

Evaluation of procedural and jurisdictional aspects of EU Merger Control
CONSULTATION STRATEGY

Context

Merger control constitutes one of the areas of EU competition law. It aims at ensuring that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations. It is based on Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EU Merger Regulation”), its Implementing Regulation and related Notices and Guidelines.

In recent years (particularly in 2009 and from 2013 onwards) the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper “Towards More Effective EU Merger Control” (the “White Paper”). In it the Commission concluded that EU merger control works well and that no fundamental overhaul of the system is needed, but considered that the experience since 2004 had also shown that there is scope for further improving some aspects of EU merger control.

The key proposals of the White Paper were the following: (1) introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition; (2) making case referrals between Member States and the Commission more business-friendly and effective; (3) making procedures simpler: this could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets; moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses; and (4) fostering coherence and convergence between Member States with a view to enhancing cooperation and to avoiding divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

On the basis of the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system works well overall. They welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification. Stakeholders were however more critical as regards the necessity and proportionality of the proposed system for the introduction of a review of minority shareholdings.

In the aftermath of the public consultation on the White Paper, a debate has emerged on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of the EU Merger Regulation, specifically on whether they allow to capture all transactions which can potentially have an impact in the internal market. This may be particularly significant in the digital economy, where relevant business models may involve the formation of commercially valuable data

inventories without generating corresponding turnover (at least in an initial period). The acquisition of such companies with low turnover is not likely to be captured under the current notification requirements of the EU Merger Regulation, even in cases where the acquired company holds commercially valuable data, or has a considerable market potential for other reasons. Therefore, it has been suggested to complement the existing merger control thresholds based on turnover by additional notification requirements based on alternative criteria, such as the transaction value. This perceived legal gap may not only concern the digital industry, but also other industry sectors, such as pharmaceuticals.

Moreover, recent experience in enforcing the Merger Regulation has shown the opportunity to evaluate certain technical aspects of the procedural and investigative framework for the assessment of mergers. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

It therefore appears opportune to build upon the work undertaken in the context of the White Paper and prior consultations and complement it by evaluating the effectiveness of certain additional procedural and jurisdictional aspects of EU merger control. Depending on the results of the evaluation, the Commission will consider whether any policy and/or legislative measures are warranted.

The evaluation is being conducted in-house by DG COMP according to Commission evaluation standards, using specific methodology and data collection tools.

Objectives and scope of the consultation

To collect views and opinions on procedural and jurisdictional aspects of EU merger control subject to the evaluation and to gather related factual information, data and knowledge.

The evaluation aims in particular at establishing the effectiveness, relevance, efficiency and coherence of (1) the jurisdictional thresholds set out in the Merger Regulation, (2) the simplified procedure applying to certain categories of concentrations as set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on simplified procedure, (3) certain technical aspects of the procedural and investigative framework for the assessment of mergers, and (4) the referral system as set out in the Merger Regulation, related provisions of the Implementing Regulation, and the Commission Notice on case referral.

Stakeholder mapping

The most obvious group of stakeholders includes undertakings that have to comply with the provisions of EU merger control law and EU citizens and undertakings that benefit from effective EU merger control. Other important stakeholders are industry and business organisations, consumer associations, formal and informal associations of professionals in EU competition law and policy, as well as national competition authorities, national ministries and other government bodies in charge of competition law and policy, and academia.

Method and accessibility

As a first step, an evaluation roadmap will be published together with this consultation strategy on the *Europa* website.

Additionally, DG COMP will launch a public consultation with the aim of reaching out to the above-mentioned stakeholders at large. It will be published on the *Your Voice in Europe* website, and also announced by a Commission press release/mid-day express.

Moreover, DG COMP will carry out interviews and discussions with selected stakeholder groups, namely industry and business organisations, consumer associations, formal and informal associations of professionals in EU competition law and policy, as well as national competition authorities, national ministries and other government bodies in charge of competition law and policy, and academia. Via announcements on the *Your Voice in Europe website* and the DG COMP website, stakeholder groups will be asked to signal their interest to participate in such interviews and discussions. Moreover, DG COMP will pro-actively approach the above-mentioned stakeholder groups.

The answers to the public consultation, as well as feedback gathered through interviews and discussions, will be collected and analysed by the Commission services. The findings from all consultation activities will be summarized in a synopsis report published as an annex of the Evaluation Staff Working Document and/or on the consultation website.