

## **Written Statement**

**of the Federal Ministry for Economic Affairs and Energy and the  
Bundeskartellamt (German Competition Authority)**

**on the White Paper published by the European Commission**

**‘Towards more effective EU merger control’**

**of 9 July 2014**

**Berlin/Bonn, 31 October 2014**

### **I. Summary**

#### **1. General comments on the White Paper**

The Federal Ministry of Economic Affairs and Energy and the Bundeskartellamt welcome the opportunity to submit an opinion on the White Paper “Towards more effective EU merger control” of the European Commission (“Commission”). The opinion concerns in particular two specific proposals for improving the Merger Regulation by extending the Commission’s jurisdiction to the control of non-controlling minority shareholdings and streamlining processes for referrals from Member States to the Commission.

As the Commission points out,<sup>1</sup> these particular issues are without prejudice to any possible further improvements of the Merger Regulation or any additional evaluation of the Commission's merger control regime. The Federal Ministry of Economic Affairs and Energy and the Bundeskartellamt would like to take this opportunity to make suggestions on these issues.

## **2. Market definition**

In the view of the Federal Ministry of Economic Affairs and Energy it is questionable whether the Commission's merger control practice takes sufficient account of current developments in the economy in all their aspects. With respect to market definition the focus is mainly on the perspective of customers and their ability to switch to alternative suppliers and products. Less weight is attached to the perspective of suppliers (producers). In some sectors of the German economy the Commission is being criticised for defining geographic markets too narrowly. According to this criticism the risk of a concentration being prohibited negatively affects companies in their competitiveness on a global scale. It should therefore be considered whether the Commission's merger control practice takes adequate account of the globalization of markets especially in defining the relevant geographic market. As a first step we propose to the Commission that it reviews and updates its notice on the definition of the relevant market (1997).

## **3. Further issues for reform**

In the context of the Commission's efforts to simplify the referral regime, it would seem appropriate to simplify referrals from the Commission to the Member States pursuant to Art. 9 ECMR as well. Furthermore, we propose that the Commission substantiates its decision whenever it denies a referral request of a Member State and prefers to carry out its own investigation.

In the recent past the Commission and certain Member States showed a divergent interpretation of the extent to which the Commission should take account of the Advisory Committee's opinion according to Art. 19 (6) ECMR. A similar divergence concerns the interpretation of Art. 19 (7) ECMR, in particular the appropriate level of detail and the extent to which the Commission is obliged to publish the Advisory Committee's opinion. This issue should be solved either by reaching an agreement on a

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<sup>1</sup> See footnote 23 and 47 of the White Paper.

consistent interpretation of the given provisions or by amending the ECMR so that an appropriate level of transparency can be ensured.

#### **4. Acquisition of non-controlling minority shareholdings and streamlining of the referral scheme**

This statement particularly concerns the two proposals for improving the ECMR by extending the Commission's jurisdiction to cover the control of non-controlling minority shareholdings and by streamlining the referral scheme for referrals to the Commission.

A transfer of jurisdiction over non-controlling minority shareholdings from the national to the EU level is only justified if the existence of an enforcement gap can be proved and if the instrument is capable of closing that gap. There are still doubts whether such an enforcement gap exists. In addition, the review of non-controlling minority shareholdings by the Commission would have to be as efficient and effective as the existing EU merger control, which is applied to other types of concentrations. The review would also have to be carried out within a similar predictable timeframe. Enforcement gaps must be avoided compared to the current situation in the EEA, where three Member States scrutinize non-controlling minority shareholdings. The administrative burden for the companies should not be disproportionately high. Therefore the extension of the Commission's exclusive jurisdiction in the area of merger control should be subject to certain conditions.

A simplification of the system for the referral of concentrations from the national level to the European level is appreciated. However, referrals in the other direction, from the Commission to the national competition authorities, should be equally simplified. Insofar, the proposals in the White Paper still need to be significantly complemented and improved.

The individual questions raised in the White Paper will be addressed at the end of this document.

## II. CONTROL OF ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS (STRUCTURAL LINKS) BY THE EUROPEAN COMMISSION UNDER THE ECMR

On the basis of the German experience in merger control, the control of acquisitions of non-controlling minority shareholdings is necessary to achieve an effective protection of competition. Given these experiences an extension of the Commission's exclusive jurisdiction in this area seems generally appropriate. But, as mentioned in the Federal Ministry's and the Bundeskartellamt's joint statement of September 2013 on the Consultation Paper of June 2013, this only holds true if certain preconditions are met. So far the White Paper's proposals do not meet all these conditions.

### 1. Proven added-value of a European instrument

Transferring jurisdiction for the control of non-controlling minority shareholdings to the European Union level can only be justified if an **enforcement gap** can be proven and if this instrument is an effective means to close this gap. An enforcement gap might possibly arise in certain merger cases that cause competitive harm in Member States whose merger regimes currently do not cover non-controlling minority shareholdings. However, a gap in the protection of competition only arises if such cases are not already covered by the existing merger control regimes in Germany, Austria and the UK, which cover non-controlling minority shareholdings. An enforcement gap can be excluded for EU-wide or cross-border markets since an intervention by a single national competition authority is able to solve competition problems in the entire market – and has done so in practice. In the case of competition problems in one of the three Member States with instruments for examining non-controlling minority shareholdings already in place (Germany, Austria and the UK) there will also be no enforcement gap. However, an enforcement gap could possibly arise in the case of competition problems in national markets in other Member States.

Therefore, the analysis of the Zephyr data base as mentioned in the Impact Assessment of the Commission Staff Working Document of 9 July 2014 is appreciated.<sup>2</sup> However, the Commission's analysis of the M&A data also shows that there are no examples of competitively harmful transactions that were not covered by the existing

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<sup>2</sup> See Commission Staff Working Document – Impact Assessment, para. 39 et seqq. und Annex III, para. 9 et seqq.

national merger regimes. The Ryanair/Aer Lingus case, to which the Commission refers, is not an appropriate example. On the one hand the case concerns to a large extent markets that only affect two Member States (market definition according to routes between departure and arrival destinations). On the other hand the UK's Competition Commission could have solved any competition problems in other Member States as well (routes between Ireland and other Member States) by prohibiting the merger.

In the absence of an enforcement gap, a European instrument could be justified in order to avoid multiple notifications by offering a one-stop-shop examination on the European level. If this were the case, this could simplify procedures. However, there are only an extremely modest number of multiple notifications of non-controlling minority shareholdings because only three Member States control such transactions. A review of notifications in Germany between 2010 and 2013 shows that not a single transaction had been notified in Germany and in parallel in the UK which fulfilled the criterion of exerting a "competitively significant influence" in Germany (in German: „Erwerb von wettbewerblich erheblichem Einfluss“) or "material influence" in the UK. Furthermore, a review of German merger control cases that involved non-controlling minority shareholdings exceeding 25 % was carried out for the year 2013. Only four cases could be identified, in which the transaction was notified in both Germany as well as in Austria. Multiple notifications are obviously not a problem in the area of non-controlling minority shareholdings. It is not sufficient as a justification for extending EU merger control that the Commission appears to expect other Member States to adopt similar changes to their national merger regimes (i.e. allowing them to examine non-controlling minority shareholdings) following an amendment of the ECMR.<sup>3</sup> This is clear if one takes the counterfactual to a legislative change into account:

If the Commission's amendment is not adopted, changes to the national merger regimes that would have been triggered by an amendment at the EU level cannot be expected. Moreover, some Member States (Poland among others) recently abolished the control of non-controlling minority shareholdings because they did not pose competition problems in these countries. This might be due to the fact that market conditions differ between the various Member States.

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<sup>3</sup> See Commission Staff Working Document – Impact Assessment, p. 7.

## **2. Requirements a European instrument to control non-controlling minority shareholdings should meet**

The control of non-controlling minority shareholdings would have to be as **efficient** and **effective** as the existing EU merger control, which is applied to other types of concentrations. The review would also have to be carried out within a **similarly predictable timeframe**.<sup>4</sup> Enforcement gaps must be avoided compared to the current legal regimes applicable in the EEA Member States. The administrative burden for the companies should not be disproportionately high.

Therefore extending the Commission's exclusive jurisdiction in this area must be subject to the following conditions:

a) The **level of protection of competition** as currently guaranteed in Germany must be maintained. The control of non-controlling minority shareholdings carried out so far under **German law** must be continued **as efficiently as in the past**, either by the Commission or the national competition authority.

aa) This would be best achieved by means of ex-ante control with a mandatory ex-ante notification and a **standstill obligation**. The White Paper has not adopted this option. Under the Commission's proposal of a targeted transparency system the parties are only obliged to submit an information notice about the acquisition of a minority shareholding that creates a competitively significant link. However, the Commission deems a waiting period worth considering,<sup>5</sup> during which the notifying parties are not allowed to implement their transaction. During this waiting period of "15 working days for example" the Commission could decide on the initiation of a further review process (i.e. request of a notification) and the national competition authorities could decide whether to request a referral. It seems that the Commission expects national standstill obligations to come into effect in cases of referral, if provided for in the relevant national legislation. That would allow Member States that do not have the necessary instruments to cope with implemented acquisitions to carry out a normal merger control proceeding.<sup>6</sup>

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<sup>4</sup> See ICN Recommendation, VI.A. "Merger investigations should be conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process."; OECD Recommendation, A.1.1. "Merger review should be effective, efficient, and timely."

<sup>5</sup> See White Paper, para. 50; Commission Staff Working Document, paras. 83 and 105.

<sup>6</sup> See White Paper para. 50.

This issue has not been addressed yet. However a standstill obligation is essential to ensure effective merger control. Unwinding an acquisition and finding an alternative acquirer is often difficult, also for minority transactions. Furthermore, the Commission assumes that the implementation of a transaction is permissible after the expiration of the waiting period, unless the case is referred to a Member State (i.e. if the Commission deals with a case itself). The Commission's White Paper provides that subsequently, the Commission has the power – within its discretion – to start a new investigation within a time period of 4 to 6 months,<sup>7</sup> and to issue interim measures, like hold-separate arrangements.<sup>8</sup>

On account of possible difficulties involved in unwinding an implemented transaction, this proposal is not an appropriate solution. The waiting period as currently considered by the Commission should be automatically extended in cases in which a notification is requested by the Commission. A **preventive notification system** with limited information requirements, without obligatory pre-notification talks, and with an informal clearance decision would be preferable to the proposed transparency system. The possibility of voluntarily submitting a complete notification and a standstill obligation that is limited to such cases are insufficient. If parties to a transaction that harms competition decide not to notify their transaction, they could implement it. The experience in Germany with voluntary notifications for certain transactions that only needed to be notified after implementation were not positive. To avoid these drawbacks a mandatory notification system combined with a standstill obligation was introduced. These experiences should be considered in European merger control.

The possibility of an **ex-post control within a time period of 6 months after the submission of an information notice** ("Prescription period"),<sup>9</sup> causes legal uncertainty for a limited time period. In contrast, a notification system with shorter deadlines would create legal certainty for the implementation of the transaction

bb) There are still concerns that have not been ruled out. These concerns are related to the minority shareholdings that can be controlled under German law to date but that would fall under the Commission's sole jurisdiction after the reform of the Merger Regulation. In these cases, the Commission could use its discretion not to start a merger control process and thereby hinder Germany from carrying out its own inves-

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<sup>7</sup> It is not apparent why this period is much longer than that of a phase 1 investigation.

<sup>8</sup> See White Paper para. 51 et seq.

<sup>9</sup> See White Paper para. 51; Commission Staff Working Document para. 108 et seqq.

tigation. Since the Commission will be in a position not to demand a notification and decide not to carry out the usual phase 1 investigation, there must be compensating measures in place to allow for a merger investigation on national level. However, it must be noted that the White Paper unambiguously clarifies<sup>10</sup> that the referral system shall generally ensure that the level of protection of national merger control regimes that allow for a control of non-controlling minority shareholdings shall be maintained and that enforcement gaps shall be avoided.

Insofar the specific design of the referral system is essential. Therefore, should the Commission stick to the transparency system, a **widely simplified mechanism for referrals** to the Member States is indispensable. In this respect, **special and possibly automatic referral mechanisms** should be considered.

If the Commission does not initiate a merger control proceeding (following a transparency notice), a merger case must be transferred automatically to the Member State that requests a referral without a formal referral decision and without a veto right for the Commission. The automatic referral on request should be viewed in the light of the Commission's competence to request a formal notification and therefore to start an investigation in every case in the first place. If this provision is adopted, the Commission could still avoid a referral in any case, if it deals with the case itself. However, problems might arise because the Commission apparently wants to avoid initiating precautionary merger control proceedings within the waiting period.<sup>11</sup>

At least the requirements of a **distinct market** should be deleted in this respect. Effects on the affected Member State should be sufficient without the requirement to demonstrate the possibility of negative competitive effects in a particular case (instead of "the threat of negative competitive effects", "effects on competition"). This corresponds to the limited information requirements of the transparency system.

In contrast, the Commission is obviously planning to stick to the requirements pursuant to Art. 9 ECMR. It only plans to adjust its requirements in practice on how detailed an Art. 9 request must be reasoned to the limited depth of information required by the transparency system. The White Paper acknowledges the necessity to maintain the current level of protection of control of minority holdings as currently provided for at the Member State level. The White Paper envisages that this will be achieved

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<sup>10</sup> See White Paper para. 50 last sentence.

<sup>11</sup> See White Paper para. 51 last sentence.



in the context of the referral system's design. However, this aim still needs to be implemented into the regulation.

In every case **information** concerning a merger transaction provided by the companies must be submitted to the Member States at an **early stage** in the process to enable them to effectively exercise their right to request a referral.

cc) In order to avoid a reduction of the level of protection on the national level, the jurisdiction of the Commission to examine non-controlling minority shareholdings, i.e. "competitively significant links" needs to be limited. It shall not preempt the use of national legislation that covers concentrations that do not amount to "competitively significant links" as defined in the ECMR.

b) Merger control proceedings on a European level must not place a disproportionate administrative burden on the affected companies.<sup>12</sup> The **added-value** of this European instrument in comparison to the protection of competition provided by the existing national merger regimes in three Member States should be demonstrated more clearly (see 1.).

Should the Commission decide to maintain its proposal to introduce the transparency system, the information requirements should fulfil two preconditions. On the one hand they should not be too burdensome, on the other hand the information provided must be sufficient to allow for informed decisions about whether to start an investigation or request a referral. No new form should be introduced.

### **3. Definition of concentration**

First of all it should be pointed out that a system that does not incorporate a proper standstill obligation must be refused. In spite of this, focusing merger control only on cases that pose a risk of raising competition issues is generally appreciated. The proposed definition of concentrations that create a "competitively significant link" is similar to the definition of "competitively significant influence" (§ 37 (1) No. 4 GWB) and the acquisition of shares and voting rights (§ 37 (1) No. 3 GWB) in German law.

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<sup>12</sup> See Recommended Practices for Merger Notification Procedures, 2003-2006, ("ICN Recommendation"), V.B. "Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that don't present material competitive concerns."; OECD, Council Recommendation on Merger Review, 2005, ("OECD Recommendation"), A.1.2. „Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties."

But at a closer look the definition still lacks clarity to some extent. In the White Paper<sup>13</sup> certain preconditions are mentioned that have to be fulfilled cumulatively. First of all the transaction in question must be an acquisition of minority shareholdings in a competitor or a company that is active upstream or downstream of the acquirer. Furthermore, the acquired shareholding must amount to

- around 20 %, <sup>14</sup> or
- between 5 % and 20 %, but accompanied by additional factors, such as:
  - rights which give the acquirer a "de-facto" blocking minority
  - a seat on the board of directors<sup>15</sup>
  - or access to commercially sensitive information of the target.

It should be clarified that shareholdings in **potential competitors** are also covered<sup>16</sup> and that the term acquisition covers the acquisition of shareholdings as well as the **acquisition of voting rights**. Furthermore, the definition of the thresholds of 5 % and 20 % should be further clarified. It must be clear that these thresholds also include the acquirer's existing shareholdings and do not only refer to the acquired shareholdings of the acquisition in question.

The **threshold of 5 %** as a lower limit seems very low for the creation of a competitively significant link (it is 15 % in the UK), but still acceptable.

Problematic cases that may raise competition issues but are not covered by the EU merger regime can still be examined at the **national level** by the Member States. Therefore, in EU merger control it is not as important as in national law to make sure that the definition of concentrations does not contain any loopholes.

It is appreciated that with respect to joint ventures the application of this new instrument is limited to so-called **"full function" joint ventures**, as mentioned in paras. 119 to 121 of the Commission Staff Working Document. An integrated examination

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<sup>13</sup> See para. 47 of the White Paper.

<sup>14</sup> Moreover, the Commission mentions that this share could be used as a threshold beyond which a competitively significant link is created. See para. 47, footnote 37 of the White Paper.

<sup>15</sup> This term needs to be clarified and properly defined in the German language version since according to German corporate law a distinction is made between a board of management and a supervisory board.

<sup>16</sup> The wording in the White Paper needs to be clarified in this respect. It currently refers to competitors and a competitive relationship.

(according to Art. 2 (4) ECMR in conjunction with Art. 101 TFEU) of joint ventures that lack the character of a full-function joint venture with a view to their concentrative effects as well as their cooperation effects is not possible within the short time frame of a merger investigation. Therefore, extending Art. 2 (4) to partial function joint ventures would excessively limit the scope of application of Art. 101 in the procedural context of Council Regulation No. 1/2003 in the area of joint ventures.

### III. SIMPLIFICATION OF THE REFERRAL SCHEME

A simplification of the referral scheme (Art. 4 (5), Art. 22 ECMR) for referrals of concentrations from the national level to the European level is **appreciated**. However, **referrals** in the other direction, from the Commission **to the national competition authorities** (Art. 4 (4), Art. 9 ECMR) should also be **simplified in the same way**. Insofar, the White Paper still leaves room for improvement.

#### 1. Referrals pursuant to Art. 4 (5) ECMR during the pre-notification phase of concentrations without a community dimension

The White Paper's proposal to simplify pre-notification referrals (Art. 4(5) ECMR) maintains the requirement that the concentration qualifies for review under the national competition laws of at least three Member States. Under the proposal the two-stage procedure is to be replaced with a single-stage procedure. The first stage of the referral procedure (which has its own pre-notification procedure and includes forwarding the Form RS to the NCAs) would be abolished. Concentrations could be notified directly to the Commission, which would pass the information on to the Member States.

The Commission Staff Working Document proposes a single-stage procedure for referrals pursuant to Article 4(5) ECMR to speed up these referrals. We support this change and want to point out that the right to veto for competent Member States has to be retained, and, as under the existing rules, the competent Member States shall not be required to provide any reasons for exercising their veto right. The same holds true for the minimum number of Member States. A reduction in number would not be acceptable. We are also in favour of the relevant Member States, i.e. the competent NCAs, being immediately informed as soon as the Commission enters into pre-notification discussions with the companies in question. The arrangement for the ini-

tial briefing papers as well as the case allocation request to be forwarded to the Member States is also appreciated. However, it should be avoided that such documents are forwarded too late during the pre-notification talks. The **wording in the White Paper is not sufficiently precise** in this respect. It should be made clear that all the aforementioned documents as well as all additionally submitted **documents are forwarded immediately**.

This clarification is necessary to ensure that Member States receive sufficient information in order to decide whether or not to veto the referral and that they receive it as early as possible. The ECMR should be amended to create a legal basis for the transmission of information.

If the NCAs or the Member States that would normally be in charge of reviewing the concentration in question were **informed at an early stage**, it would be possible for them to take a decision whether or not to veto a referral within less than the current period of 15 working days. In this case it would therefore be acceptable to shorten this period to ten working days.

## **2. Referrals pursuant to Article 22 ECMR (referrals of concentrations that do not have a Community dimension upon the request of one or more Member States)**

The Commission Staff Working Paper lays out changes to referrals that are made upon the request of one or more Member States (Article 22 ECMR). We **welcome and support** these changes, which are designed to simplify the procedure and to allow for entire cases to be handed over to the Commission by way of a single referral.

### **a) Community-wide jurisdiction of the Commission after a referral**

It is appropriate that the competence to refer a concentration to the Commission is restricted to the Member States in which the concentration in question can be reviewed. It is also appropriate that the Commission, after having accepted a referral, has jurisdiction in the entire EEA. Furthermore, it is acceptable that it will not be necessary for further Member States to join a Member State's referral request in order to trigger the Commission's jurisdiction in a certain case. Therefore, it is indispensable that Member States which could initiate a merger control proceeding retain their **veto rights** (without being required to provide any reasons for exercising their veto right) with respect to a referral. This is part of the Commission's proposal. The proposal

would significantly simplify a referral by several Member States in the same case. After an initial referral request it would suffice for a Member State not to exercise its veto right in order to join the referral request. It would no longer be necessary to provide reasons as to why there might be competitive effects within a Member State. The Commission would no longer need to issue individual referral decisions for each Member State. This **could speed up the referral process**. Therefore, the Commission should reflect on whether it might be possible to reduce its decision deadlines.

**b) There is no need for an additional case information system and parallel investigative powers of the Commission before a referral pursuant to Art. 22 ECMR**

With respect to national merger control proceedings carried out in parallel on Member State level, it is reasonable for Member States to inform each other about the existence of notifications and potential future referral requests. The Commission put forward far-reaching proposals on this matter in paragraph 153 et seqq. of the Commission Staff Working Document.

But these proposals **go too far** since there has already been a well-functioning information system in place for over 10 years that provides sufficient information for the national competition authorities. It applies to cases of multiple notifications. The basic information exchanged between the national authorities does not include any business secrets and, therefore, the exchange does not require any additional legal basis.

The existing ECA notices (via email) are efficient, fast, lean and precise. They should not be replaced by a more complex formal information system copying that of Regulation 1/2003. An exchange of information about intended referral requests by national competition authorities is also provided for and has taken place in most cases since 2004 in accordance with the ECA principles. The ECA principles provide that the Commission is also informed. In general this cooperation works very well.

**Parallel investigations carried out by national competition authorities and the Commission** before a referral request is made are **not deemed necessary**. With respect to referrals pursuant to Art. 22 ECMR the Commission has jurisdiction to deal with the effects of a concentration in the whole of the EU in any case after the referral. Therefore it is not necessary for the Commission to investigate with regard to

Member States where there had been no notification when the referral was requested. The necessary investigations can be conducted after the case has been referred to the Commission.

In contrast to the ECA notices, the proposed information system would create an **additional and unnecessary administrative burden** for merging parties and competition authorities:

- The administrative burden for the merging parties caused by providing the required information would considerably increase.
- The information that would have to be provided according to the Commission's proposal<sup>17</sup> goes beyond the information and notification requirements under German law.
- The administrative burden for the national competition authorities would increase considerably.
- In order to gain meaningful information about markets in other Member States than Germany, the Commission would have to make its own information requests as explained in paragraph 158 of the Commission Staff Working Document. But this would be inconsistent with the one-stop-shop-principle. Multiple notification cases would become prohibitively burdensome. Currently, depending on the number of parties involved, numerous multiple notification cases can be handled more easily by the national competition authorities compared to an EU notification.

These negative effects and this additional workload for the competition authorities and the notifying parties have to be compared with the low number of referrals pursuant to Art. 22 in the past. According to paragraph 143 of the Commission Staff Working Document there have only been 23 referral requests pursuant to Art. 22 ECMR since 2004.

Furthermore, the Commission's proposal that the national deadlines for examining a concentration should be **suspended after national competition authorities** have informed each other about a notified transaction is going too far. This also holds true for the proposed suspension of national deadlines, once the Commission has invited a Member State to make a referral request (Art. 22 (5) ECMR). From a German per-

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<sup>17</sup> See. para. 158 of the des Commission Staff Working Document of 9 July 2014.

spective the current rules that provide for a suspension of deadlines once a referral has been requested by a Member State are appropriate.

In cases where one Member State clears a concentration before other Member States can request a referral, the clearance will remain in force and the referral will only be applicable to the Member States that have not yet cleared the concentration. This proposal in the White Paper is appreciated.

**3. Referrals pursuant to Article 4(4) ECMR (pre-notification referrals of concentrations that have a Community dimension), i.e. referrals to the competent national authority at the request of the merging parties)**

Requests for referral to a NCA pursuant to Article 4(4) ECMR should be simplified in the same way as requests for referral pursuant to Article 4(5) ECMR. The same reasons as given in the context of Article 4(5) apply vice versa. It seems sensible to move to a **single-stage procedure**, which provides for notification directly to the competent NCAs *uno actu* as a national filing and as a request for referral. Such a provision is still missing in the White Paper. Under such a modified procedure the parties to the concentration (or the NCA) would inform the Commission by way of forwarding the notification. The Commission would then forward the notification (or another suitable document) to all the other Member States. **The Commission would retain its right to veto and could decide whether to exercise its veto in parallel to the NCAs investigations.** Such a procedure would correspond to the referral procedure according to Art. 4 (5) ECMR as proposed by the Commission. Furthermore, it could be considered whether the parties to a concentration should be obliged to address a referral request to the Commission in parallel to their national notification. To avoid any delays in the context of such a parallel procedure it would be advisable if the Commission abstained from the use of a pre-notification procedure in these cases. This would be ensured if it were sufficient for the NCAs to forward a notification that includes a referral request to the Commission.

For that purpose the notification and related documents would have to contain enough information to allow the Member State named by the parties to the concentration, the Commission and other Member States to assess whether the requested referral is appropriate. The document would have to contain information about the merging parties' activities in the other member states. The Commission would retain its veto right.

It is appreciated that the White Paper envisages **lowering the substantive requirements for referral requests** pursuant to Art. 4 (4) ECMR (“the transaction is likely to have its main impact in a distinct market in the Member State in question.”) This is appropriate and avoids a “chilling effect”, i.e. that companies are deterred from making a reasonable referral request due to the current wording of Art 4 (4) ECMR.

#### **4. Referrals pursuant to Art. 9 ECMR (referrals to the competent authorities of the Member States)**

For the sake of simplifying the referral scheme it seems appropriate also to simplify referrals according to Art. 9 ECMR. So far, referrals in the direction of Member States and requested by NCAs are the only category of referrals that are not addressed by the reform plans.

However, referrals pursuant to Art. 9 ECMR should also be simplified. As proposed for Art. 4 (4) ECMR, referrals pursuant to Art. 9 ECMR should also benefit from lower **substantive requirements**. In order to ensure a consistent approach, referrals pursuant to Art. 9 ECMR should be subject to the same criteria as referrals pursuant to Art. 4 (4) ECMR, that “the transaction is likely to have its main impact in a distinct market in the Member State in question.”

In contrast, the proposal to **extend the Commission’s deadline for its investigation of referral requests** pursuant to Art. 9 ECMR, as suggested in paragraph 174 of the Commission Staff Working Document, cannot serve to simplify referrals. It is not appropriate to extend the deadline for referral decisions from 65 days after notification to 65 days after entering a second phase investigation. The Commission’s rationale for this proposal cannot be followed. Instead this proposal would thwart the Commission’s declared aim to simplify the referral scheme.

Therefore we propose that the Commission explains its decisions regarding referrals pursuant to Art. 9 ECMR in cases where it does not accept a Member State’s referral request and prefers to carry out its own investigation. Such explanations could be part of the case decision or could be made on a stand alone basis. A decision on a stand alone basis would be preferable since it would provide information about the Commission’s assessment of a case in a timely manner to its decision.



## IV. OTHER POINTS FOR DISCUSSION/TECHNICAL IMPROVEMENTS

### 1. Foreign-to-foreign mergers

From a German perspective, it would make sense to change the Commission's current practice in **foreign-to-foreign mergers**. In its White Paper, the Commission proposes to exclude the creation of a **full-function joint venture** from the scope of the ECMR if it is located and operated outside the EEA (and which would not have any impact on markets within the EEA). Such a joint venture would not need to be notified to the Commission even if the turnover thresholds according to Art. 1 ECMR are exceeded.

This proposal is appreciated.

As far as the national level is concerned, the Bundeskartellamt has decided against adopting the Commission's current practice. Instead it continues to apply the domestic effects clause pursuant to Article 130 (2) GWB as a separate test in addition to the domestic turnover thresholds. The Bundeskartellamt explains this approach in its guidance document published on 30 September 2014 by setting out different categories of cases which either clearly do not have any effects on Germany or have obvious effects.

### 2. Information exchange

An **exchange of information** between the Commission and national authorities in referral cases makes sense because it helps to avoid wasting resources and increasing the administrative burden for business due to parallel investigations. This also includes information already obtained during pre-notification contacts, as shown in paragraph 181 of the Commission Staff Working Document.

### 3. Block exemptions for unproblematic concentrations

In the White Paper the Commission proposes to be granted the power to **exclude certain groups of concentrations from a prior notification** if they do not cause competitive problems. This might be the case for concentrations without horizontal or vertical relationships that are currently treated under the simplified procedure. Moreover, the Commission proposes to use a targeted transparency system for these cases as well, as suggested for non-controlling minority shareholdings.

Block exemption regulations are generally based on a self-assessment by the parties in question. They cannot therefore be regarded as an adequate means for the purpose of merger control. A standstill obligation granting a competition authority the means to assess a concentration prior to its implementation is an important precondition for effective merger control. This measure should not be abandoned. We therefore reject the Commission's proposal.

#### **4. Stock market transactions**

It seems acceptable to extend the point of time for a **notification of stock market transactions** to the very situation when a buyer can credibly demonstrate his good faith intention to make an acquisition.

#### **5. Unwinding of concentrations**

It is appropriate to require the **dissolution** of partially implemented acquisitions that are incompatible with the internal market to re-establish the competitive status quo ante. This holds true even if these partial acquisitions, if they had occurred on a stand-alone basis, would not have had to be notified in the first place.

#### **6. Parking Transactions**

It seems appropriate to introduce a clarification with respect to **parking transactions** in the sense of their interpretation in the Consolidated Jurisdictional Notice. This would also add to more legal certainty for the companies.

#### **7. Sanctioning the misuse of non-public information**

It is understandable that the Commission wants to prevent situations in which the parties involved in a merger control procedure could publicise or pass on **non-public information** about other companies. The use of such information should be restricted to the exercise of procedural rights in the context of the merger control procedure. Enabling the Commission to sanction infringements of this principle as proposed in paragraph 199 of the Commission Staff Working Document seems appropriate.

#### **8. Revoking of decisions according to Art. 4 (4) ECMR**

In paragraph 200 of the Commission Staff Working Document the Commission proposes being able to **revoke** a referral decision taken according to **Art. 4 (4) ECMR retroactively** if this decision was based on incorrect or misleading information pro-

vided by the notifying parties. This proposal does not foresee a time limit for revoking referral decisions. It can therefore lead to substantial legal uncertainty with respect to the control, clearance or prohibition of a concentration. The Commission already has far reaching powers to sanction the submission of incorrect and misleading information. These should ensure a sufficient level of deterrence. Therefore, this proposal has to be rejected. In this context it is worth mentioning that Member States do not have the possibility to obtain a repeal of a referral decision according to Art. 4 (5) ECMR once the decision has been made.

## **V. ADDITIONAL PROPOSALS FOR THE AMENDMENT OF THE ECMR OR THE EVALUATION OF MERGER CONTROL THAT ARE NOT YET INCLUDED IN THE WHITE PAPER**

### **1. Market Definition/Dominant Position**

In the view of the Federal Ministry of Economic Affairs and Energy it is questionable whether the Commission's merger control practice takes sufficient account of current developments in the economy in all their aspects. With respect to market definition, this is focused on the perspective of customers and their ability to switch alternative suppliers and products. Less weight is attached to the perspective of suppliers (producers). In some sectors of the German economy the Commission is being criticised for defining geographic markets too narrowly. According to this criticism, the risk of a concentration being prohibited negatively affects companies in their competitiveness on a global scale. Competitive pressure on the German/European economy from international companies can also be expected to increase in the future. From the companies' perspective concentrations can be an appropriate means to secure their market positions. It should be considered whether the Commission's merger control regime takes adequate account of this development and the globalization of markets in the way in which it defines geographic markets. As a first step we propose that the Commission reviews and updates its notice on the definition of the relevant market (Commission notice 1997). An explanation of the Commission's current practice of its competition analysis would add to more legal certainty for the companies.

## **2. Advisory Committee**

In the recent past the Commission and certain Member States showed a divergent interpretation of the extent to which the Commission should take account of the Advisory Committee's opinion according to Art. 19 (6) ECMR. In addition, it appeared that there were also divergent opinions on the appropriate level of detail and the extent to which the Commission is obliged to publish the opinion according to Art. 19 (7) ECMR. This issue should be solved either by way of a consistent interpretation of the provisions of the ECMR or by changing the ECMR so that an appropriate level of transparency can be ensured.

### **Questions of the Commission Staff Working Document**

#### **1. Minority shareholdings:**

*a) Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission's competence or not be subject to the 15 days waiting period.*

Extending the application of Art 3 (5) (a) ECMR to non-controlling minority shareholdings seems appropriate. It would seem inconsistent to treat non-controlling minority shareholdings in a different manner than the acquisition of control. The Commission's proposals, if implemented, would not inhibit restructuring transactions or the liquidity of equity markets. However, a further specification with respect to restructuring transactions does not seem necessary.

*b) Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?*

No. The extension of the application of Art 3 (5) (a) ECMR to non-controlling minority shareholdings seems sufficient.

*c) Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?*

The German system requires the parties to submit only very limited information. In many cases not even market share information is required (§ 39 (3) No. 4 GWB).

The submission of internal documents should be considered. This could simplify and speed up the process and the decision on whether a case should be further examined.

*d) Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.*

The requested information is not available.

*e) Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?*

Yes. In the normal course of business a 15-day period is indispensable during which the concentration is not allowed to be implemented.

## **2. Referrals - Article 22:**

*a) Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?*

The proposed information system would create a substantial additional workload for businesses, national competition authorities and the Commission. This additional

workload is disproportionate to the few cases for which any benefits from the new system might be expected.

Moreover, this system goes beyond the information requirements under German law. The same holds true for the proposed suspension period in national control procedures. The well-established, lean and effective system of ECA notifications is more efficient and sufficient.

*b) Would such a system reduce the risk of diverging decisions by the Member States?*

The complexity and scope of the system seem inadequate to reach the system's aim of making well-informed decisions. It would require considerable resources for the provision of information and the analysis of the information submitted. As a consequence, the decision-making process would be deprived of these resources.