



September 2014  
AK Position Paper

# White Paper of EU Commission: Towards more effective EU merger control

## About us

**The Federal Chamber of Labour is by law representing the interests of about 3.4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.4 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

# The AK position in detail

The Austrian Federal Chamber of Labour (AK) would like to make the following statement to participate in the consultation process on the White Paper of the EU Commission "Towards more effective EU merger control". The AK agrees to the publication of the present statement.

## 1. Minority shareholdings

In its White Paper, the EU Commission holds out the prospect of also including non-controlling minority shareholdings in the EU merger control in future.

Based on the example of actual cases, the EU Commission very clearly presents in its White Paper the necessity of expanding EU merger control to non-controlling minority shareholdings. Under certain circumstances, these might have similar anti-competitive effects to controlling shareholdings, which in the end are detrimental to consumers and businesses.

The AK expressly welcomes the proposal; after all, experiences made in Austria and Germany, both of whom have long enshrined in law a control option also for minority shareholdings, show that the inclusion of minority shareholdings within the scope of merger control is objectively justified. For example, the German Federal Cartel Office has blocked four proposed mergers, which were geared towards acquiring a minority shareholding resp. were aimed at gaining significant competitive influence.

In the opinion of the Commission, non-controlling minority shareholdings

should be subject to an investigation if the minority shareholding in a competitor or a vertically related firm is acquired and if the minority shareholding is either above a certain higher level (e.g. 20 percent) or at least 5 percent and if it is linked to rights such as the representation in executive boards, the right to prevent particular resolutions and to information rights respectively.

This delimitation proposed by the Commission with regard to investigation-relevant minority shareholdings is perfectly understandable and represents progress compared to the Austrian regulation as it, apart from a shareholding threshold, also introduces a dynamic element – namely other participation rights.

From a procedural law point of view, the Commission presents three relevant models: self-assessment, targeted notification and targeted transparency, whereby it favours the latter.

In respect of targeted transparency, companies ready to merge convey - in case of an investigation-relevant minority shareholding (see above) to the EU Commission a notification concerning the proposal accompanied by relevant market information. The EU Commission resp. the national competition authorities are then able to initiate an investigation, whereby in this case the conventional procedure is carried out.

From the point of view of the AK, in respect of notification requirement and stand-still obligation, the merger control of minority shareholdings should be

subject to the same provisions as apply to controlling shareholdings. Option 2 would be in accordance with this procedure.

In view of the circumstance that fewer than 1 percent of all notified mergers are disallowed, as well as given the aim of the EU Commission to keep costs within the scope of expanding the merger control in limits, both for businesses and competition authorities, Option 3, namely the targeted transparency, is a feasible way, provided certain provisions are adhered to. This includes a waiting period (preliminary stand-still obligation) of at least three weeks to ensure that national competition authorities resp. the EU Commission are not confronted with mergers that have already been implemented.

Apart from that and from the point of view of the AK, Option 3 is only then acceptable if – as described in margin number 51 of the White Paper – the EU Commission is able to initiate an investigation within a further period (4-6 months), should for example relevant business complaints exist or anti-competitive effects should be ascertained at a later date. Apart from that, any subsequent initiation of an in-depth investigation should not only be limited to the EU Commission; this option should also be available to national competition authorities if the merger has a negative impact on the respective Member States.

## **2. Referral of merger cases between national competition authorities and the EU Commission**

According to current provisions provided in EU merger control, businesses may apply that the EU Commission will be competent for a merger if otherwi-

se it had to be investigated in three or more Member States. Only if the competent Member States do not voice any opposition, it will be possible to notify the EU Commission. In its White Paper, the EU Commission states that only a small number of businesses are using the option of a central notification with the EU Commission as it is associated with an additional time and administrative burden.

Procedural simplifications and streamlining referral provisions have been proposed within the scope of the White Paper. In future, substantiated applications for referral shall no longer be necessary and companies, willing to merge – provided a merger would have to be investigated by several Member States – may notify the merger directly to the EU Commission. However, as soon as an affected national competition authority rejects this, the Commission will forego this competence and the merger will be investigated by the competent national competition authorities. From the point of view of the AK, this simplification will not reduce their rights because they can still reject a referral.

In the opinion of the AK, companies willing to merge have to state in their notification, in which Member States the merger would have to be notified. It cannot be the responsibility of the competition authorities to check all mergers referred by the EU Commission with regard to their national concern. Should the notifying companies fail to include a Member State affected by the merger, this would also have to be regarded as a prohibited implementation in the respective Member States. The option, to sanction a prohibited implementation, for example by imposing fines, has to remain.

As outlined in the White Paper, the EU Commission expects that the proposed new regulation in respect of referrals will result in an additional administrative burden. It is therefore a condition for amending the referral technique that the EU Commission has sufficient resources available to deal with cases in a proper way. The reform must not be at the expense of merger control quality.

The AK would therefore ask you to consider our reflections stated in the further legislative process.

Should you have any further questions  
please do not hesitate to contact

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