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EU Merger Regulation Reform: No Smiles from the Threshold

Gavin Bushell (Baker McKenzie, Belgium) · Monday, October 24th, 2016

"Hope Smiles from the threshold of the year to come, Whispering 'it will be happier'…"

Introduction

This quote from Alfred, Lord Tennyson might – I sincerely hope after recent events – be applicable to life generally in Brussels in 2017. But not so – I fear – in the world of EU merger control.

It came as no surprise, roughly two weeks ago, when the Commission quietly published its most recent consultation on the EU Merger Regulation.

The debate has been rumbling since the prior consultations in 2009 and 2013, and the White Paper (see here) of 2014. In March this year, Commissioner Vestager gave another hint that reform was still being considered, and that a value-based threshold was in the wings (see speech here).

A link to the Commission's consultation can be found here. The deadline for the submission of responses is 13 January 2017.

This post provides a summary of the Commission's public consultation, together with commentary on where real reform is needed. In short, whilst certain technical improvements and refinements are to be welcomed, the introduction of a value-based threshold should be resisted. And if that is an impossible task, then the Commission should define "*highly valued*" at the very highest of levels.

Bottom line: reform is in the air but what change will come is unclear; any legislative amendment to the EU Merger Regulation before the end of 2018 is likely to be very ambitious.

Background

The present consultation seeks to build on the previous consultations in 2009 and 2013 by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail, in the following areas:

• simplification: the treatment of certain categories of cases that do not generally raise competitive concerns;

• the functioning of the turnover-based jurisdictional thresholds set out in the EU Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover (as a result of: concerns in the light of *Facebook/WhatsApp* and proposed

amendments to the German merger control regime);

• the functioning of the case referral mechanisms (by which jurisdiction to review mergers may be transferred between the EU Member States and the Commission, and vice-versa);

• certain technical aspects of the procedural and investigative framework for the assessment of mergers.

My starting point is that the public consultation from the Commission is to be welcomed. Engagement with stakeholders is proper and appropriate. Debate is needed, however, on which of these areas truly merit legislative change.

The premise of the consultation is a view that was confirmed in the White Paper, that EU merger control "*works well*" and that "*no fundamental overhaul of the system is needed*". I would agree that this is an appropriate overall conclusion.

Over the past 25 years, an effective and well-established system of merger control at the European level has emerged, providing clients with a high degree of legal certainty as to how the process is implemented in practice.

Nevertheless, I also agree with Commissioner Vestager that even the best systems can be improved. The White Paper envisaged "*specific amendments in order to make* [the EUMR] *more effective*".

Some of amendments proposed by these cumulative consultations are justified; others are not. And some areas for improvement are simply not addressed, but should be.

And on the question of thresholds…

Section IV.2 of the consultation seeks comment on whether the jurisdictional scope of the EU Merger Regulation should be broadened. The concern is that it does not currently capture certain transactions, principally because the relevant turnover-based thresholds are not met by one (or more) of the parties.

The Commission refers to *Facebook/WhatsApp* as a source of inspiration. This is misplaced, as I explain below. What is not mentioned is the recent proposal to reform the German merger control thresholds, to incorporate a EUR 350 million value threshold (a subsequent proposal raised this to EUR 400 million). Whilst this has not prompted the Commission's thinking, it is clearly encouraging it.

An initial comment is that, from a client-friendly perspective, any extension of regulation should be viewed with caution. Previously, the Commission has stated that it is seeking to reduce red-tape. This proposal would appear to go against that intention. I have previously cautioned against knee-jerk reactions for wholesale reform based on limited examples.

True reform should be based on a widely-perceived need for increased enforcement action, based on a critical mass of cases, in which empirical evidence reveals the existence of a failure to prevent competitive harm to, or a negative impact on, economic welfare.

My view is that no reform to the EU Merger Regulation thresholds is required. Just because there

is potential German reform in this area, does not justify an extension of the EU Merger Regulation.

Such thresholds may make sense if the intention of the law is to capture transactions that are likely to have economic significance and an impact on the market structure within a single jurisdiction, such as under the HSR in the US, or within a national Member State, such as Germany.[1.Other jurisdictions incorporate value-related thresholds. For example, Canada: "size of parties" and "size of transaction" tests are used; Mexico: a "price paid" test is used; Philippines: a "value of transaction" test is used; Argentina: an exemption applies depending on "the value of the assets being transferred in Argentina" or "the price of the transaction". In addition, there are several jurisdictions which, although they do not refer to "purchase price" or "value of transaction", they do have thresholds which can be met by the target's asset value with no requirement for turnover. Whilst asset value is not equivalent to price paid/consideration, these are value thresholds. Belarus, Colombia, Kenya, India, Namibia, South Africa, Swaziland and Tanzania all have thresholds which can be triggered by target asset value alone.]

The European system, however, is different, with competence being shared at two levels (more on competence below).

It should not be forgotten that the application of EU national merger control regimes continue to apply when the EU Merger Regulation is not triggered; that referral mechanisms remain in place to allow upward transfer to the Commission in suitable cases (either at the request of the parties, or by the NCAs in consultation with the Commission).

It should also be recalled that *Facebook/WhatsApp* was ultimately referred up to the Commission by three undisclosed Member States (presumably Portugal, Spain and the UK with their market share/share of supply thresholds).

Therefore, *Facebook/WhatsApp* is not a muse for threshold reform; it is a shining symbol of the fact that the current system works.

Whilst there remains a risk of a case falling entirely through the cracks, would this be an economically significant transaction?

Philosophy aside, the imposition of a value-based EU Merger Regulation threshold raises in any event important practical concerns, as well as considerable political issues.

Firstly, I fear that a value-based threshold introduces more complexity to the (already painfully complex) EU Merger Regulation thresholds. Explaining Article 1(3) thresholds to clients and corporate colleagues always takes time and care. Perhaps a more worthwhile endeavour would be an updated survey of how many pure Article 1(3) notifications have there been in the last 10 years, and the level of intervention that arose from them, before considering whether these "one-stop-shop" thresholds are really justified? Such a survey was conducted in 2008 but the result simply seemed to be a quick glance over the system rather than a meaningful review of the Article 1(3) thresholds as I suggest. Interestingly, the 1999 Commission report to the European Council reveals that in the review period (the 18 months of March 1998 to December 1999) the number of Article 1(3) cases was only 45 (9% of all notifications). This suggests that there may only be ~30 such cases a year. Updated statistics and detail on the level of intervention attached to such cases would be welcome. If the number of such cases is low, and the referral mechanism is further refined (see below), query whether we still need the Article 1(3) thresholds? A majority of respondents to the 1999 consultation thought they were not needed. It is time to revive the 1999 debate…

Secondly, to quote another famous poet, "*beauty is bought by judgement of the eye*". That is to say that value is an inherently subjective matter. Valuations based on NPV, share value, deal value are all inherently laced with some risk – values can change materially over short periods of time and are of course subject to opinion/market volatility.

Relative values diverge across industries, and setting an arbitrary deal value threshold may have the perverse effect of increasing the burden for some sectors (e.g. pharmaceuticals) whilst allowing others to escape the intended scrutiny.

It is also not inconceivable that a deal value could be artificially set in order to avoid the EU Merger Regulation. Or, more likely, that the true deal value is not immediately apparent upfront as the result of a complex post-transaction price mechanism for the benefit of the seller (e.g. a share of future but as yet undefined profits/valuations of shares as consideration).

I should note that this arose even in *Facebook/WhatsApp*. When Mark Zuckerberg offered a deal to Jan Koum in February 2014, the price was USD 19 billion. By October 2014, on completion, however, the price had risen to USD 22 billion as a result of the rise in the value of Facebook's shares (tendered as part consideration). What if the threshold had been EUR 20 billion?

This is a simple example, but real questions arise as to how such rules should be applied in fairness and equity in day-to-day deal-making.

Equally, thresholds based on "multiples" are to be avoided given that they are also based on opinions, are highly subjective, and may change materially over short periods of time. Query, also, if this would have a chilling effect on M&A (i.e. buyers and financial advisors may instinctively limit multiples to a certain level if this implies a higher regulatory burden)?

Finally, I would add that the EUMR thresholds set the effective boundary between the application of European Union law (administered by the Commission) on the one hand, and EU national law (administered by the national competition authorities).

Setting a low value threshold, therefore, would very likely result in a potential "*land grab*", in which jurisdiction over a larger number of previously non-EUMR cases transfers to the Commission. There are very many "*ordinary course*" transactions which do not meet the EUMR turnover thresholds (but yet may be capable of being referred up).

A value-based threshold of say even EUR 1 billion would potentially capture a good number of these transactions (e.g. assuming a multiple of five, a transaction involving a target with global turnover of only EUR 200 million (i.e. not able to meet the Article 1(2) EUMR turnover threshold) would potentially become notifiable at the EU level, rather than the national level).

I expect this debate to entail highly political discussions with the Member States, and that the co-decision procedure (for any amendment to the EU Merger Regulation) to be drawn out until the controversial jurisdictional tussles are resolved.

The current criteria for determining European Union dimension are clear-cut, well-established and provide for a bright-line test as to when the Commission has jurisdiction. Such assets should not be tampered with.

Informal discussions with Commission officials, however, appear to indicate that "the house" is

wedded to the idea of a value-based threshold. It may, therefore, simply be a case of "how much" and "when", rather than "if".

Clearly, if this reform cannot be resisted, any threshold should be set a very high level to limit the impact of such a change. I will refrain here from postulating a number.

However, I would add that if a value-based threshold is to be imposed, additional criteria will be required to limit the application of the new threshold and to ensure an appropriate nexus with the European Union. I would argue that:

• the existing worldwide combined EUMR turnover threshold under Article 1(2) should apply to the parties (EUR 5 billion);

• the existing European Union-wide turnover threshold under Article 1(2) should apply to at least one of the parties (EUR 250 million); and

• the "*maximum level turnover threshold for the target*" idea should be rejected, because it introduces yet further complexity into already complex jurisdictional threshold under the EU Merger Regulation and may be difficult to apply in practice.

Simplify, Simplify, Simplify!

Section IV.1 of the consultation seeks comment on the functioning of the EU Merger Regulation's Simplified Procedure. Currently, five different types of transaction may benefit from the Simplified Procedure assuming the relevant criteria are met, and that the Commission does not attempt to impose a normal procedure in certain given circumstances.[2.These are: (i) transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the EEA; (ii) transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged; (iii) transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (a) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20%; (b) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 %; (iv) transactions where a party is to acquire sole control of an undertaking over which it already has joint control; and (v) transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (a) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (b) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150.]

The current consultation seeks to investigate whether more simplification 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 EEA markets. Moreover, notification requirements

for other non-problematic cases – currently dealt with in the Simplified Procedure could be further reduced.

Any measures that cut costs and administrative burden for our clients should be welcomed. Wholesale exemption of certain categories of transaction from the notification requirement should be encouraged in some circumstances. Below are a number of comments on this area:

• The Simplified Procedure has created much added value for clients. By expanding the categories of cases that may benefit from the Simplified Procedure, and in particular, by raising the thresholds (20%/30% for horizontal and vertical overlaps/links respectively), the Commission has reduced the overall burden on many more cases seeking Commission clearance – and this is clearly demonstrated by the statistical increase in Simplified Procedure cases. This fact should be celebrated, and should encourage the Commission to simplify further.

• "Point 5a" (JVs) transactions have been subject to the Simplified Procedure rules since 1994. Therefore, the previous reform in 2013 arguably did little to reduce the administrative burden on parties to such transactions. As such joint ventures are unlikely to give rise to effects in the EEA, they should escape scrutiny under the EU Merger Regulation or benefit from lighter requirements. I concede however that the threshold for assets/revenues in EEA (EUR 100 million) is relatively significant (I do not use the word "high"!) and that it might be adjusted if an exemption is contemplated.

• Purely extra-EEA joint ventures, however, should be fully exempted from the EU Merger Regulation. I note that in Question 13, the Commission raises "*the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage)*". Care is required here. Firstly, future transfers of, for example, EEA assets/shares/businesses into the joint venture from either parent are arguably subject to a potential EU Merger Regulation or national merger control notification at that future point in time. So such transfers should not escape merger control scrutiny. Further non-EEA transfers should remain exempt on the same basis that the creation of the joint venture was exempt. Secondly, "expansions" is an imprecise term, that may include natural growth, for example, through regional exports. Merger control is designed to govern the structure, not the operation, of markets. Expansions in the natural course of business should not be caught by the EU Merger Regulation.

• "Point 5b" (no overlap) transactions have been subject to the Simplified Procedure rules since 2000. The previous reform in 2013 appeared to reduce the administrative burden on parties to such transactions by dispensing with the pre-notification requirements (the so-called "*Super-Simplified Procedure*"). However, as such transactions are likely to give rise to zero effects in the EEA (in the clear absence of any horizontal overlap vertical or link), they should benefit from less administrative burden (e.g. some form of non-suspensory information notice) or be exempted from the application of the EU Merger Regulation altogether. Such cases would include for example pure Private Equity bolt-on transactions. I note that the Commission's own commentary mentions the risk of potential competition or conglomerate issue cases avoiding scrutiny. This risk should not however be overstated – any exemption should clearly be on the basis where no conceivable competition law issue can arise (whatever the formal theory of harm). In addition, it should be recalled that the Commission retains residual powers under Article 101 and 102 TFEU. Whilst these powers may be less than ideal for addressing structural concerns, they do remain available to the Commission and have been used in the past (e.g. *Continental Can*).

• It is true that the raising of the (20%/30%) thresholds for "Point 5c" (no affected markets) transactions and the introduction of the HHI safe harbour ("Point 6" transactions) in 2013, did permit a greater number of parties to avoid the burden of the full notification procedure. This is to be celebrated. However, it should be noted that the administrative burden of the Simplified Procedure increased with the new Short Form CO (e.g. Section 7 Short Form CO, the need to consider "*plausible markets*", etc), and the requirement to produce certain internal documents under the new Section 5.3.[3."*The following information needs to be provided only in cases where the concentration gives rise to one or more reportable markets in the EEA: copies of all presentations prepared by or for or received by any members of the board of management, or the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing the notified concentration*".] Companies that had never produced documents to the Commission previously, were required to do so on transactions that are unlikely to raise any competition concerns. The Commission should be encouraged to review whether the extent of the current Short Form CO is appropriate, and whether the notification burden can be reduced.

• Again, "Point 5d" (joint to sole) transactions have been subject to the Simplified Procedure rules since 2000. Therefore, the previous reform in 2013 did little to reduce the administrative burden on parties to such transactions. Consider whether such transactions should be exempted. Furthermore, as a matter of EU law, it is currently unclear whether Article 101 TFEU applies between a parent and its joint venture (historical precedents indicate that this may be the case). Recent commentators, and national law judgments (e.g. in Germany), have pointed in the other direction (and this is consistent with the Commission's position in respect of the attribution of parental liability). That is to say that a parent and its joint venture should be treated as being part of the same economic entity. If that is the correct analysis, then joint-to-sole control acquisitions should not be capable of giving rise to any effects in the EEA. If so, such transactions should be exempted from the EU Merger Regulation entirely. The Commissioned should be encouraged to clarify the law in this area and to allow such transactions to benefit from less administrative burden or be exempted from the application of the EU Merger Regulation.

• Clearly, a "lighter" Simplified Procedure requirement would be more welcome than the current Short Form CO (e.g. information notice). That would likely still involve some legal cost, and some burden on the in-house legal team (and possibly the internal client). On balance, however, this may be the most proportionate outcome, in terms of legal cost/burden and legal certainty.

• Overwhelmingly less desirable is a self-assessment system (as proposed under Question 8.3). If overall reduction of legal cost and administrative burden is the goal, such a system may be seen as optimal. However, the implicit value of having received a Commission approval decision in respect of a transaction, and the legal comfort this may provide, should not be forgotten. Buyers may be reluctant to proceed without a notification/decision (and the legal certainty of approval), whilst sellers may be difficult to convince to proceed with a notification. Unnecessary time and legal cost may be expended resolving such disputes. Therefore, self-assessment and merger control, do not work.

Bottom line: the Simplification project has seen successful reform since its inception, and with recent modifications. The Commission should be encouraged to simplify even further, where it is patently clear that the effect within the EEA is non-existent or de minimis.

Moving on up…

Section IV.3 of the consultation seeks comment on whether the referrals mechanisms under the EU Merger Regulation can be improved. Essentially, the Commission is consulting on whether its previously suggested improvements should be adopted:

• Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;

• Specific modifications under Article 22 of the Merger Regulation, to expand the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 (currently the Commission only obtains jurisdiction in those Member States that join the referral request), and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request; and

• The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice.

With the exception of the first limb of the second bullet point above, these proposals should be welcomed.

On balance, it would be appropriate to state that the referral mechanisms (particularly those for the benefit of the parties under Articles 4(4) and 4(5)) do reduce the overall administrative burden.

The existing Form RS system is burdensome and duplicates much of the work required under the Form CO. The proposals made (also in the White Paper) would contribute to reducing the burden and facilitating the better allocation of cases between authorities.

However, the proposal to expand the Commission's jurisdiction to the entire EEA for Article 22 referrals should be rejected. Commission jurisdiction should not be expanded to Member States in which filings were not triggered. Recent Article 4(5) experience is a good indicator of what will result. Often is the case that a reference up is made in respect of say three or four countries, but the parties soon entertain and have to deal with requests for information in respect of all EEA countries, the EU-level, the EEA-level, and sometimes at broader levels. This is surely not an efficiency-enhancing reform.

And here is a further idea. Why could not the Form RS be eliminated entirely? Under Article 4(4), why could not a notifying party prepare a draft notification and lodge that with an EU NCA? The NCA would then inform the Commission and the other Member States that a notification had been made (and provide them with electronic copies). The draft notification would contain all the relevant jurisdictional and substantive evidence to determine whether the effects of the transaction are largely confined to one Member State, even if the two-thirds rule is not automatically met. The Commission would then have an opportunity to object, but the draft notification would be fit for purpose before the relevant authorities (i.e. reducing the burden and costs for the parties).

Let's get technical, technical…

Section IV.4 concludes the consultation by considering whether additional improvements could be made to the EU Merger Regulation procedure in certain technical aspects. A brief description together with an initial comment for each aspect is set out below:

• *Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid*. Comment: it is unclear precisely what is intended here by the Commission.[1] This point was not explicitly dealt with by the White Paper, but was addressed in the previous Impact Assessment. The current rules do not allow for the notification of share transactions on the stock exchange before the acquisition of control on the basis of a good faith intention. On the other hand, they prohibit the exercise of the voting rights once control has been acquired. The Commission has suggested it may be useful to adapt the criterion of "good faith intention" in order to allow the parties to notify before the level of shareholding required to exercise (de facto) control is acquired. The proposal makes sense if the acquiring party can demonstrate a clear commitment to carry out the acquisition by preparing everything necessary (internally and externally) to proceed (not necessarily immediately as suggested by the Commission but within a specific short-term timeframe). Such a proposal should be welcomed.

• *Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures*. Comment: some uncertainty remains around the methodology for the calculation of turnover for joint ventures (and also with the attribution of market shares to and from such joint ventures). Although guidance is contained in the CCJN, further clarification in this area would be welcome.

• *Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases*. Comment: even in Phase II, time periods are short, particularly when voluminous data and document requests have to be dealt with prior to the issuance of an SO, and in the formulation of remedies, late in the process. Presently, the clock can only be stopped where the Commission adopts a decision requesting further information/ordering an inspection. Some additional mechanism for time extensions would be welcome – but only on condition that this is a negotiated extension with the consent of the notifying party (but I would note that the interests of other parties, such as the seller and/or the target may not be aligned).

• *Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).* Comment: this proposal arises out of the long-running *Ryanair/Aer Lingus* (2007) saga. The General Court explicitly confirmed that the Commission did not have the power to order a divestiture of the creeping acquisition of shares made by Ryanair in the prelude to its public offer bid for the entirety of Aer Lingus' shares. This proposal should be resisted – because it seeks to extend (by the back door and in support of its intentions on minority shareholdings) the Commission's competence to review non-controlling minority shareholdings. As I have written previously (here and here), and not repeated herein, the Commission retains powers under Article 101 and 102 TFEU, and some of the EU NCAs retain merger control powers in addition, to control such cases (which in any event appear to be limited in number).

• *Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.* Comment: Whilst

the Commission's proposal here is not precisely clear, it should be welcomed if the intention is remove the application of the EU Merger Regulation from cases where there is no real circumvention and the first step transaction has been reviewed and approved by an EU NCA. For example, global Company A seeks to acquire Asset 1 in Germany with German revenues of EUR 125 million. Notification to and approval by the BKA is obtained. 12 months later Company A seeks to acquire Asset 2 in Germany with German revenues of EUR 126 million. Whilst both transactions are individually notifiable separately (and only) to the BKA, the current system requires a notification to the Commission on the second transaction if the two-thirds rule is not met. Query if this requirement should be dropped.

• *Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.* Comment: This topic would be worthy of its own post. Whilst it is unfortunate that the Commission's view precludes clients from making use of such mechanisms (and it is questionable whether this is sustainable as a matter of law at the present time)[2], greater clarity is welcome. In the absence of explicitly permitting such transactions, legal certainty for structuring transactions will be an improvement.

• *Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.* Comment: Whilst greater sanctioning powers should only be adopted in a limited manner, such additional protections are arguably for the benefit of businesses involving in submitting confidential information to the Commission. This proposal should be welcomed.

• *Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.* Comment: Whilst greater sanctioning powers should only be adopted in a limited manner, such risks arising in practice are arguably close to hypothetical – but the sanction should be confined only to circumstances involving deceit. This proposal should be welcomed subject to that caveat.

The areas for reform that are not covered by the public consultation, but should be

It is notable that the public consultation – though apparently wide-ranging – avoids certain topics. There are other areas of EU Merger Regulation practice that are ripe for reform. I list below a couple of suggestions (and no doubt the public consultation will throw up others).

• The EU Merger Regulation should contain maximum time limits for the pre-notification period, and failing this, then further best practice guidance should be provided to foresee specific time frames for pre-notification for certain categories of cases (e.g. Simplified Procedure cases: 10-15 working days; Simplified Procedure cases using the Normal Form CO: 30 working days; Normal Procedure cases with affected markets but all horizontal shares below 40%: 60 working days; and a six-month overall limit for all other cases unless waived by the parties, etc).

• As noted above, explicit confirmation in the EU Merger Regulation that where a transaction involving the creation or a further change to a full-function joint venture (such as the entry of a new shareholder) has been notified to, and approved by, the Commission, then Article 101 TFEU ceases to apply between the parent companies and the joint venture.

• Explicit confirmation as to the limited circumstances in which an upfront buyer condition can be

imposed (e.g. three-to-two cases, where the U.S. agencies apply the condition in the same transaction, etc).

Concluding remarks

Firstly, I apologise for the length of this post. That was an inevitable consequence of the scope of the issues raised by the public consultation. It could have been much longer…

There are important issues here, and they merit debate. However, I would argue strongly for reform in the right areas. *If it ain't broke, don't try to fix it.*

Sure, there are areas where the system may be refined or improved. But wholesale reform is not needed. Further complexity, is also, not needed. No new thresholds please! In fact, why not less? If the referral system is refined, do we need Article 1(3) at all?

Let's focus on the areas where real change is required. Making the process smoother, leaner, less burdensome, more predictable.

In terms of timing, the Commission has indicated that its evaluation will take until Q3 2017. This means that any real legislative reform, whatever that looks like, can only be expected in 2018 at the very earliest. And if the Member States fear a land grab, that may be very ambitious timing.

Keep smiling everyone.

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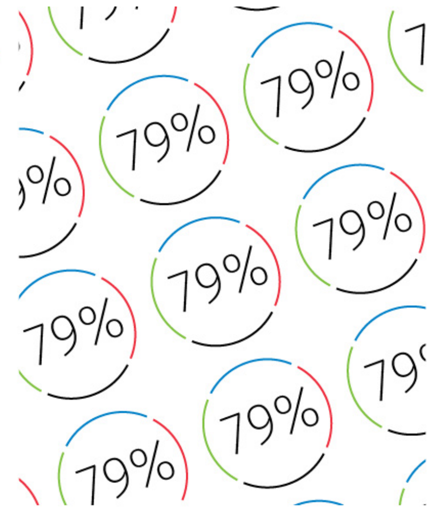

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