

COMMENTS TO THE EUROPEAN COMMISSION WHITE PAPER ENTITLED “TOWARDS MORE EFFECTIVE EU MERGER CONTROL”

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This submission is presented to the European Commission (Commission) on behalf of the Japan Business Council in Europe (JBCE). JBCE is registered in the EU transparency Register under the ID number 68368571120-55.

1. About JBCE

Created in 1999, the Japan Business Council in Europe (JBCE) is a leading European organisation representing the interest of the multinational companies of Japanese parentage active in Europe. JBCE membership covers a wide range of sectors, including information and communication technology, electronics, chemicals, automotive, machinery, wholesale trade, precision instruments, pharmaceutical, railway, textiles and glass products. Together, JBCE member companies of around 70 major multinational companies represent global sales of 1.4 trillion euros in 2013.

JBCE takes an active role in enhancing the understanding and promoting the business of Japanese companies in Europe, and in putting forward the views of its members on legislative issues currently under debate and on public policy issues which will shape the years to come (www.jbce.org).

2. General Comments

JBCE Members have frequently notified transactions under the current merger control regime and are pleased to be able to contribute to the Commission’s present consultation on the basis of their extensive experience.

Against that background, JBCE recently also made a submission in response to the Commission’s Staff Working Document “Towards More Effective EU Merger Control”.¹

JBCE welcomes the fact that, in drafting the White paper, the Commission has been willing to take into account a number of observations made by JBCE to the Commission’s Staff Document. JBCE furthermore welcomes the Commission’s initiative to reconsider the procedures currently in operation with a view to making the EU merger control regime more effective and efficient.

Against the above, however, JBCE notes that despite the efforts made by the Commission to accommodate industry concerns voiced during the earlier consultation, the approach chosen

¹ Available at http://ec.europa.eu/competition/consultations/2013_merger_control/jbce_en.pdf.

in the White Paper may still significantly increase administrative burden on businesses and decrease the legal certainty sought for and needed by business in an economically stimulating environment.

The proposed course of action in the White Paper will lead to an increase in the number of transactions which require notification in one form or another for businesses that take minority shareholdings on a regular basis. It should not be forgotten that minority shareholders provide the necessary capital to a project that might otherwise not materialize. Such capital injections are vital to innovation and to competitiveness of the economy.

Indeed, as JBCE has pointed out before, the overwhelming majority of such cases will be completely benign in nature, and will never be able to raise any competition concerns.

The present submission will focus almost in its entirety on the position taken by the EU Commission in its White Paper in relation to minority shareholdings. Where the other points under discussion are concerned, JBCE points to the observations made in its earlier submissions.

Before going into the matter of minority shareholdings itself, JBCE would like to attract the Commission's attention to the reasons why the Japanese business community takes such great interest in this subject.

3. Japanese business presence in Europe

JBCE's members regularly acquire minority stakes in companies which are located or active in Europe. Japanese companies find it very important to have these investment opportunities, which are primarily utilised for risk mitigation, and trade purposes. The investment often offers significant opportunities for the invested company to develop a product or bring a product to market, which it might not have been able to do or do less well without such external capital injection.

In most cases, these investments are not associated with a change of control and hence do not require notification to or approval by the Commission. JBCE's members would thus be directly affected by the inclusion of minority shareholdings into the Commission merger review jurisdiction. Indeed, quite a number of JBCE's members would have to bear the additional burden of making more notifications concerning transactions that are unlikely to have *any* impact on competition in Europe.

External M&A activities by Japanese companies have been on the rise in the past years. On a numerical basis, overseas M&As by Japanese enterprises in 2009 were at 300, in 2010 at 370, and in 2011 at 457, in 2012 at 501, and in 2013 at 527. We do not have comprehensive breakdown data for each year, but based on the 2012 data, of those transactions, between 30-40% are capital participations (i.e. acquisitions of no more than 50% stakes), and 5% are increases in capital contributions.² Some of these cases may have involved acquisitions of control, as such triggering EU filing obligations, but based on the publicly disclosed EU filings made by Japanese companies, the number of such cases is very limited. In other words, the proposed amendments being the subject of the current consultation would

² Japanese Ministry of Economy, Trade and Industry, 'White Paper on International Economy and Trade 2012', available at <<http://www.meti.go.jp/english/report/data/gWT2012fe.html>>

potentially affect approximately 40% of all overseas mergers and acquisitions carried out by Japanese businesses, unless the parties' turnover go under the filing thresholds.

This is particularly relevant in light of the fact that, for a very large number Japanese companies carrying out business in the EU, the purchase of minority stakes in EU-based companies is frequently the primary way of entering into the EU market or into a new line of business. In addition, minority investments are on the whole pro-competitive as they are often financial participations in support of innovation projects. In most cases the target will be vertically related.

JBCE would also like to stress the fact that Japanese minority stakeholders often change their status by becoming majority stakeholders after a certain period of time. In such cases, merger notifications (and all the associated costs and resources) would be required more than once (i.e. first for the initial acquisition of a minority share, and then once again for the acquisition of the majority stake), meaning that certain acquisitions would become commercially less rational given the additional cost associated with merger control.

4. Jurisdiction over minority shareholdings

In the 2013 consultation paper, the Commission envisaged three systems for the control of the acquisitions of non-controlling minority shareholdings: a notification system, a transparency system and a self-assessment system.

In the White Paper, the Commission proposes a “targeted” transparency system, which combines the self-assessment and transparency systems.

This targeted transparency system would apply to transactions that create a “competitively significant link”. According to the White Paper, such a link is created by acquisitions of a minority shareholding in a competitor or a vertically related company, where the acquired stake is i) around or in excess of 20 per cent or ii) between 5 per cent and approximately 20 per cent, if it is combined with “additional factors”, which include “rights that give the acquirer a de-facto blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target”.

JBCE has already underlined to the Commission that any measures that would further increase the administrative burden placed on businesses, such as by way of introducing a new category of notifiable concentrations would be undesirable.

Companies would be obliged to assess for themselves whether their transactions give rise to a “competitively significant link”. In transactions that result in such a “competitively significant link”, the parties would need to submit an “information notice” to the Commission. We understand this to be something less than a full, detailed notification, but which still requires significant information about the parties, their revenues, the transaction and the markets involved. Otherwise, the Commission will hardly be in a position to assess whether it chooses to investigate the case further.

Based on the information provided in the notice, the Commission would subsequently have to decide whether or not to investigate the case further. The individual EU Member State could theoretically also ask for the Commission to refer the case to it.

The Commission and the EU Member States have then 15 working days to make this determination, during which time the parties would not be able to close the transaction.

Only after this waiting period, will parties be free to close their transaction, unless the Commission informs them that it intends to investigate the transaction or an EU Member State requests a referral.

Importantly, JBCE understands that the Commission will retain the right to open an investigation during all of an additional six months – which raises very serious questions of legal certainty.

If the Commission decides to investigate the transaction further, the parties will be obliged to file a full, detailed notification, which would be followed by a further waiting period during which the transaction cannot be closed.

JBCE has a number of serious observations in respect of the proposed system:

a) The proposed system goes against the objective of reducing the administrative burden for companies.

As pointed to above, parties would have to carry out a self-assessment for any acquisition of a share in excess of 5% of the shares to establish whether they are horizontally overlapping or vertically related to the target and if so, whether their transaction would bring about a competitively significant link. At the same time, it does not concern a system of self-assessment as we know it from other areas of competition laws, where the assessment is not followed by the ex-ante notification of the transaction.

Although the Commission envisages the new system to lead to 20 or 30 additional cases per year, the self-assessment will have to be carried out in a multiple of that number of cases, at least to establish whether or not further action is needed, which in proportion to the often limited size of the investment concerned is a serious burden.

Indeed, in addition a minority shareholding may sometimes precede an acquisition of a controlling interest. In such case, the same combination would have to be notified and assessed twice. The proposal does not cover this constellation at all.

The Commission should also realize that minority shareholdings might sometimes be taken for strategic business reasons, which businesses might want to handle discreetly. It needs to be emphasised that the publicity consequence will occur irrespective of whether the proposed minority acquisition would in fact raise a competitive issue. The publicity that the notification system will bring about might deter certain investors from taking strategic minority stakes.

In light of this, JBCE calls upon the Commission to do everything possible to reduce to the minimum any increase of the administrative burden that will follow from the proposed changes, at least by providing clear guidelines and unambiguous information requirements. In addition JBCE requests the Commission to reduce or eliminate any additional waiting periods, where possible.

b) The notification system and waiting periods create legal uncertainty

The Commission appears to have combined in the White Paper the different options proposed at the occasion of the earlier consultation in order to satisfy concerns raised by business. However, the Commission sticks to its initial idea to acquire the jurisdiction to review acquisitions of minority shareholdings.

Although the proposal abstains from requiring a general overall mandatory notification, notification (in the form of an “information notice”) is still needed if and when the cumulative thresholds discussed above are met.

JBCE’s is seriously concerned about the legal uncertainty resulting from the Commission’s proposals. Indeed, if businesses must determine themselves whether there is a need for a filing with a competition authority, the thresholds for exercising such self-assessment must be entirely clear and should not give rise to complex interpretation and judgment decisions by firms. This is not ensured by the concept presented in the White Paper: The self-assessment contains the determination whether the target company is a competitor or is vertically positioned in relation to the acquirer. This means that it must define markets in accordance with the terms of EU competition law and calculate market shares. In the Commission’s view, such an assessment would not require a detailed antitrust analysis of relevant markets and indeed, for both issues applicable guidelines already exist.

However, investors will clearly need to tread very carefully, given the severe penalties for closing notifiable deals within waiting periods, particularly when internal documents which analyse the markets may need to be submitted with the notice.

All of the above creates a serious uncertainty surrounding the planning of a transaction. It means that even in the preparation of minor transactions, parties must factor in waiting periods without a clear view on what in practice that waiting period will be. Moreover, the parties to a transaction cannot establish which authority will review their case as the Commission proposal includes a possibility for referral requests of national authorities (without stating if such referral request requires that the national authority does have jurisdiction to review such minority acquisitions under their national laws or not). The further uncertainty that the Commission might revive a file during a period of six months following the submission by the parties of their information notice is unacceptable.

There is as little justification for this as there is to reopen a full merger case beyond the statutory waiting periods. The Commission should therefore withdraw its plan to maintain such an arbitrary period during which the case could be reopened. The legal insecurity that is now being created puts the acquisition of a minority shareholding in a more insecure position than a regular acquisition of control.

c) Absence of a clear safe harbour.

In its previous submission JBCE proposed introducing safe harbours, below which structural links would always fall outside of the scope of the updated EUMR.

JBCE is pleased to see that the Commission to a certain extent recognizes the importance of a safe harbour and the potential legal certainty this may bring for businesses. However, there are two points that JBCE wishes to plead for.

The first is to make a distinction between horizontal and vertical relationships. The Commission has made this distinction throughout the whole spectrum of its competition law enforcement policy, thus giving credit to the idea that horizontal overlaps have potentially a more significant effect on competition than vertical relations. Indeed, the inclusion of vertical relationships into the assessment will probably dramatically increase the number of cases potentially covered, given the number of situations that are conceivable where parties are potentially in a vertical relation to one another. This is particularly true in case of the acquisition of minority stakes by investment funds and companies holding diverse portfolios of participations (without necessarily pursuing a uniform competitive strategy).

In order to reflect this, JBCE would argue in favour of the exclusion from the proposed rules of any minority shareholdings that only involve a vertical relationship. For these shareholdings, the principle of control should continue to be guiding. In the alternative, the Commission should provide for very clear guidelines and limit application quite strictly to existing vertical relations and not include any potential or hypothetical relations.

The second point is that the absence of a clear and closed list of “additional factors”, and the potential application of merger control rules to non-controlling minority shareholdings of as little as 5 per cent would lead to significant legal uncertainty. This is because a large number of transactions could potentially fall under merger control rules. At the very least, the Commission should present clear guidance regarding the circumstances that could still give rise to a notification requirement for a shareholding between 5 and 20% and ensure that such guidance need only be interpreted restrictively.

In addition, also here, the “additional factors” should not be capable of triggering a notification requirement in situations other than where there is a clear horizontal overlap between the parties.

Furthermore, the “additional factors” are now worded in such a way that they will bring about a notification requirement very easily, even when this is not necessary. Access to and exchange of sensitive information is already limited by virtue of article 101 TFEU and does not require additional review.

The presence of a single seat on the board will often not contribute any meaningful influence over the company concerned and should therefore also be removed as a triggering example.

It would indeed be preferable that in the case of horizontal overlaps the Commission only gains jurisdiction on the basis of a strict threshold, such as the acquisition of 20 per cent, and not rely on additional arbitrary criteria.

3.1 **IV. Miscellaneous**

JBCE had already noted that there is no justification for compelling businesses to incur the expense of notifying transactions which will be taking place outside the EEA, and which will not have any conceivable effects on any market within the EEA.

JBCE is therefore grateful that the Commission has acknowledged this incongruity and has followed the suggestion coined by JBCE to consider a system of voluntary notification.

The Commission suggests amending Article 1 of the Merger Regulation so that a full-function joint-venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission's competence, even if the turnover thresholds are met.

JBCE had previously suggested to introduce an additional category of transaction under Article 3(5) of the Merger Regulation, such that a concentration would not be deemed to arise where “a joint venture is formed, or there is a change of control of a joint venture, provided that the joint venture carries out its current and intended activities exclusively outside the EEA and those activities have no appreciable effect on competition within the EEA”

Both proposals would appear to have the same effect.

4. Conclusion

JBCE has detected a clear willingness on the part of the Commission to consider the need for increased legal certainty and for the reduction of administrative burden for businesses.

JBCE requests the Commission to pursue consistence in its approach in these matters and consider the proposals formulated by JBCE in its present submission to this effect while still achieving its policy objectives of creating a more effective, but business-friendly system of merger control.

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