BUSINESSEUROPE

POSITION PAPER

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MAKING MERGER CONTROL MORE EFFECTIVE

BUSINESSEUROPE welcomes the opportunity to comment on the European Commission White Paper "Towards more effective EU merger control".

The White Paper proposes to adapt the Merger Regulation on two important points. The first is an evaluation of the notification mechanism for concentrations with an EU dimension. The Commission proposes an extension of its competences to include the acquisition of non-controlling minority shareholdings.

Then, the interaction between national competition authorities and the Commission's merger control is put to the test. The Commission suggests changing the rules on referrals between national competition authorities and the European Commission.

Extending Merger Control to minority shareholdings

BUSINESSEUROPE opposes the extension of the Commission's merger control powers to the acquisition of non-controlling minority shareholdings, for the reasons stated below.

Admittedly, minority shareholdings that do not lead to "decisive influence" may, under exceptional circumstances, nonetheless cause unilateral or coordinated effects, restrictive of competition. The White Paper refers to some cases illustrating this phenomenon. However, it is not certain that the current system has a significant regulatory gap in relation to the acquisition of minority shareholdings. In addition, the severity (harm), magnitude/frequency and permanency of the problem are all fundamental criteria to evaluate whether a legislative intervention is needed.

Absent evidence, ex ante assessment should continue targeting only those structural links that may grant decisive influence on the activities of the target undertaking, thus generating greater risks in terms of harm to competition. Conversely, structural links relevant for a competition assessment of minority shareholdings may continue to be addressed under Article 101 (i.e. horizontal coordinated effects), Article 102 (i.e. input and customer foreclosure) or under company law or unfair competition law (i.e. horizontal unilateral effects).

As the Commission outlines, there are only a few problematic cases with a potential of danger to competition. The Impact Assessment (para 46) arrives at an estimated intervention rate of 1-2 cases a year. Given the data from which it has been calculated, this prognosis obviously suffers from appreciable uncertainty. The outcome also depends on which minority acquisitions would eventually be captured (criteria in addition to the overall turnover thresholds). Theories of harm and the empirical

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evidence seem less developed for this category of acquisitions. Generally, though, anti-competitive effects resulting from minority stakes are likely to be much less pronounced than for acquisition of control.

As a consequence, BUSINESSEUROPE considers that extending the scope of the Merger Regulation and imposing a heavy and costly administrative burden to the companies concerned would be excessive and disproportionate. With regard to procedural economy, the extension of the merger control as proposed by the Commission will be contrary to the aim of a more effective and efficient system. Based on the available facts, it cannot be concluded that the problem actually merits legislative intervention.

Extending the scope of EU merger control would generate further administrative burdens for the undertakings concerned, thus adding another, additional element to the increasing costs of doing business in Europe. Such reform proposal would clearly not pass the "competitiveness proofing" test.

BUSINESSEUROPE opposes the extension of the Commission's merger control powers to the acquisition of non-controlling minority shareholdings. Extending the scope of the Merger Regulation and imposing a heavy and costly administrative burden to companies would be excessive and disproportionate.

Another issue is the impact of the proposal on corporate venture investments for SMEs, e.g. innovative start-up companies. The acquisition of a non-controlling minority stake could also have positive effects, such as easier access to capital when the target firm is a SME or an innovative start-up. Venture capitalists often invest strategically in small or medium-sized start-ups who are operating in the same sector or which have a similar portfolio as the parent investor. The qualification of a "competitively significant link" is very likely and would affect the majority of corporate venture investments in innovative smaller companies. Small VC investments may become unattractive because of the administrative burden and the financial costs for corporate investors that the proposal would create.

In addition, European investments would be discriminated against non–European investments and corporate investors would be discriminated against financial investors, because start-up companies will choose the investor posing the least administrative burden, avoiding the need to notify the Commission.

Since facilitating access to finance is on the key objectives of the EU, we believe that this is another reason to reconsider this proposal and ensure better alignment of different EU objectives and initiatives.

If the Commission – despite all the arguments to the contrary listed above - proceeds along the direction outlined in the White Paper, BUSINESSEUROPE believes that the self-assessment system should at least be the preferred procedural option among the

ones proposed. The other two options ("notification" and "transparency") have a greater potential for increasing administrative burdens.

While an ex ante information system is understandable and proportionate for the acquisitions of control, a similar **ex ante system for the acquisition of minority shareholdings would be disproportionate**. In the latter case, in fact, not only the potential harm to competition is far less likely and extensive, but the strength of the structural link created is weaker and easier to remove. Furthermore, as these operations are far more frequent, the parties to the acquisition of minority stakes would face a high number of notifications and high administrative costs - which would add up to a generalised slowdown of capital market transactions due to the stand-still obligation.

Further observations can be made with regard to the so called **"targeted transparency system"**. In particular, the obligation to submit an information notice to the Commission would only be triggered if the transaction meets two cumulative criteria, thus falling within the definition of "competitively significant link": i) the target firm is a competitor or a vertically related company; ii) the acquired shareholding is around 20% or between 5% and 20% but accompanied by additional factors (i.e. rights which give the acquirer a "de-facto" blocking minority, a seat in the board of directors, access to commercially sensitive information of the target).

In light of the above, the parties to the transaction would be required to self-assess whether it is likely to create a "competitively significant link" and, if so, to submit an information notice.

As the self-assessment may be rather complex, this approach would introduce uncertainty and run counter to the principle that administrative requirements, such as notifications, should not rely on substantive assessments, but on clear-cut criteria. The proposed model is otherwise likely to make acquirers seek clearance just to "be on the safe side" in a significant number of cases. For reasons of clarity and legal certainty the concept of "competitively significant link" should be anchored to pre-defined and easily verifiable parameters without the need of any substantive assessment.

We doubt whether the possible benefits of extending the merger control would off-set the burdens of the proposed "targeted transparency system". The White Paper substantially underestimates the actual administrative burden.

In addition, the White Paper argues that by choosing the targeted transparency option, the administrative burden will be proportionate since the scheme will only capture the relatively few, potentially problematic cases and as those will only require a simple information notice. That, however, overlooks the work needed to analyze various additional minority acquisitions in order to identify those on which companies would have to submit information to the Commission. The requirement of market-related data is particularly burdensome as it

implies recourse to relevant market analysis. In doing so, the Commission could be setting up a quasi-notification system.

Furthermore, the **proposed quantitative thresholds seem too low** and give the Commission wide margins of discretion. In particular, the 5% threshold should be increased at least up to 15% for horizontal acquisitions and up to 25% for vertical ones.

Finally, the "targeted transparency system" foresees the possibility for the Commission to investigate a transaction within a 4 to 6 months period, whether or not it has already been implemented. However, the state of legal uncertainty that would result from it is unacceptable. This possibility should not be foreseen, or at least the period should be significantly shorter.

Whilst it clearly does not represent a desirable solution, the "self - assessment system" is the less problematic procedural option among the three brought forward, as long as targeted minority shareholdings are clearly identified.

Even with the possible adjustment above, we reiterate our doubts on whether the possible benefits of extending the merger control would off-set the administrative and other burdens of the proposed "targeted transparency system". We believe the White Paper substantially underestimates the actual administrative burden - as well as some other downsides of the proposal.

Should the proposal be adopted, Member States are likely to introduce similar – but not harmonized – schemes, adding to the already severe burden of multiple filings, with ripple effects outside Europe.

Looking at the broader context, most Member States' merger regimes do not at present cover non-controlling minority acquisitions. Should its proposal be adopted, we invite the Commission to reflect that many or even all these Member States are likely to introduce similar schemes, but not necessarily harmonized ones. That would add to the already severe burden of multiple filings below the thresholds. Similar ripple effects may be foreseen for regimes outside the EU/EEA. This is another reason why the administrative burden is underestimated by the White Paper.

Simplification – transactions without nexus with the EU

BUSINESSEUROPE welcomes the proposals on simplification and streamlining for certain full-functioning JVs outside the EEA and for transactions leading to no reportable markets, and particularly their possible exclusion from the scope of the Merger Regulation.

However, the measures could be further improved and clarified. This provision raises in particular questions as to the undertakings concerned by the deal - i.e. those who would have to be taken into account for the purposes of the turnovers calculation. It is unclear whether one should consider the buyer or the target company only. We

suggest that the target's turnover should only be taken in consideration. Also, it should be considered that in the case the Commission would take into consideration the buyer and all companies which control the target company, such option would automatically broaden the scope of the procedure.

Simplification – referrals

BUSINESSEUROPE strongly supports the proposal to streamline procedures under Article 4(5) of the Merger Regulation. The abolition of the reasoned submission will be a great time-saver and cost-saver for the companies concerned, and will undoubtedly render this option more usable.

The veto possibility for the Member State should not be retained. Member States opposing the referral should have the right to put forward a reasoned opinion, but the decision should rest with the Commission.

In addition, if a merger is notifiable in two Member States, it is by nature cross-border. The number of countries required for referral should therefore be reduced from three to two. Another useful improvement could be achieved by introducing the option of limiting the geographical scope of the Commission's investigation to the Member States that would have otherwise been competent to review the deal. This would avoid unnecessary collection of data from other non-affected jurisdictions

Also, we believe that the veto possibility for the Member State should not be retained. Member States opposing the referral should have the right to put forward a reasoned opinion, but the decision should rest with the Commission.

For companies, a notification of a concentration is a time-consuming and costly procedure. In the unfortunate case the veto is retained, when a national competition authority opposes retrospectively the referral to the Commission, the company must repeat the notification, this time to the national competition authorities concerned, causing a significant loss of time and resources. In this context, preliminary contacts between the parties, the competent national competition authorities and the Commission may be helpful to reduce the risk of a veto against the referral.

As for Article 22, limiting the possibility to request a referral to only those competition authorities that have jurisdiction on the basis of their national law will enhance legal certainty. Similarly, the grant of exclusive jurisdiction to the entire EEA after acceptance of jurisdiction by the Commission would reduce the administrative burden on the notifying parties because it excludes the possibility that the concentration should be notified both to the Commission and the national competition authorities. Nevertheless, here again we invite the Commission to consider the possibility to limit the geographical scope of its investigation to the Member States that would have been competent to review the deal absent the referral, for the same reasons stated earlier.

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