



Autorità Garante della Concorrenza e del Mercato

White Paper “Towards more effective EU merger control” – COM(2014) 449 final

Public consultation – Submission of the Italian Competition Authority

The Italian Competition Authority (ICA) welcomes the opportunity to comment on the policy proposals put forward by the European Commission in its White Paper “Towards more effective EU merger control”.

The White Paper reflects the extensive consultations of stakeholders and the fruitful discussions held with NCAs ever since the Commission announced its intention to reform in part the current merger review system. The ICA deems appropriate to intervene in the public consultation at this stage, where Commission’s proposals have been spelled out in sufficient detail to elicit more precise feedback from respondents.

First of all, the ICA concurs with the White Paper’s assessment of acquisition of non-controlling minority shareholdings. Its enforcement practice, as well as the sectoral enquiry on the corporate governance of financial institutions, demonstrate that competition may be significantly dampened by the creation of proprietary links between undertakings, falling short of control. In Italy, the divestiture of pre-existing minority shareholdings has therefore been imposed on occasions in the context of the review of notified mergers.

The ICA considers that in principle the acquisition of minority shareholdings unrelated to a concentration between independent undertakings might fall within the scope of application of article 101 TFEU and its national equivalents, inasmuch as it can be construed as an agreement capable of restricting competition. However, it acknowledges that in limited circumstances – most notably in cases of staggered purchases – antitrust rules may prove ill-suited to capture this phenomenon. A system of ex ante control on the basis of merger regimes might indeed ensure greater legal certainty for undertakings concerning the legality of their transactions, while at the same time avoiding the risk that competition agencies be mired in the complex task of unwinding deals which have already been implemented.

The ICA supports setting up a targeted transparency notice system, whereby the parties inform the Commission of any transaction creating a competitively significant link. However, with a view to minimizing the additional administrative burdens imposed upon undertakings, the ICA calls the Commission to make sure that any information requirements at this stage be strictly limited to what is necessary for the Commission to decide whether to request a full notification. The principles of proportionality and legal certainty also suggest further reflection on the proposed rule allowing the Commission to take up a case for a period of four to six months after the expiry of the initial waiting time and the ensuing implementation of the transaction. Indeed, even a partial reversal of a transaction several months past its completion might involve complex legal issues and considerable costs for the parties, and should be considered only in exceptional circumstances.

As regards the envisaged reform of the case referral system, the ICA shares the goal of streamlining and simplifying existing procedures, in order to facilitate the assessment of cases by the more appropriate authorities and limit the risk of diverging outcomes at national level.

In particular, the ICA supports the proposed overhaul of post-notification referral procedures pursuant to article 22 of Regulation 139/2004, which would limit the ability to request referrals to those NCAs which are competent to review the transaction at stake, and grant the Commission EEA-wide jurisdiction whenever such request is accepted. The underlying rationale of such policy choice is to avoid any unpredictability stemming from the concurrent exercise of merger control competences by non-requesting NCAs in their respective territories, and the Commission for the Member States of requesting NCAs. Accordingly, the White Paper envisages that if any competent NCA opposes the referral, all Member States would retain their jurisdiction.

However, the ICA wishes to signal a partial departure from this principle, enshrined in the Commission's proposal whereby if a NCA adopted a clearance decision before a referral request is formulated, such decision would remain valid, yet the Commission might carve out the relevant Member State and accept jurisdiction for the rest of the EEA.

In the ICA's opinion, this exception would introduce an unwelcome asymmetry in the forthcoming case referral system. In fact, if public interest considerations run against concurrent procedures at Member States and EU level, it is not clear why a single clearance decision adopted prior to a referral request would attract a different treatment than the veto of one NCA.

The ICA considers that article 22 referrals should only be contemplated when they empower the Commission to exercise its competence over the entire EEA. Accordingly, whenever a clearance decision is adopted before the formulation of a referral request, the Merger Regulation should enable the relevant NCA to either:

- a) oppose the request, thereby causing the Commission to renounce jurisdiction and other NCAs to retain their original competence, according to the general vetoes' rules; or
- b) join the request, thus withdrawing the adopted decisions and allowing the Commission to exercise EEA-wide competence.

Ad hoc legislation at EU level would be needed to overcome any procedural obstacle which might exist under national laws.

At a more general level, while confirming its broad support for the policy initiatives envisaged in the White Paper with reference to the case referral mechanisms, the ICA is not persuaded that such measures prove entirely adequate to achieve the objectives pursued by the European Commission, namely reducing administrative burdens for undertakings and eliminating the risk of conflicting decisions by NCAs.

Available data suggest that the number of multi-jurisdictional transactions notifiable in the European Union may range between 230 and 240 per year¹. Each of these transactions needs to be notified to more than three NCAs on average. The case referrals system cannot provide a comprehensive solution to legal certainty issues arising from multiple filings: since the entry into force of the revised Merger Regulation in 2004, only 269 requests for pre-notification referrals have been formulated pursuant to article 4(5), while application of article 22 has remained largely anecdotal, at just 30 requests in 24 years.

The ICA submits that a significant cutting of red tape and increased legal certainty cannot be attained through a mere revamping of referral rules, and advocates for the adoption of a more ambitious and far-reaching normative strategy.

Indeed, the voluntary 'soft' convergence of theoretical frameworks for merger assessment across European jurisdictions paves now the way to a "communitarisation" of cross-border concentrations, through an extension to merger control of the cooperation instruments which have been successfully developed within the European Competition Network.

In particular, the Italian Competition Authority considers that NCAs should be called to apply European law to multi-jurisdictional mergers, thus replicating in this area a decentralized enforcement system loosely modeled on Regulation 1/2003.

From a legal point of view, such solution would allow NCAs to apply the same substantive assessment criteria, provide early notices and engage in timely exchanges of information with other NCAs, as well as providing mutual investigative assistance in merger cases.

The envisaged merger control system would bring tangible benefits for undertakings, whose multi-jurisdictional filings would be reviewed through uniform substantive and procedural rules. On the other hand, NCAs could co-operate and handle their resources more effectively.

¹ Source: Autorité de la Concurrence, Making merger control simpler and more consistent in Europe – A "win-win" agenda in support of competitiveness – Report to the Ministry for Economy and Finance – 16 December 2013 .

The ICA notes that other NCAs, as well as several qualified stakeholders, have recently called for deeper convergence of substantive and procedural regimes of multi-jurisdictional mergers across Europe, as a pre-condition to foster a genuine level playing field.

In fact, the European Commission itself seems sympathetic to these considerations, as the Staff Working Document accompanying the White Paper states that “a move towards a system similar to the current enforcement framework of Articles 101 and 102 TFEU could be appropriate for transactions in the Single Market with cross-border effects, which are increasing in number. It could further reduce the risk that NCAs dealing with the same case will reach conflicting outcomes and could simplify the administrative burden for parties in multi-jurisdictional filings” (paragraph 42).

The Italian Competition Authority encourages the Commission and fellow NCAs to seize the opportunity of the current review of Regulation 139/2004 to make such a move.

The Secretary General