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EU Commission consults on merger control reform

Jay Modrall (Norton Rose Fulbright, Belgium) · Wednesday, October 26th, 2016

The EU Commission recently launched a [consultation](#) on ‘procedural and jurisdictional aspects of EU Merger Control’ (the Consultation), which most notably proposes the introduction of a deal-size threshold in the EU Merger Regulation (EUMR) to capture significant acquisitions where the target does not meet the current turnover-based thresholds. The Consultation follows a number of comments by Commissioner Vestager, notably in her speech [Refining the EU Merger Control System](#).

The Commission is concerned in particular with transactions in the digital services and pharma sectors. The most often cited example of an important transaction that fell below the EUMR thresholds is Facebook/WhatsApp. However, that transaction was in fact reviewed by the Commission based on a referral request, as were other similar transactions. Thus, the need for an amendment to the EUMR to allow the Commission to review such transactions seems questionable.

Consultation respondents who believe the current turnover-based thresholds leave an ‘enforcement gap’ are asked for their views on whether a deal-size threshold should be added to the EUMR, and if so at what level. Recognising that a deal size threshold alone could result in transactions with no connection to the EEA being caught by the EUMR, the Consultation also asks for views on different types of ‘local nexus’ requirement, such as a general requirement that notifiable transactions have a ‘measurable impact’ within the EEA or industry-specific criteria. The concept of ‘measurable impact’ is very vague, though the Consultation suggests that the Commission would issue specific guidance at a later stage.

Similarly, there is no indication of the types of industry-specific criteria DG COMP has in mind, though the focus on digital services and pharma transactions suggests that the Commission may be thinking about criteria like data volumes (in the digital services sector) and patents issued or applied for (in the pharma sector). Such industry-specific criteria could be problematic; for example, the competitive significance of any particular data set depends on many factors other than its size, just as the importance of patents varies significantly from one to another.

The Consultation also suggests other complementary criteria that could be added to limit the application of the deal-size threshold, including worldwide turnover for all parties together or the target alone, EU-wide turnover for one of the parties, and a

ratio of deal size to the target's worldwide turnover. The Consultation suggests that a deal-size-to-turnover ratio could be a way to identify transactions in which the target has particularly high market potential even though it does not yet generate significant turnover.

Deal-size thresholds already exist in certain jurisdictions, most notably the United States, where filing is required if the parties meet both the 'size-of-person' and 'size-of-transaction' threshold. The size-of-transaction test is met when a buyer acquires, or will hold as a result of an acquisition, voting securities, assets, or non-corporate interests valued in excess of \$78.2 million. If the value of the transaction is greater than \$312.6 million, the transaction is reportable even where the size-of-person test is not satisfied. Importantly, however, acquisitions of foreign assets and voting securities of foreign issuers are exempt from notification unless the target meets certain US asset value or sales thresholds. As a result, high-value transactions in which the target's sales levels are low would likely not be notifiable if they involved exclusively non-US parties. Since many of the transactions the EU is trying to capture are likely to involve non-EEA (in particular US) parties, the US approach to foreign transactions is unlikely to appeal to the Commission. Not surprisingly, the Consultation does not offer the US approach as an option.

Germany is also planning to introduce a deal-size threshold test to plug what it sees as an enforcement gap for significant transactions in which the target's turnover is low. Germany is not planning to await the results of the Consultation, however, but to race ahead with a change in early 2017, despite criticism over the lack of a clear local nexus test in the proposed German law. Germany's rush to introduce a new deal-size test ahead of the Commission raises questions about the lack of coordination and the potential for inconsistent approaches at the German and EU levels.

The Consultation's deal-size threshold proposal differs sharply from previous proposals made under Commissioner Almunia, who also wanted to expand the EUMR thresholds, but to capture certain acquisitions of non-controlling minority interests, such as Ryanair's minority interest in Aer Lingus. Almunia's proposal attracted severe criticism from many quarters, not least the venture capital industry. Commissioner Vestager seems to have abandoned this idea.

In other areas, however, there is much greater continuity in the Consultation, including further procedural simplifications for cases that do not raise competitive concerns, the case referral system and certain other technical issues. DG COMP already introduced welcome reforms to simplify the EUMR process in December 2013. The Consultation seeks feedback on how successful these reforms have been and moots the possibility of exempting certain transactions from having to notify under the EUMR at all, or alternatively introducing lighter information requirements by requiring only a short information notice rather than a Short Form CO. The Consultation also focuses on the treatment of so-called 'extra-EEA joint ventures,' which can be notifiable under the EUMR even if they have no connection to the EEA, and which could also benefit from exemption or lighter information requirements.

As regards the referral process, the Consultation proposes eliminating the two-step process for voluntary referrals by merging parties (a 'reasoned submission' followed

by a notification) under the EUMR. The two-step process is designed to allow a Member State that would otherwise have jurisdiction to review a transaction to object to the referral to the Commission, but in practice Member States very rarely do so. These reforms are likely to be welcomed. Indeed, they build on proposals covered by DG COMP's 2014 [White Paper](#) and prior consultations, and it is not entirely clear that DG COMP needs to consult on these issues again.

The Consultation is open until 17 January 2017. In parallel, DG COMP will conduct interviews and discussions with selected stakeholders, such as industry, consumer and professional bodies, national competition authorities and other government entities. DG COMP expects to publish the responses to the Consultation together with a summary in the first quarter of 2017, with a staff working document evaluating the results of the Consultation to follow in the second half of 2017. At that point, DG COMP can be expected to signal what specific legal changes it will propose, if any. The earliest that any such changes would likely enter into force would be 2018. The Commission's plan is explained in detail in an '[evaluation roadmap](#)' published in August.

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