

Concerns related to the EU Merger Regulation (European Council Regulation (EC) No 139/2004) as applied to real estate investments and co-investments by certain institutional investors

We have a number of issues with regard to the jurisdictional application of the EU Merger Regulation to real estate transactions.

The EU Merger Regulation, as it is currently interpreted and applied to joint real estate investments and co-investments by large institutional investors, including pension funds, sovereign wealth funds and insurance companies, requires that many transactions by 'undertakings' that exceed certain threshold amounts must be reviewed for anti-competitive effect and receive Commission clearance following a mandatory filing process. This review is triggered simply by the size of the investor(s) and can be required if an institutional investor acquires joint control of even a single building through certain types of acquisitions or a co-investment involving a joint venture, club deal, fund or other co-investment vehicle. This is the case, for example, when a pension fund and an insurance company jointly purchase a business district office building as an investment and have a joint controlling interest even though there is no realistic likelihood of anti-competitive impact. Moreover, if a single investor purchases the same building, the Merger Regulation is not applicable, since typically such a transaction would not exceed the relevant turnover thresholds.

The EU Merger Regulation is designed to regulate excessive concentration in European markets and resulting undesirable potential impacts on competition. It requires that certain transactions involving undertakings that exceed specific thresholds be submitted to EU competition authorities for review and clearance before the transaction can take place. Preparation of the submission (including submission of a draft filing in pre-notification discussions), review and receipt of clearance can often take at least 8 to 10 weeks and often longer. Clearly, this can be a critically long time period in a competitive commercial environment. As the rules are currently being interpreted, if any two partners acquiring joint control in a real estate co-investment are large enough, filing and review are nearly always advised.

Real estate acquisitions were, in our view, never the intended target of the Merger Regulation, but the Regulation is drafted in such a way that it applies in cases where bright-line thresholds related to the size of the investor and legal form of the investment are crossed. As a result, real estate industry practice is to conservatively interpret the regulations and to file for review by the Commission even when companies are not merging and where it is very clear that no other competitive concerns are triggered as the buildings that are bought will keep the same role in their markets, and it is not relevant whether one or multiple investors own them.

The delay, cost, and resource entailed in preparing and filing for review and receipt of approval by the Commission is frequently a serious impediment to being able to successfully close a real estate transaction in the time needed and negatively impacts the position of joint buyers relative to single buyers. The application of the Regulation is increasingly a deterrent for many investors. The efficient operation of the real estate investment market, which requires that real estate transactions be concluded without undue delay, is also impeded.

Without having empirical data, our members report numerous instances of investments not being able to take place as a result of the delay involved in review and approval. Moreover, such clearance is invariably obtained; we are not aware of any real estate transactions in which the Commission has identified a competition concern that merited a conditional clearance or a detailed Phase 2 investigation. It is extremely unlikely that the acquisition of commercial buildings would raise any material competition issues. This demonstrates that, in addition to being a burden to business with no discernible benefit to regulating anti-competitive behaviour, requiring notification of real estate transactions is a clear example of excessive compliance cost and complexity which is disproportionate to any likely competition risks.

To address this unnecessary regulatory burden, we propose that the Commission adopt measures to clarify that real estate co-investors exercising joint control that might otherwise exceed the Merger

Regulation thresholds do not need to submit co-investments to the Commission for review and approval (i.e., an exemption of the type referred to in question 8.1 of the Commission's consultation questionnaire or, failing that, a self assessment system of the type referred to in question 8.3 of the questionnaire). Real estate is not a significant percentage of institutional investors' overall portfolios and the burden imposed by requiring review of real estate co-investments is out of proportion to any possible regulatory benefit, especially as the Merger Regulation is clearly not applicable if a single investor purchases the same building.

If the Commission does not agree that real estate co-investors that might otherwise exceed the Merger Regulation thresholds should not have to submit co-investments to the Commission for review and approval, we would urge consideration of a number of actions which either alone or in combination would go a long way to both simplifying and reducing the unnecessary burdens imposed by the application of the regulations to real estate investments:

1. Adopt a special regime for investment / asset managers compared to "real" corporates in order to determine what exact information should be submitted, given that the activities of an asset manager are completely different than the activities of a corporate;
2. Adopt a notification procedure to the Commission for such transactions, in place of the current review and approval process. An 'ex-post' review in place of an 'ex-ante' review could significantly lessen the EU Merger Regulation's commercial impact since it would allow deals to proceed while at the same time preserving the Commission's ability to investigate any acquisitions which raise any issues. This approach works well in the UK, with the UK competition authority having the ability to "call in" any property deals which potentially raise concerns;
3. Provide more clarity regarding the calculation of turnover for asset managers, insurance companies and pension funds. Notwithstanding the guidance in the Commission's consolidated jurisdictional notice, it remains unclear which of the various revenue streams of these institutional investors and their investments actually constitute turnover under the EU Merger Regulation;
4. Remove the standstill obligation for all cases that observe the requirements for simplified treatment, allowing for simultaneous signing and closing of transactions;
5. Provide more clarity regarding how full-functionality is assessed and when the criterion is applied. In particular, there appears to be a considerable degree of inconsistency in how these criteria are applied to joint acquisitions of real estate assets, with some ventures considered to lack full functionality due to factors such as the significant involvement of controlling investors in the management of the asset, whereas notifications of other highly similar transactions have been accepted on the basis that there was full functionality. The Commission's approach to acquisitions of joint controlling interests lacks predictability, since in some cases Commission staff take the view that the full functionality criteria must be satisfied, while in other comparable cases the Commission makes no such requirement;
6. The Commission should also consider revising paragraph 91 of the Consolidated Jurisdictional Notice so that acquisitions of joint control over real estate assets will only ever be notifiable if they result in a full function joint venture. The current approach – which subjects non-full function ventures to a filing obligation depending on whether or not an investor is retaining a controlling interest – produces results that are entirely arbitrary in the context of real estate transactions;

7. Provide more clarity on the circumstances in which a real estate asset will amount to an undertaking, i.e. a business active in the supply of goods or services on a market. In our view, there are sound arguments that 'pure' real estate assets (as opposed to the businesses that manage such assets) should not be viewed as undertakings simply because they generate rental income, or have the potential to do so. Such properties are productive assets, not (in and of themselves) businesses. For accounting purposes, property deals, regardless of whether they are 'asset deals' or 'share deals', are generally treated as asset acquisitions. In other words, accounting standards do not consider property on its own to constitute a business, even if that property is capable of delivering rental income;
8. Reduce the information that needs to be provided in relation to particular types of transactions that do not involve horizontal or vertical overlap. Even the simplified procedure as it currently stands requires a considerable level of turnover and other data which goes well beyond what is actually necessary to review a straightforward transaction which does not have any overlap;
9. Limit questions as much as possible to the formal review period, reducing the length of the pre-notification phase;
10. More critically assess whether requests for additional information are proportionate and necessary in order to determine that a particular transaction does not result in a significant impediment to effective competition;
11. Promote consistency with respect to the composition of case teams that deal with subsequent notifications made by the same company so reviews can be completed more efficiently and effectively as case team members would be familiar with the company's portfolio from previous cases;
12. Limit disclosure of non-public commercial information, specifically including the names of the entities involved, by redacting such information from the documents that are made publically available; and/or
13. Alternatively, the Regulation could prescribe a minimum turnover or asset value threshold applying to the target real estate asset. This would at least have the benefit that the acquisition of individual buildings, or smaller property portfolios, which are clearly non-material, would fall outside the scope of the Regulation, leaving the Commission to review only those transactions involving substantial properties or property portfolios.

Submissions related to the EU Merger Regulation (European Council Regulation (EC) No 139/2004) as applied to infrastructure asset investments by certain institutional investors

We also wish to raise a number of points in connection with institutional investment in infrastructure assets.

Infrastructure transactions can cover a wide range of sectors and assets, including energy, transport, communications, water and waste. We acknowledge that there may be some instances in which large-scale merger transactions in these sectors may require investigation.

However, a large number of transactions will not raise any competition issues whatsoever. In these instances, it is often the case that, given the typical size of the institutional investors involved, the transaction will almost certainly trigger the EU Merger Regulation's turnover thresholds. This is

particularly burdensome in the case of smaller asset acquisitions which are carried out by jointly investing partners (where the partners themselves have large portfolio holdings). As recognised by the UK Office of Fair Trading in its infrastructure ownership stock-take, there has been a long-term trend toward infrastructure fund and institutional investor / infrastructure fund ownership in these asset classes,¹ which has exacerbated this issue.

The delay that arises from the need to prepare a draft notification, file and await clearance can often present an unnecessary obstacle to completion. Given the vital importance of infrastructure investment in supporting the efficient functioning of the broader economy, any unnecessary regulatory hurdles potentially hindering such investment should be addressed by the Commission.

For the above reason, we support the proposals tabled by the Commission at 8.2 and 8.3 of its Questionnaire, namely:

- Exempting one or several categories of the cases listed in Question 2 of the questionnaire from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation (8.2, Commission Questionnaire); and
- Introducing lighter information requirements for certain categories of cases listed in Question 2 of the Questionnaire, notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision) (8.3, Commission Questionnaire).

While the steps above would represent a positive move toward further simplification of EU merger control, we would alternatively suggest a number of measures, similar to those set out above in relation to real estate transactions, aimed at reducing the burdens of the notification process:

1. Adopt a special regime for investment / asset managers compared to "real" corporates in order to determine what exact information should be submitted, given that the activities of an asset manager are completely different than the activities of a corporate;
2. Provide more clarity regarding the calculation of turnover for asset managers, insurance companies and other funds (e.g. pension funds, infrastructure funds etc.). Notwithstanding the guidance in the Commission's consolidated jurisdictional notice, it remains unclear which of the various revenue streams of these institutional investors and their investments actually constitute turnover under the EU Merger Regulation;
3. Reduce the information that needs to be provided (as part of a formal filing) in relation to particular types of transactions that do not involve horizontal or vertical overlap;
4. Limit questions as much as possible to the formal review period, reducing the length of the pre-notification phase;

¹ Infrastructure Ownership and Control Stock-take Final report: Main findings, December 2010, OFT1290.

5. More critically assess whether requests for additional information are proportionate and necessary in order to determine that a particular transaction does not result in a significant impediment to effective competition;
6. Promote consistency with respect to the composition of case teams that deal with subsequent notifications made by the same company so reviews can be completed more efficiently and effectively as case team members would be familiar with the company's portfolio from previous cases;
7. Where investors are jointly acquiring a target asset/business through a special purpose vehicle (i.e. there is no other integration between the investing partners), a specific threshold for the **target** business' turnover should be introduced to exclude smaller-scale asset acquisitions from the EU Merger Regulation; and/or
8. Provide further clarity in the Commissions' guidelines on the issue of the calculation of turnover for state-owned enterprises that are "undertakings concerned" for the purposes of the EU Merger Regulation.