COVINGTON

COVINGTON & BURLING LLP

ADVISORY | Antitrust

2 July 2013

EUROPEAN COMMISSION CONSULTS ON POSSIBLE IMPROVEMENTS TO EU MERGER CONTROL

On 20 June 2013, the European Commission published a consultation paper which proposes a reflexion and seeks comments from stakeholders on two distinct issues in the field of merger control: **non-controlling minority shareholdings** and the **system of case referrals**. The Commission raises detailed questions about these two issues. Answers and comments can be submitted until 12 September 2013.

NON-CONTROLLING MINORITY SHAREHOLDINGS

The current EU Merger Regulation applies only to transactions leading to a change of **control** over an undertaking. The Commission raises the question whether the Merger Regulation should be amended to allow the Commission to assess potential anticompetitive effects of certain acquisitions of **non-controlling** minority shareholdings (referred to as "**structural links**"). Currently only a few Member States, notably Germany, Austria and the UK, apply their national merger control legislation to the acquisition of non-controlling minority stakes.

> The question of whether the EU Merger Regulation should apply to non-controlling minority stakes was brought to the spotlight by the *Ryanair/Aer Lingus* case. In 2007, the Commission prohibited Ryanair's acquisition of control of rival Irish airline Aer Lingus, but considered that it could not order Ryanair to sell down its 29% minority stake in Aer Lingus for lack of competence. The General Court of the EU confirmed the Commission's view in 2010, following which the UK's Office of Fair Trading and now the Competition Commission applied national merger control regulation.

The answer to this question is not obvious:

- The **anticompetitive effects** resulting from structural links generally appear to be **weaker** than in the case of the acquisition of control.
- Subjecting structural links to the EU Merger Regulation arguably creates an **undue burden for businesses**.
- **No compelling case for a one-stop-shop solution** can be made as only a few Member States control structural links.
- Finally, the parties are in any event subject to the restrictions of **Articles 101 and 102 TFEU**.

The Commission recognises that the anticompetitive effects resulting from structural links are likely to be less pronounced than in the case of the acquisition of control. However, it notes that the potential **efficiencies** from structural links are also likely to be **more limited**, and consequently, concludes that overall structural links may lead to a significant impediment of effective competition.

Procedure

The Commission sets out two options in regards to the procedure:

- The first option would be to extend the current system of *ex-ante* merger notification to structural links ("**notification system**"), following the German and Austrian models.
- The second option would grant the Commission discretion to select the structural links it wants to investigate ("**self-assessment system**"), similar to the system currently applied in the UK. Alternatively, the second option could also require the parties to select a *prima facie* problematic structural link to file a short information notice to make the Commission, the Member States and third parties aware of the transaction ("**transparency system**"). A system could also be developed to enable the parties to the transaction to make a voluntary notification.

Definition of Structural Links

The Commission envisages the introduction of **safe harbours** for transactions falling outside the Commission's jurisdiction in order to provide legal certainty for companies considering the acquisition of a minority stake in another company. Moreover, the Commission explains that if a self-assessment or transparency system were to be adopted, it might consider issuing **guidance** on the types of transactions it is most likely to examine (such as those creating structural links between competitors in concentrated markets).

In regards to structural links in **joint ventures**, the Commission proposes to continue applying the current rule that only joint ventures that are "full function" are subject to merger scrutiny. This would preserve a divergence from the application of merger control regimes in force in Germany and Austria, for example, which apply to non-full function joint ventures.

Substantive Test

The Commission explains that the current substantive test set out in the Merger Regulation, i.e. whether a transaction **significantly impedes effective competition**, could apply to structural links, possibly with some additional clarifications in the relevant Commission guidelines.

With respect to full-function **joint ventures**, the Commission would similarly apply the test currently set out in Article 2(4) of the Merger Regulation by assessing whether the structural link has the object or effect of coordinating the parents' conduct, and, if this is the case, whether such coordination infringes Article 101 TFEU.

Relationship Between the Commission and the National Competition Authorities

The Commission proposes to use the current **turnover thresholds** of the Merger Regulation to determine whether the Commission has jurisdiction over **structural links.**

It would also apply the current system for **case referrals** to **structural links**. Under a notification system, the case referral system would be applied to structural links as it is applied to full concentrations. Under a self-assessment or transparency system, the referral mechanism would enable one or more Member States that have legislation in place allowing them to assess structural links to request a referral of a case that would fall under the Commission's jurisdiction if the Commission were to decide not to investigate that case.

REFERRAL OF MERGER CASES

The Merger Regulation and the Commission Notice on Case Referral allow for a concentration without an EU dimension to be referred to the Commission following a request by either the merging parties (Article 4(5) of the Merger Regulation) or one (or more) Member States (Article 22 of the Merger Regulation). The Commission discusses options to **improve the effectiveness and smoothness** of the system.

> The Commission wants to reduce the procedural burden of referrals without fundamentally reforming the system or the allocation of competences between the Commission and Member States.

The proposed changes are based on the findings of the 2009 Report on the Functioning of the Merger Regulation, according to which a significant number of cross-border cases are still reviewed in several Member States.

Pre-Notification Referrals to the Commission (Article 4(5))

Currently, the pre-notification referral of a merger to the Commission follows a two-step procedure. First, the merging parties inform the Commission by way of a reasoned submission ("Form RS"), which is immediately transmitted to the Member States. If no Member State opposes the referral within 15 working days, the Commission obtains jurisdiction for the entire European Economic Area ("EEA"), and the concentration must be notified to it (by filing a "Form CO"). In order to limit the burden of such a procedure, the Commission envisages the following main modifications:

- **Direct notification to the Commission.** The reasoned submission would disappear. The merging parties would immediately send a Form CO to the Commission, which would forward it to the Member States.
- **The consultation of the Member States and the Commission's Phase-I investigation would run in parallel.** The Member States would still have a certain period of time to oppose a referral. However, the Commission would conduct its Phase-I investigation in parallel. The Form CO would contain all relevant information to determine whether the requirements for referral are met.
- **Reversion of jurisdiction.** If at least one competent Member State opposes the referral, the Commission must renounce its jurisdiction.
- **Broadening of the information exchange.** In the event that the referral is opposed and Member States retain their jurisdiction, they would be given access to the information gathered by the Commission during its investigation.
- **A shortening of the consultation period.** The Commission is proposing a shortening of the deadline within which Member States can oppose a referral from 15 working days (the current timeframe) to 10 working days. However, to ensure that they are in a position to fully assess the referral request, the competent Member States could receive information during the pre-notification period (which would require a modification of the rules for sharing confidential information and might be sensitive for transactions not yet in the public domain).

The Commission considers that these changes could lead to faster reviews and reduce the burden on companies as currently Member States oppose request for referrals in less than 3% of cases.

Post-Notification Referrals to the Commission (Article 22)

Article 22 of the Merger Regulation allows Member States to refer to the Commission notified cases that the Commission is best placed to review. These include, for example, cases that raise serious competition concerns that have cross-border effects. Under the current system, Member States have 15 working days after the national notification (or, where no notification is required, after the date when the concentration was "made known" to the relevant authority) to make a referral request. This request is then transmitted to all the Member States which have 15 working days to decide to join the request. The Commission proposes, *inter alia*, the following changes:

- **The extension of the Commission's jurisdiction to the whole EEA.** Currently, the Commission's jurisdiction is limited to the territory of those Member States requesting and joining the referral. Thus, if some but not all Member States refer, the concentration is examined by the Commission and the non-referring national authorities in parallel. Extending the Commission's jurisdiction to the entire EEA would avoid this, applying the **one-stop-shop principle.** It would also align the Article 22 and Article 4(5) regimes.
- **Only a competent Member State could request a referral**. Currently, any Member State can request a referral. The Commission proposes that only Member States competent to review the transaction under their national law be permitted to request a referral. The Commission considers that this would increase legal certainty for companies as, no later than 15 working days after the notification – during which a Member State can request a referral – the case could not be referred to the Commission.
- In this context the Commission underlines the challenges raised by **national clearance decisions** issued prior to Commission decisions relating to the same transactions. The Commission proposes alternate solutions to address the difficulties that could arise if a Member State issues a clearance decision prior to a referral being requested by one or more other Member States. Finally, the Commission stresses the need to limit **forum shopping**. If a prior national clearance decision were to prevent the Commission from accepting a referral, companies could file early in more lenient jurisdictions in order to prevent a referral.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our antitrust group:

Georg Berrisch	+32.(0).25495240	gberrisch@cov.com
Miranda Cole	+32.(0).25495264	mcole@cov.com
Damien Geradin	+32.(0).25495275	dgeradin@cov.com
David Hull	+32.(0).25495235	dhull@cov.com
Lars Kjølbye	+32.(0).25495259	lkjolbye@cov.com