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Institute of Economic and Social Analysis' position on Merger Control

Position paper on the Towards more effective EU merger control public consultation (reference number: HT. 3053). Our suggestions:

Expanding acquisitions review into the field of non-controlling minority shareholdings.

According to the White Paper "Towards more effective EU merger control" There is a possibility for competing companies to acquire minority stakes in for competitors and thereby influence their behavior thus reducing competition in the market. It is stated that suggested reform would ensure that the Commission can examine those transaction which may raise competition concerns. Such amendments to merger control would cover all sources of harm to competition. The White Paper also states that such reforms would not create a significant extra regulatory burden for businesses.

It is stated that acquisition of a minority shareholding may:

- *Lead to horizontal unilateral effects due to an increase in parties' ability and incentive to unilaterally raise prices or restrict output.*
- *Enable the acquirer to gain a competitive advantage in the market by increasing its rival's cost.*
- *Enable the acquirer to use its position to limit the competitive strategies available to the target firm thereby weakening it as a competitive force.*
- *Enhance the ability and incentive of market players to coordinate in order to achieve supra-competitive profits.*
- *Lead to foreclosure, particularly input foreclosure, given that the acquirer only internalizes a part, rather than all, of the loss in the target firm's profits.*

White paper suggest dealing with such problems by extending the existing system of ex-ante merger control by adding potentially problematic acquisitions of non-controlling minority shareholdings to the field of possible review. Problematic acquisitions are considered to be those that have competitively significant link. It means that Commission must be informed about a merger in several cases which are if the shareholding is:

- Acquired in a competitor or a vertically related company; and
- Either (i) above a certain higher level of, for example, 20%, or (ii) 5% or more and accompanied by additional factors such as rights which give the acquirer a „de-facto“ blocking minority, a seat on the board of directors, or Access to commercially sensitive information of the target.

Similar legal procedures currently exist in only three Member states: Austria, Germany and United Kingdom.

Such amendments should not be implemented because of two main reasons. Firstly possible harmful effects presented in the consultation do not really pose any serious threat and secondly, suggested procedures actually increase regulatory burden for businesses.

Most of the harms, such as an increase in parties' ability and incentive to unilaterally raise prices or restrict output, negatively influence competitive strategies to the target firm, possibilities to lead to foreclosure, that are exclaimed in the Consultation do not really pose a serious threat to the competition. While this might be a valid point to some extent, but on the

other hand, acquiring shares in itself passes the right to a new owner of shareholdings to influence such economic parameters.

Firstly, restriction of such rights would diminish the value of bought shares. Every additional regulatory obstacle decreases a value of transaction it is limiting. In this case while parties will be notifying the Commission about their transaction, they won't be able to carry out business and receive possible income brought by merger.

Second of all, possible restrictions imposed by the Commission would negate the rights of the new owner of the shareholdings. Transaction between the parties of the contract in which shareholdings are bought and sold is carried out voluntarily and willfully by both sides of the contract. If the party does sell a part of its shareholdings it means that it gives up a part of its influence over a control of the firm to the buyer. Restricting such influence would negate the buyer's full rights over his new property and possibilities that come with it.

What is more, the White Paper explicitly emphasizes acquiring of the non-controlling minority shareholdings. This means that even though the influence over targeted firm's economic parameters might increase; it would not be significant enough to de-facto pose any serious threat towards the competition. Minority shareholdings that would be considered as competitively significant link by the White Paper would not grant buyer rights to do any aforementioned harm as such piece of shareholdings would not provide enough control over a firm. Therefore presented amendments to merger control are not necessary.

Such extension of administrative burden would be harmful to both Commission and businesses. Even though it is claimed that new regulations have to meet the principle of avoiding any unnecessary administrative burden, new proposals do the opposite.

Targeted notification system is being proposed as a possible solution to presented harms. It actually expands the existing system of ex-ante merger control. Suggested procedure includes condition for a party that is acquiring shareholdings to be either a competitor or a vertically related company. By such extension more mergers would be subjected to the possible review of the Commission. It means that a greater number of subjects would have to deal with acquisitions that are more expensive in terms of time consumption, human resources and price.

What is more, such requirement to notify the Commission would bring unintended consequences as it is incompatible with a stock market system. Majority of the stock contracts are carried out automatically. It means that they are mostly carried out online without any requirements of additional approve of the government institutions. New regulations would mean that if one party buys enough shareholdings to meet the requirements of the procedures the automatic procedures would be blocked in order to notify the Commission. Such processes would hurt finance markets and diminish companies' possibilities to raise money and find investors.

Impact assessment states that the Commission would intervene in another 1–2 cases per year. It means that such regulation would not bring any practical increase of the protection of competition. First of all there is no practical harm towards the competition, second of all, expanded scope of the merger review only increases administrative burden. It means that the Commission will be bound to review all the notifications in order to determine which cases

should be investigated. This leads to a greater human recourse and time consumption for the Commission let alone financial costs.

Another important point is that none of the possible harms mentioned in a White Paper would happen if a vertically related company would acquire a non-controlling minority shareholding in a targeted firm. Therefore such regulation would only bring unnecessary regulatory burden.

Merger control mechanism should not be extended due to previously mentioned arguments. Harms presented in the White paper do not pose any serious threat. Limiting acquisitions of minority shareholdings would undermine buyer's rights that they get after purchasing shares. Expanding the administrative procedure would act as a both time consuming and financial burden both to businesses and the Commission. Such amendments would not only tamper with shareholding's prices but would harm companies' possibilities to attract new investments.

Simplification of The Merger Regulation

White paper suggests further simplifications of The Merger Regulations. It is suggested that The Merger Regulation could be amended so that the creation of a full – function joint venture located and operating totally outside the EEA (and which would not have any impact on markets within the EEA) would fall outside its scope. Thus such joint ventures would not have to be notified to the Commission, even if the turnover thresholds of Article 1 are met.

What is more, in order to further simplify merger procedures, the Commission could be empowered to exempt from notification certain categories of transactions that normally do not raise any competition concerns (such as those transactions which do not involve any horizontal or vertical relationships between the merging undertakings and are currently dealt with under a simplified procedure) from mandatory prior notification. Such cases might be subject to a procedure similar to the "targeted transparency system" envisaged in the White Paper for dealing with acquisitions of non-controlling minority shareholdings.

LFMI fully supports suggested simplifications of The Merger Regulation. Both of the aforementioned suggestions would decrease administrative burden both to The Commission and businesses. This means that such procedures would be less time and cost consuming for all the subjects that are involved in the merger procedure.

Conclusion

3.1 INESS strongly suggests rejecting the expansion of merger control in to the field of acquisitions of non-controlling minority shareholdings. Suggested amendments will not fulfill its purposes and will only increase administrative burden.

3.2 INESS supports the initiative to simplify The Merger Regulation. It would be beneficial for businesses and the Commission to exclude these mergers from the field of the merger control:

- Creation of a joint venture located and operating totally outside the EEA.
- Such mergers that do not include horizontal or vertical competition