

European Commission consults on improving merger control

The European Commission (EC) is consulting on proposals to reform the EU merger control regime. The plans include an eye-catching proposal to extend the EC's powers of review to acquisitions of non-controlling stakes where there is a competitive link.

The reforms would also make case referrals between the EC and EU Member States more effective, and make certain procedures less onerous (including exempting review of joint ventures that operate only outside the EEA).

While the EC's willingness to streamline its procedures should be welcomed, businesses will be concerned at plans to extend the EC's powers of review to non-controlling interests.

Context

The EC's EU Merger Regulation was last overhauled in 2004, but has been reviewed twice since (2009 and 2013).

While the EC considers that the current Merger Regulation is still generally fit for purpose and contributes to the smooth running of the internal market, it recognises that there is room for improvement – singling out non-controlling stakes and case referrals as areas ripe for reform.

The EC has outlined its proposals in a White Paper and accompanying documents, and is seeking views on the plans in a consultation window running until 3 October 2014.

Non-controlling interests

The plans would give the EC power to review acquisitions of non-controlling stakes – essentially those that allow the exercise of material influence over commercial policy or access to commercially sensitive information – even where the shareholding acquired is as low as 5%.

Although the EC notes that this is similar to the tests used in the UK, Germany, Austria and several ex-EEA jurisdictions, it is nevertheless a considerable widening of the EC's remit, and the 5% threshold is actually lower than that typically applied in those other jurisdictions.

The proposed requirement for a "competitively significant link" means that only minority acquisitions that appear to be problematic from a competition perspective need to be notified. This requires a competitive

Key points

- The EC is seeking power to review certain acquisitions of minority shareholdings as low as 5%
- Only those minority acquisitions featuring competitive overlaps would be caught
- Nonetheless, for many businesses this could lead to a marked increase in filing obligations
- Conversely, all deals with *no* overlaps (and non-EEA joint ventures) would be exempted from review entirely, which is to be welcomed
- Case referral procedures between the EC and EU Member States would also be streamlined



relationship between the buyer and target, i.e. where they are nominally active in the same market or in vertically related markets – a surprisingly broad test that could easily be met by financial buyers with a diverse portfolio of interests, even where there are no conceivable competition concerns.

Parties to such a deal would be required to submit an Information Notice to the EC. It is not yet clear exactly how much detail this would require, but the EC has already indicated that it should include transaction structure and some market share information. Parties would also be obliged to wait for a period (e.g. three weeks) for the EC to decide whether a full notification was required (in which case the parties would of course still need to prepare the Form CO, pre-notify and wait for the EC's formal review to take place).

Case referrals

The EC also seeks to limit the number of cases reviewed by multiple EU Member States. The proposals are designed to encourage greater use of the existing case referral provisions, particularly from Member States up to the EC.

For example, the plans would allow parties who qualify for review in three or more Member States to file in full directly with the EC, without having to

request permission first, reducing the paperwork and time involved under the current system. The proposals also mean that where one Member State asks the EC to review a deal, the EC would automatically take jurisdiction for the whole EEA (unless another competent Member State objected), meaning there should be less scope for multiple parallel – and potentially divergent – reviews.

Other proposals

The EC has also suggested a number of other simplifying and streamlining measures, including exempting entirely from review:

- full-function joint ventures located and operating outside the EEA with no effect on EEA markets; and
- deals leading to no "reportable markets", i.e. where there are no horizontal or vertical overlaps (or at least requiring only an Information Notice).

The EC has also stated that there should be greater coherence and convergence with the merger control rules of EU Member States. Its aim is to enhance cooperation and to avoid divergent decisions where there are parallel reviews. The EC makes particular reference to some national laws that allow governments to overrule a competition authority's decision on public interest grounds (as seen in the UK with the Lloyds / HBOS merger in 2008).

Comment

The proposed reforms should be welcomed insofar as they alleviate the workload for businesses and streamline existing procedures and requirements, e.g. making case referral mechanisms more efficient. Exemption from review for non-EEA joint ventures and deals with no overlaps would be particularly good news for financial investors such as private equity houses.

However, it is already apparent that the plans could produce a number of undesirable effects or fall short of the intended aims.

Increased burden for businesses

For businesses, any extension of the merger control regime to cover non-controlling acquisitions means adding more delay and cost to those deals. By effectively seeking to lower the test for "control" where there is a competitive link, the EC will require businesses to notify it of transactions that currently pass unbothered by merger control.

The proposed additional waiting period (while the EC decides whether a full Form CO is required) may mean in practice that parties to time-sensitive deals feel forced to opt for a full Form CO in the first place, increasing the workload for both businesses and the EC itself.

Effect on case referrals

It is unclear whether all of the EC's proposals to make case referrals to and from Member States more effective will hit home. While the changes to make referrals more efficient for parties should be welcomed, the "nudge" style proposal requiring Member States to *actively* object to the EC's automatic seizure of sole jurisdiction in some cases may not have a great effect where the Member State remains minded to examine the deal itself.

A European Merger Area

The EC indicated that its long term aim is to develop a European Merger Area with a single set of rules used by itself and Member States. This would be a step change that would seemingly require unanimous support of national governments and majority support at the European Parliament, and would be a major departure from the current system of national regulation informed by, but not necessarily identical to, the EU regime.

In-depth views to follow

We will be issuing an in-depth briefing focusing on possible consequences of the proposals in due course.

EU Antitrust Contacts

If you would like to know more, please contact the names listed below (or any other member of the Antitrust Practice):

Belgium: [Tony Reeves](#)

Czech Republic: [Alex Cook](#)

France: [Patrick Hubert](#)

Germany: [Joachim Schütze](#)

Italy: [Luciano Di Via](#)

The Netherlands: [Steven Verschuur](#)

Poland: [Iwona Terlecka](#)

Romania: [Nadia Badea](#)

Spain: [Miguel Odriozola](#)

United Kingdom: [Alex Nourry](#)

Authors

[Alastair Mordaunt](#)

[Christopher Duff](#)

Global Antitrust Contacts

Chair: Thomas Vinje
Managing Partner: Oliver Bretz

Australia

Dave Poddar
 +61 28922 8033
 dave.poddar@cliffordchance.com

Belgium

Tony Reeves
 +32 2 533 5943
 tony.reeves@cliffordchance.com

Thomas Vinje
 +32 2 533 5929
 thomas.vinje@cliffordchance.com

China

Richard Blewett
 +86 10 6535 2261
 richard.blewett@cliffordchance.com

Czech Republic

Alex Cook
 +420 222 555 212
 alex.cook@cliffordchance.com

France

Oliver Bretz
 +33 1 4405 5216
 oliver.bretz@cliffordchance.com

Emmanuel Durand
 +33 1 4405 5412
 emmanuel.durand@cliffordchance.com

Patrick Hubert
 +33 1 4405 5371
 patrick.hubert@cliffordchance.com

Michel Petite
 +33 1 4405 5244
 michel.petite@cliffordchance.com

Germany

Joachim Schütze
 +49 211 43555547
 joachim.schuetze@cliffordchance.com

Marc Besen
 +49 211 43555312
 marc.besen@cliffordchance.com

Hong Kong

Emma Davies
 +852 2825 8828
 emma.davies@cliffordchance.com

Angie Ng
 +852 2826 3403
 angie.ng@cliffordchance.com

Indonesia

Linda Widayati
 +62 212988 8301
 linda.widayati@cliffordchance.com

Italy

Luciano Di Via
 +39 064229 1265
 luciano.divia@cliffordchance.com

Aristide Police
 +39 06422911
 aristide.police@cliffordchance.com

Japan

Masafumi Shikakura
 +81 3 5561 6323
 masafumi.shikakura@cliffordchance.com

The Netherlands

Steven Verschuur
 +31 20 711 9250
 steven.verschuur@cliffordchance.com

Frances Dethmers
 +32 2 533 5043
 frances.dethmers@cliffordchance.com

Poland

Iwona Terlecka
 +48 22 429 9410
 iwona.terlecka@cliffordchance.com

Romania

Nadia Badea
 +40 21 66 66 100
 nadia.badea@badea.cliffordchance.com

Russia

Torsten Syrbe
 +7 495 725 6400
 torsten.syrbe@cliffordchance.com

Spain

Miguel Odriozola
 +34 91 590 9460
 miguel.odriozola@cliffordchance.com

Miquel Montaña
 +34 93 344 2223
 miquel.montana@cliffordchance.com

Thailand

Andrew Matthews
 +66 2 401 8800
 andrew.matthews@cliffordchance.com

Ukraine

Ulyana Khromyak
 +380 44390 2219
 ulyana.khromyak@cliffordchance.com

United Arab Emirates

Mike Taylor
 +971 43620 638
 mike.taylor@cliffordchance.com

United Kingdom

Alex Nourry
 +44 20 7006 8001
 alex.nourry@cliffordchance.com

Jenine Hulsmann
 +44 20 7006 8216
 jenine.hulsmann@cliffordchance.com

Alastair Mordaunt
 +44 20 7006 4966
 alastair.mordaunt@cliffordchance.com

Elizabeth Morony
 +44 20 7006 8128
 elizabeth.morony@cliffordchance.com

Greg Olsen
 +44 20 7006 2327
 greg.olsen@cliffordchance.com

Luke Tolaini
 +44 20 7006 4666
 luke.tolaini@cliffordchance.com

United States

Timothy Cornell
 +1 202 912 5220
 timothy.cornell@cliffordchance.com

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