden on businesses	-	- -	-
4. Public enforcement costs	- - -	- -	-
5. Consistency with the existing merger control system on an EU and Member State level and allocation to the more appropriate authority	-	+ +	+

18. Option 3 is the preferred option because it (i) captures the potentially problematic cases, (ii) avoids any unnecessary administrative burden and (iii) fits with the current EU and national merger control regimes. While Option 3 captures the potentially problematic transactions, it allows those transactions which are most likely innocuous to proceed without review. The administrative burden on businesses is also limited by requiring less information to be submitted to the Commission in the first instance and the number of cases covered by the Commission's competence would be limited. Finally, Option 3 fits with the current EU and national merger control regimes, as the information notice enables Member States to request a referral. It could also be considered to introduce a three weeks waiting period to ensure that Member States with a notification system and stand-still obligation are not faced with already implemented transactions before they start their investigations.

2.5. Analysis of subsidiarity

19. Many of the acquisitions of minority shareholdings previously reviewed by Member States clearly had a cross-border dimension, meaning that the Commission would likely have been the more appropriate authority to investigate them.

3. CASE REFERRALS BETWEEN NATIONAL COMPETITION AUTHORITIES AND THE COMMISSION

3.1. Problem definition

20. The 2009 Report found that a significant number of cross-border cases are still reviewed in three or more Member States, and that this may be due to the procedural burden associated with a referral.

3.1.1. Pre-notification referral from Member States to the Commission, Article 4(5)

21. Article 4(5) of the Merger Regulation allows the merging parties to request the referral of a case to the Commission before notification. Parties must first submit a "reasoned submission" requesting a referral. Provided that no Member State opposes the referral, the Commission obtains jurisdiction for the entire EEA and the parties must then submit a notification to the Commission.

22. The experience over the last 10 years shows that the requirement for two separate submissions is burdensome and time-consuming, which may have led to a resistance by companies to make use of Article 4(5).

3.1.2. Post-notification referral from Member States to the Commission Article 22

23. Article 22 allows one or several Member States to request a referral of a case to the Commission. If accepted, the Commission only takes jurisdiction for the territory of the Member State(s) requesting (or supporting) the referral request. This is contrary to the “one-stop-shop” principle as it leads to a patchwork of competences.

3.2. Objectives of the EU initiative

24. The objective of the proposal is to increase the effectiveness and efficiency of European merger control by simplifying the case referral procedure. More specifically, the proposal involves

- abolition of the requirement to file both a reasoned submission and a notification under Article 4(5); and
- ensuring that the Commission is in a position to examine the effects of a merger in the whole of the EEA territory following an Article 22 referral.

3.3. Policy options

25. With regard to both Article 4(5) and for Article 22, only one proposal for amendment is presented below. Both proposals received very strong support from stakeholders during the public consultation.

26. The proposal to amend Article 4(5) involves the abolition of the requirement for the parties to file a "reasoned submission". The parties would notify the transaction directly to the Commission. If one or more competent Member State opposes the referral, the Commission would renounce jurisdiction and Member States would retain theirs.

27. The proposal to amend Article 22 involves the following:

- One or more competent Member State(s) could request a referral to the Commission.
- The Commission may decide whether to accept a referral, upon which it would obtain jurisdiction for the whole of the EEA.

– However, if one or more competent Member State(s) opposes the referral, all Member States would retain their jurisdiction.

3.4. Assessment of impact and comparison of options

3.4.1. Assessment criteria

28. In line with the objectives set out above, the impact of the policy options has been assessed against the following criteria:

– preventing harm to competition and consumers;

– legal certainty;

– administrative burden on business;

– public enforcement costs;

– fits with the principles of the Merger Regulation.

3.4.2. Identifying and assessing the impact of each option

The table below sets out the Commission's assessment of the likely positive and negative impact of the proposal against the baseline scenario.

Criteria	**Impact against baseline scenario (- - - to + + +)**	**Explanation of rating and aspects of the policy option most relevant**
Article 4(5) referrals		
1. Preventing harm to competition and consumers	+ +	The proposal encourages the use of Article 4(5) where the Commission is the more appropriate authority.
2. Legal certainty	+ +	The proposal is clear and precise. Any uncertainty arising from the possibility of a Member State veto following notification to the Commission is outweighed by the time and cost-savings achieved by the proposal.
3. Administrative burden on businesses	+ + +	Abolition of the two-step procedure significantly reduces the administrative burden on business.
4. Public enforcement costs	+ + +	Abolition of the two-step procedure will reduce public enforcement costs. A potential increase could occur if parties opt for a referral request more often. However, this would be off-set by a reduction of workload at national level.
5. Compatibility with the principles of the Merger Regulation	+ +	The proposal encourages the use of Article 4(5) where the Commission is the more appropriate authority. It is also in line with the one-stop principle as the Commission would be competent for the entire EEA territory.
Article 22 referral		
1. Preventing harm to	+ +	The proposal enables the Commission to review referred mergers for the

competition and consumers		entire EEA territory.
2. Legal certainty	+ + +	The option is clear and precise. Limiting referral requests to competent Member States increases legal certainty for parties.
3. Administrative burden on businesses	+ + +	Upon referral, the Commission would obtain EEA-wide jurisdiction, thereby avoiding a patchwork of competences. Further, an investigation can no longer be triggered by referral requests from Member States that are not competent.
4. Public enforcement costs	+ +	The proposal avoids parallel investigations by multiple authorities. No increase in the Commission's workload is foreseen as the number of cases with cross-border effects is not expected to increase.
5. Compatibility with the principles of the Merger Regulation	+ + +	Upon referral, the Commission would obtain EEA-wide jurisdiction, in line with the one-stop-shop principle.

29. In light of the above, the proposals are considered to have a positive impact as compared with the baseline scenario.

3.5. Analysis of subsidiarity

30. The proposals encourage further adherence to the principle of the more appropriate authority which emanates from the principle of subsidiarity.

4. MONITORING AND EVALUATION

31. The Commission will continue to monitor the application of the Merger Regulation going forward. It will decide whether to take further steps toward a legislative proposal to amend the Merger Regulation based on feedback on the White Paper and its on-going dialogue with stakeholders.