



European Commission Launches a Consultation on Extending the Scope of the EU Merger Regulation to Non-Controlling Minority Shareholdings

June 21, 2013

On June 20, 2013, the European Commission launched a consultation on potential modifications to the EU Merger Regulation (the “EUMR”), including extending the application of the EUMR to acquisitions of non-controlling minority shareholdings.¹ The announcement shortly follows a previous consultation regarding improvements to the so-called simplified procedure.²

This consultation was expected as Joaquín Almunia, the European Commission Vice President responsible for Competition Policy, had announced in November 2012 that the European Commission planned on closing a perceived “enforcement gap” with respect to non-controlling minority shareholdings.³

Currently, under the EUMR, acquisitions of minority shareholdings are subject to the European Commission’s prior approval only if they give rise to *de jure* or *de facto* control over the target. However, acquisitions of non-controlling minority shareholdings do not require prior approval by the Commission.⁴

The consultation discusses two options to review acquisitions of non-controlling shareholdings: (1) a notification system in which all non-controlling stakes which meet certain thresholds would trigger a filing; and (2) a system where the European Commission would select cases at its own discretion.

Notification System – Under the notification system, all acquisitions of non-controlling minority shareholdings that meet certain thresholds (*e.g.*, 25% or more) would trigger a filing with the European Commission. The consultation does not define the size of the stake that would trigger a filing, but the European Commission discusses defining safe harbors to

¹ See Eur. Comm’n, Press Release: Mergers: Commission Consults on Possible Improvements to EU Merger Control in Certain Areas (Jun. 20, 2013), and Eur. Comm’n, Staff Working Document: Towards More Effective EU Merger Control (Jun. 20, 2013).

² See Eur. Comm’n, Press Release: Mergers: Commission Consults on Proposal for Simplifying Procedures Under the EU Merger Regulation (Mar. 27, 2013).

³ See Eur. Comm’n, Joaquín Almunia, Merger Review: Past Evolution and Future Prospects (Nov. 2, 2012).

⁴ Acquisitions of non-controlling minority shareholdings, however, may fall under the jurisdiction of certain EU member states, such as Austria, Germany or the United Kingdom, where the triggering event for the applicability of the national merger control provisions is not solely based on the concept of “control.”

determine which acquisitions of a non-controlling interest may fall outside the scope of its jurisdiction if it adopted a notification system.

Case Selection System – Under the case selection system, the European Commission would select certain acquisitions of non-controlling minority shareholdings for review. The consultation considers two potential jurisdictional triggers for review of non-controlling minority shareholdings by the European Commission: (i) a self-assessment system, whereby the European Commission would rely on its own market intelligence to decide whether and when to open an investigation against acquisitions raising substantive concerns; or (ii) a transparency system, whereby in the case of a *prima facie* competition concern, the acquirer would have to file a short information notice to the European Commission. Should it adopt the case selection system, the European Commission envisages issuing guidelines identifying the transactions that would raise *prima facie* competition concerns.

The consultation also indicates that the procedural aspects of the European Commission's review, such as whether a standstill obligation barring the parties from closing pending review should apply or whether notifications could be voluntarily submitted, will largely depend on the option, *i.e.*, notification system or case selection system. The consultation does not contemplate, however, modifying the turnover thresholds currently set forth in the EUMR.

Although the consultation contains clear proposals for improvement in certain areas of the EUMR, it is unclear at this stage whether the stakeholders will favor the notification system over the case selection system. Joaquín Almunia has previously expressed a preference for the case selection system.⁵

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See Eur. Comm'n, Joaquín Almunia, Merger Review: Past Evolution and Future Prospects (Nov. 2, 2012).

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