Introduction

1. The In-House Competition Lawyers’ Association (“ICLA”) is an informal association of in-house competition lawyers across Europe. The Association meets quarterly to discuss matters of common interest, as well as to share competition law knowledge. There are currently almost 180 members in 14 countries. The Association does not represent companies, but is made up of individuals as experts in this area of the law. This paper represents the views of some of its members only.

2. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward merger control regime that prioritises certainty, minimises costs, and does not represent a disproportionate demand on businesses’ time and resources.

3. We welcome the opportunity to comment on the European Commission’s staff review of the EU Merger Regulation insofar as it applies to minority shareholdings and the referral system to transfer cases between Member States and the Commission (the “Consultation Paper”).

4. We do not seek to respond to every question posed in the Consultation Paper; rather, we focus on those areas on which ICLA members’ views and experience can assist the Commission the most.

Limiting jurisdiction by operation of an “impact” doctrine

5. We welcome the proposal to limit the Commission’s jurisdiction to review concentrations that do not have any “impact” in the EEA such as full function joint ventures located and operating outside the EEA. This strikes the right balance between reducing costs and burden on business (and the Commission), while ensuring that the Commission has jurisdiction to review concentrations that may harm consumers in the EEA.

6. It would also be consistent with the ICN’s Recommended Best Practices for Merger Notification Procedures which state that:
   
   a. jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned; and
b. merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification.

7. However, the way in which 'impact' will be interpreted will be crucial for the success of this amendment and for providing clarity and certainty for businesses. Perhaps the absence of an immediate, substantial and foreseeable effect should suffice. Whichever wording is chosen, it will be important for the Commission to provide practical guidance on it in the Consolidated Jurisdictional Notice. For example, over what timeframe must the parties not be able to / have no plans to market their product in the EEA?

Referral Process

Article 4(5) references

8. We welcome the proposal to streamline the procedure for pre-notification referral to the Commission by the parties to a concentration, especially given the evidence that over the last decade only 6 cases have been opposed by a Member State. These reforms will minimise the burden and costs on both the Commission and the parties; and make the possibility of using the European ‘one stop shop’ mechanism more appealing to businesses.

9. In particular, we support the proposals to:

   a. remove the requirement to submit both a Form RS and a Form CO; and

   b. shorten the consultation period and running this in parallel with the substantive review.

10. Given that the Commission will have already begun, and indeed, will have completed a significant amount of its work at Phase I, in our view, it should be incumbent on Member States to show strong justification (e.g. legitimate national interest is at stake) before being able to oppose to avoid material duplication of effort and complexity.

11. An additional welcome reform would be that, if Member States do exercise their right to oppose, the relevant national competition authorities should accept the Form CO as sufficient to ‘start the clock’ on the national review. The Form CO is a comprehensive filing. It adds unnecessary burden, complexity and delay for parties to be required to replicate the content of the Form CO in the format required under national law. If the national competition authority feels that it requires any additional information, then this could be dealt with by way of a request for information.

12. We note that the Commission is considering modifying the rules for sharing confidential information with Member States during the pre-notification period. We are concerned about the possibility of information being shared widely during pre-notification, typically at
a time when deal negotiations are ongoing and confidential. We would therefore welcome clarification on how the Commission would propose to modify the current rules.

13. We would also welcome greater detail on what is envisaged by the Commission when it proposes in the Consultation Paper a “broad information exchange between the Commission and Member States which includes the information gathered in the market investigation”.

**Article 22 references**

14. On balance, we welcome the principle that if the Commission is to accept jurisdiction on an Article 22 reference, it should review competition in the whole of the EEA. If this were not to be the case, parties can become embroiled in multiple proceedings within the EEA and there is the risk of potentially conflicting decisions and divergent remedies.

15. We believe that Member States should be required to show strong justification before being able to submit an opposition to limit the circumstances in which the laudable objectives of these reforms can be frustrated.

16. We note that the Commission is considering whether to align the timing of national notifications and to broaden the suspensive effect of the regime. We would welcome clarification on these proposals, and would request that all stakeholders be given an opportunity to review and comment on such proposals before they are progressed further.

**Minority Shareholding**

17. We have serious concerns about the proposals to extend the Commission’s powers to review the acquisition of non-controlling minority shareholdings; and we would strongly urge the Commission staff to reconsider their position.

18. We are not convinced that the proposals are sufficiently justified:

   a. there are only a limited number of EU jurisdictions in which the national competition authority is afforded powers to review non-controlling minority shareholdings: there does not therefore appear to be a compelling reason to provide the European Commission with powers to review such transactions across the whole of the EEA (arguments about the creation of a ‘one stop shop’, with the possibility of reference back, are weak); and

   b. the “enforcement gap” apparently identified by the Commission is likely to be very small and review of minority shareholdings at an EU level cannot therefore be considered a priority issue:
i. *first*, if a competitor acquires the ability to exercise decisive influence over another, this will already be captured by the EUMR;

ii. *second*, as the Commission acknowledges in the Consultation Paper, anti-competitive effects from structural links are likely to be less pronounced than with acquisitions; but in any event, for those more challenging situations e.g. where a competitor receives competitively sensitive information from another (even if the information only flows in one direction), this would already be caught by Article 101(1) (as this has been expansively interpreted by the EU courts e.g. *T-Mobile*); and

iii. *finally*, the Commission has in its "enforcement toolkit" the power to review acquisitions of minority stakes by a dominant company in its competitors under Article 102.

19. Meanwhile, these proposals would give rise to significant unintended consequences:

a. (depending on the threshold at which the “safe harbours” are set and whether or not the test is restricted to stakes being acquired by actual competitors) a significant number of transactions would potentially be notifiable under the new rules, which would put considerable strain on the Commission’s resources and create significant undue cost and burden for the parties – particularly troubling when the vast majority of these have little or no impact on competition;

b. if the Commission were to adopt a voluntary system in respect of minority shareholdings, this would represent a departure from the bright lines which currently exist in the EU merger control regime, creating complexity and confusion for businesses (particularly given that the Commission appears to be considering vague theories of harm, such as silent stakes increasing incentives to coordinate or shifting financial incentives in the logic of UPP, which companies would struggle to apply in practice during a self-assessment);

c. if the Commission had a right to open a merger control investigation (particularly if this could take place at any time after the acquisition has happened¹) and to impose standstill obligations, this would create considerable legal uncertainty for the parties and may have a chilling effect on investment;

d. in several cases, e.g. restructurings such as debt for equity swaps, it is critical that the transaction completes quickly: the risk that the merger control regime will be triggered for even small minority equity stakes will undermine this and may lead to more businesses collapsing; and

¹ The longer that period is, the longer the uncertainty for the businesses continues and the greater the chilling effect on investment.
20. The above consequences would be particularly negative in relation to private equity and venture capital investments in innovative start-ups / SMEs, often carried out through the acquisition of minority stakes. EU policymakers, especially in the context of the EU2020 strategy, have put innovation at the heart of competitiveness. It seems, however, that extending the Commission’s powers to review the acquisition of non-controlling minority shareholdings would discourage investments in research, development and innovation which play in fact a key role in boosting growth and competitiveness. Rather, investors should be incentivised to strengthen the capital structure of innovative European enterprises also in order to increase their capacity to be present on the international markets.

Conclusion

21. There are many positive reforms considered within the Consultation Paper (such as limiting reviews of joint ventures which have no conceivable impact in the EEA and streamlining of the referral process). However, we are concerned that other proposals (such as introducing merger control review of non-controlling minority shareholdings) will increase the cost of doing business in the EU and may have the effect of stifling investment, innovation and growth. Although the Commission’s ‘ideal’ of catching all potentially anti-competitive transactions is laudable, it is difficult to see how this can be reconciled with the Commission’s commitment to avoid unnecessary administrative burden on parties.

ICLA would be willing to discuss these views further with the Commission

For further information, please contact the chairman of the association, Paolo Palmigiano at

Paolo.palmigiano@competitionlawyer.co.uk