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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

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 purchase a business district office building as an investment 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.

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. 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 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 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 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. 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.

To address this unnecessary regulatory burden, we propose that the Commission adopt measures to clarify that real estate co-investors 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 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;
2. 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;
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 criteria are 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;
6. 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. Alternatively, the Commission should 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. Reduce the information that needs to be provided in relation to particular types of transactions that do not involve horizontal or vertical overlap;
8. Limit questions as much as possible to the formal review period, reducing the length of the pre-notification phase;
9. 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;
10. 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; and/or
11. 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.

