



# The Competition Authority

An tÚdarás Iomaíochta

The Registrar  
Mergers Registry  
Directorate-General for Competition  
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By e-mail: [comp-merger-registry@ec.europa.eu](mailto:comp-merger-registry@ec.europa.eu)

## **Re: Public Consultation – White Paper “Towards More Effective EU Merger Control”**

Dear Registrar:

In a previous submission as part of the Commission’s consultation process, “Towards more effective EU merger control”, Ireland’s Competition Authority (“Authority”) supported the work undertaken by the Commission and the general direction that the Commission was taking. The Authority continues to commend the work the Commission is doing and to support the Commission’s general direction. The Authority believes that the Commission is responsibly addressing important questions. Although we offer a few suggested adjustments, we are supportive of most of the judgments reflected in the Commission White Paper: Towards more effective EU merger control (9 July 2014) (“White Paper”).

### **Minority Shareholdings**

The Authority has previously stated that it views minority shareholdings as a potential competitive problem that should be addressed, and it continues to be of this view. The Authority believes that the proposed “targeted” transparency system” is generally an appropriate way to address these concerns.

### **Specific comments are by White Paper paragraph number**

#### **Paragraph 47 (vertical issue):**

A “competitively significant link” would be defined as having a sufficiently significant relationship either with a competitor or with a “vertically related company”. The Commission Staff Working Document accompanying the White Paper: Towards more effective EU merger control (“Staff Working Document”), at paragraph 88, refers to “a directly vertically-related company”. Both wordings are ambiguous.

On the one hand, vertical mergers are not limited to where two firms are currently doing business together. If firm “A” is an important producer of a product that is an important input purchased by firm “B”, then a merger of A and B is a vertical merger even if, for instance, firm B currently purchases the input from one of A’s competitors.

On the other hand, relatively few mergers involving an upstream firm and a downstream firm pose competition issues (whether or not the two are currently doing business). This is clear in the Commission's non-horizontal merger guidelines. The Authority thus considers that further elaboration is required as to the definition of a vertical "competitively significant link". Given the relative infrequency with which vertical minority shareholdings pose a substantial risk to competition, it is important not to require too many transactions to be reported.<sup>1</sup>

#### **Paragraph 47 ("acquired shareholding"):**

A link is significant "if the acquired shareholding" is sufficiently large. The thresholds seem appropriate. Consider a 20% threshold, however. If an undertaking had 19% of outstanding voting shares – had held them for a long time – and purchased another 19%, would it have to give notice? The Staff Working Document, at paragraph 111, seems to suggest that notice would not be required (because it talks about where a stake is "acquired"). In contrast, the U.S. premerger notification system addresses acquisitions after which the acquirer would "hold" varying levels of shares – which would mean that a 19% firm would have to give notice were it to buy 1% of outstanding voting securities. This is the better approach, since there is no reason why the Commission should be concerned about a 20% shareholding arrived at quickly but not one arrived at more gradually.

The question of subsequent notices, which is addressed in the Staff Working Document at paragraphs 111 to 113, is also interesting. The Authority considers that, at a minimum, there should be a second notice when the 20% threshold is crossed, since this presents quite a different situation from an acquisition of 5%. The wording should be clear that any exemption from an obligation to give notice is an exemption only from giving a *second* notice.

Related to this point, the Staff Working Document, at paragraph 112, also asks whether there should be additional notices every time shareholdings or rights increase. That would seem to be overkill: if issues are not raised by holding 20% today, they are probably not raised by holding 21% tomorrow. On the other hand, one might require a new notice (a) before going over some higher threshold(s), such as 30% or 40%, and/or (b) if substantial time (five years?) has passed since the previous notice was filed.

If it is thought to be unduly burdensome to require a second notice with a waiting period when passing a second threshold, an alternative would be to require a notice but, instead of a waiting period, simply an obligation to hold the acquired securities separate and not exercise rights for a specified period of time. Hold separate provisions, which can be quite problematic for an asset acquisition or an acquisition of control, can be implemented more effectively for acquisitions of minority shareholdings.

#### **Paragraph 49:**

The White Paper and the Staff Working Document (at paragraph 104) are not precise about the information that would be required in a notice. It would be important to get this right, and it may be necessary to revisit any decision after

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<sup>1</sup> Were it possible easily to address the unusual problematic vertical minority shareholding even where it had not been reported to the Commission, as the Authority recommended in its 2013 submission (at paragraphs 2.15-19), the Authority would be tempted to recommend that parties be required to report acquisitions involving only horizontal minority shareholdings.

a period of time. The Authority offers two observations. First, if undertakings are required to define a relevant market in a manner that could be prejudicial to them, this inevitably means that they will have to do a significant competition analysis. Enforcement needs could be satisfied by identification of alternative possible markets without requiring undertakings to endorse one or more of them. Second, as suggested in the Staff Working Document at note 75, it would be quite easy for undertakings to submit documents "prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analysing the acquisition with respect to" various competition-related factors (quoting from HSR 4(c)). By limiting the requirement to documents prepared (a) by or for officers or directors, and (b) for purposes of evaluating this acquisition, it is a self-limiting requirement and should not be unduly burdensome.

#### **Paragraph 50:**

The Authority considers that a 15 working day waiting period is appropriate and not unduly burdensome. If it were thought to be problematic, however, another option would be to require a hold separate arrangement.

#### **Paragraph 51:**

The Authority initially read this as providing that the Commission could investigate any acquisition of a non-controlling interest, whether or not notice had been provided, for four or six months after completion. That seemed like a prudent back-stop to the contemplated approach. Interim remedies, as suggested in paragraph 52, also seemed appropriate.

If this four-to-six month period has applicability only to acquisitions with respect to which notice was given, however, the time period seems unnecessarily long. One alternative would be to authorise the Commission to extend the 15-day period for another 15 working days. This approach would provide the merging parties with certainty when they closed the transaction. If a post-closing review period is considered necessary, it should be as short as possible. We suggest it should be closer to one month than to four or six months.<sup>2</sup>

Regardless of the length of time, it would be important to clarify that it is only the *acquisition* of the non-controlling stake that would be subject to the limit. If an undertaking *holding* such a stake is accused of abusing a dominant position or engaging in an anticompetitive concerted practice, the holding of such a

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<sup>2</sup> The Authority understands that advocates of a supplemental post-closing period note that multinational firms appear to function effectively even though U.S. merger review is available, in theory, in perpetuity. A distinction must be drawn between subsequent review of non-notified mergers, which occurs with some regularity, and of mergers properly reported under the HSR Act. Merging parties in the US are very aware that merging without reporting brings with it a risk of subsequent challenge. See ABA Section of Antitrust Law, *The Merger Review Process: A Step-by-Step Guide to Federal Merger Review*, 3d edition (2006), at 71 ("... there are circumstances where it may be advantageous ... to have a transaction so as to be reportable and reviewed before consummation rather than after.") In contrast, the situation with respect to reported transactions is very different, as the Department of Justice Antitrust Division has explained: "Although a decision not to challenge an HSR-reported transaction prior to consummation does not preclude the agencies from subsequently challenging it, such challenges are extremely rare. Thus, parties get a high degree of certainty at the end of the HSR process as to whether they will face an enforcement challenge". Department of Justice Antitrust Division, *Background Information on the 2006 Amendments to the Merger Review Process Initiative*, at 5 (footnote omitted), available at <http://www.justice.gov/atr/public/220241.pdf>.

stake and/or the exercising of rights thereto could obviously be part of the analysis.

#### **Heading 3.2.4:**

For clarity, the heading should refer to Article 102 as well as Article 101.

#### **Case referrals**

The Authority supports simplifying Article 4(5) referrals by abolishing the current two-step procedure and streamlining Article 22.

#### **Specific comments are by White Paper paragraph number**

##### **Paragraph 69:**

The proposal contemplates that if one or more member states object to an Article 22 referral to the Commission, that objection acts as a complete veto. The Authority considers that this is too severe for two reasons. First, a single member state might have a unique market situation, such that it could address its market separately without doing harm to an otherwise all-EEA review. Indeed, other member states might well prefer that the Commission handle the matter. Second, if opposition to referral acts as a complete veto, a member state opposed to referral for its particular situation might be reluctant to oppose because doing so would require all other affected member states to conduct a merger review. The better course would be to provide either that opposition is limited to that member state or that opposition would empower the Commission to decide whether the appropriate course is for it to renounce its jurisdiction entirely or, instead, to renounce jurisdiction only with respect to one or more member states.

##### **Paragraph 71:**

Paragraph 71's wording is ambiguous. It could be seen as calling for NCAs to circulate near-automatic notices that a cross-border merger has been notified. On the other hand, it could be seen as providing that an NCA should not provide any such notice unless and until it has decided that it is "considering making a referral request" – which could be considerably later than the date on which a merger was notified. Which is the intention?

The above observation relates also to the next point: the paragraph states that "the notice would trigger the suspension of the national deadlines of all Member States which are also investigating the case". This wording is itself somewhat vague. And if a notice does play a key role in suspending national deadlines, should notices be issued near-automatically? Or only if the NCA is considering (or maybe very seriously considering) making a referral request?

The Authority does not have the answers to all these points but believes they must be addressed before moving forward. The Authority does have doubts about the extent to which the system would benefit were all member states to circulate notices of large numbers of mergers.

##### **Paragraph 75:**

The Authority strongly supports the removal of the requirement of an assertion that a transaction may "significantly affect competition in a market". This would be a welcome change. Please note that the wording that is eventually


adopted should also be used in Article 9. It is important to facilitate appropriate referrals both from and to NCAs.

**Paragraph 77:**

The wording of the second point, and the explanation in the accompanying Staff Working Document, is a little unclear about one aspect of the contemplated process. If mergers are exempted from any obligation to notify the Commission, would they remain subject to the jurisdiction of NCAs? There can be little objection to the Commission's deciding to leave some additional mergers for the NCAs to review (if necessary). But if these mergers would be exempted from review by the NCAs and then also exempted from notification to the Commission, there would have a good basis for confidence that they are not problematic.

If you have any queries regarding the above, please do not hesitate to contact me by phone on + 353 1 804 5456 or by e-mail at: [sc@tca.ie](mailto:sc@tca.ie).

Yours sincerely,

A large black rectangular box redacting the signature of Stephen Calkins.

**Stephen Calkins**  
**Member and Director, Mergers Division**  
**The Competition Authority**