

The European Commission invites comments on possible changes to its merger control rules

On 7 October 2016, the European Commission (EC) launched a public consultation on several procedural and jurisdictional aspects of EU merger control, including the possible introduction of filing requirements based on transaction value and block exemptions from the filing obligation for certain types of transaction.

Context and scope of the new EC consultation

The EC's EU Merger Regulation was last overhauled in 2004, but has since been reviewed twice (in 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 EU internal market, it recognises that there is room for improvement.

Following its 2014 White Paper, the EC intends to explore new ways to further simplify its procedure in order to reduce costs and administrative burden for businesses, but also to expand its scope of investigation to capture certain transactions that do not currently fall under its jurisdiction.

The new consultation aims to assess:

- **The need for simplification:** the treatment of certain categories of cases that are currently subject to simplified procedure;

- **The functioning of the revenue-based jurisdictional thresholds:** possibility of introducing a "transaction value" threshold in order to capture highly valued acquisitions of target companies that have not yet generated substantial revenue; and
- **The functioning of the case referral mechanisms and certain technical aspects of the framework for the assessment of mergers.**

Proposals that were included in the 2014 White Paper, to extend the jurisdiction of the EUMR to cover acquisitions of non-controlling minority interests, are not included in the current consultation. While not expressly stated in the consultation, it is almost certain that these proposals have been dropped, following the serious doubts that the current Competition Commissioner, Margrethe Vestager, has expressed about them.

Key issues

- Should some types of transaction be excluded or block exempted from filing obligations under the EU Merger Regulation, or subject to lighter information requirements? If so, which transactions?
- Should acquisitions of high value target companies be notifiable, even if the target has only minimal sales in the EU? If so, how can transactions with insufficient economic nexus with the EU be excluded?
- Should the EC proceed with changes to the referral procedures between EC and EU Member States and certain technical procedural issues, which have already been the subject of two previous consultations?

Reducing the administrative burden on companies

The adoption of new measures in December 2013 widened the scope for application of the so-called simplified procedure for non-problematic cases. Under this procedure, qualifying transactions can be notified using a simpler, shorter form, and the EC may decide not to undertake a market investigation. According to the EC, the number of cases dealt with under the simplified procedure has increased from an average of 59% during the period 2004 – 2013 to 69% of all notified transactions as of January 2014.

Currently, the simplified procedure applies to the transactions resulting in a combined market share of less than 20% in markets where the parties compete, or less than 30% in markets where one of the parties sells an input to a market where the other one is active. Further, a simplified procedure is applied to transactions leading to “no reportable” markets (*i.e.*, where there are no horizontal or vertical overlaps). Such transactions benefit from a lighter review regime than non-qualifying transactions, but are nonetheless still subject to (i) the requirement to file a notification (albeit a simplified one) and (ii) the maximum 25-working day standstill review period, during which the transaction cannot be implemented (although simplified procedure transactions are usually cleared before this deadline).

In an effort to reduce the administrative burden and to cut costs for businesses, the EC is considering ways to simplify the treatment of these cases further. In particular, it suggests that the current regime could be replaced by the:

- Exemption of some categories of cases from the prior notification obligation;
- Introduction of lighter information requirements, *i.e.* replacing the notification form with a short information notice; or
- Introduction of a self-assessment system for certain categories, leaving it up to the parties to decide whether or not to notify.

Types of transaction that the EC has previously suggested might be suitable for such treatment include acquisitions of joint control over targets with minimal sales in the EU, creation of extra-territorial joint ventures, and transactions in which the parties have no horizontally- or vertically-related activities.

Subjecting high value transactions that might otherwise not be caught to EU merger control

The EC has also raised the issue of new jurisdictional thresholds in order to capture high value acquisitions that do not currently fall under its jurisdiction due to the revenue-based thresholds. It is considering the introduction of additional notification requirements, based on alternative criteria, such as the value of the transaction (which are not specified in detail in the consultation document). According to the EC, such a threshold could fill a possible enforcement gap of EU merger control.

If transaction value-based thresholds are introduced, the EC wants to ensure that such a complementary threshold would only cover transactions that have a significant economic link with the EEA. It has suggested two options for doing so: (i) a general requirement that transactions must be likely to have a

"measurable impact" in the EEA, or (ii) some "industry specific" (but otherwise unspecified) criteria.

According to the EC, the issue of high value transactions escaping EU merger control is in particular of major importance for companies active in the digital economy, where services are launched to build up a significant user base before a business model is adopted that generates significant revenues. The EC considers that companies in this sector may have a considerable actual or potential market impact, although they may only generate a little or even no revenue to date. A well-known example is the recent *Facebook/WhatsApp* transaction which despite its importance for the EU market, fell outside the EU thresholds (but was ultimately referred to the EC).

The discussion about transaction value-based thresholds is also relevant for pharmaceutical companies, where it is common practise for major companies to acquire smaller ones which focus on the research and development of new treatments with high commercial potential but little or no revenue to date.

Other changes under consideration

The EC's questionnaire also asks for feedback on proposals for changes to the current case referral mechanism and a number of other miscellaneous technical and procedural reforms (such as allowing the Phase 2 timetable to be further extended in certain circumstances). These proposals were all covered in the 2014 White Paper and most were also included in the earlier 2013 consultation. Respondents now have

an opportunity to reiterate their views on them for a third time.

Comment

The EC's proposals to reduce administrative burdens on businesses engaging in no-issue transactions are welcome. Many businesses today are faced with burdensome EU notifications of (and waiting periods for) transactions that raise no competition law issues. Although fairly straightforward, even simplified notifications often unnecessarily call on resources of the parties and delay the implementation of the transaction. Financial investors such as private equity houses in particular will welcome the EC's consideration of the simplification of notification requirements, as they are frequently required to file simplified notifications even though they have no overlapping business with the target. Similarly, filing requirements for joint acquisitions of real estate assets have proved to be particularly wasteful of business and regulatory resources.

The EC's proposals to extend its merger review to high value transactions that would otherwise not have triggered a notification on the

other hand would appear to increase administrative burdens on companies on the basis of what may at least in some cases be purely speculative concerns. For every successful *Facebook/Whatsapp*-type acquisition of a fast-growing start-up, one is likely to find transactions for which the buyer overpaid and rosy market forecasts did not come to pass. Whether there are enough high value transactions escaping EC merger review to justify the introduction of entirely new jurisdictional criteria, and whether such transactions are not sufficiently adequately reviewed under national competition law as opposed to EU law, is a question on which the consultation will hopefully help shed light.

Next Steps

The consultation is open until 13 January 2017. It is anticipated that the responses to the consultation will be published in the first quarter of 2017 and will be taken into account by the EC when drafting a Staff Working Document, which is expected to be published in the second half of 2017.

Useful links

DG Comp web page for the current consultation:

http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html

European Commission's Questionnaire for the consultation:

http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf

European Commission's 2014 White Paper and working document:

http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html

European Commission's FAQ on the Simplification Package:

http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm

Authors



Dieter Paemen
Partner, Brussels

E: dieter.paemen
@cliffordchance.com



Alex Nourry
Head of London Antitrust
Practice

E: alex.nourry
@cliffordchance.com



Georgios Yannouchos
Associate, Brussels

E: georgios.yannouchos
@cliffordchance.com



Heleen Engelen
Associate, Brussels

E: heleen.engelen
@cliffordchance.com

Global Antitrust Contacts

Chair: Thomas Vinje

Australia

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

Belgium

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

Dieter Paemen
+32 2533 5012
dieter.paemen@cliffordchance.com

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

China

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

Yong Bai
+86 10 6535 2286
yong.bai@cliffordchance.com

Czech Republic

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

France

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 4355547
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 Widyati
+62 212988 8301
linda.widyati@cliffordchance.com

Italy

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

Japan

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

Morocco

Franck Coudert
+212 52013 2082
franck.coudert@cliffordchance.com

The Netherlands

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

Saudi Arabia

Omar Rashid
+966 11481 9720
omar.rashid@cliffordchance.com

Singapore

Harpreet Singh
+65 6661 2028
harpreet.singh@cliffordchance.com

Nish Shetty

+65 6410 2285
nish.shetty@cliffordchance.com

Valerie Kong

+65 6410 2271
valerie.kong@cliffordchance.com

Spain

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

Miguel Montaña
+34 93 344 2223
miguel.montana@cliffordchance.com

Thailand

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

Turkey

İtir Çiftçi
+90 212339 0077
itir.ciftci@cliffordchance.com

United Arab Emirates

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

United Kingdom

Alex Noury
+44 20 7006 8001
alex.noury@cliffordchance.com

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

Nelson Jung
+44 20 7006 6675
nelson.jung@cliffordchance.com

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

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

Matthew Scully
+44 20 7006 1468
matthew.scully@cliffordchance.com

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

United States

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

Robert Houck
+1 212878 3224
robert.houck@cliffordchance.com

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