COMMENTS TO THE EUROPEAN COMMISSION STAFF WORKING DOCUMENT "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

Issue date: 12 September 2013

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

JBCE is the European organisation representing companies of Japanese parentage operating in Europe. The mission of JBCE is to contribute to European Public Policy. JBCE membership currently consists of more than 60 multinational companies and covers a wide range of industry sectors, including air conditioning, automotive, chemicals, consumer electronics, engineering, industrial machinery, information and communication technology, medical equipment, photo and imaging equipment.

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 consultation on the basis of their extensive experience.

Recently, JBCE also made a submission to the Commission's public consultation on the simplified procedure in merger cases.[1]

JBCE welcomes the Commission's willingness to consider the views of the industry before setting out rules that directly concern businesses. 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 certain of the options for reform currently under consideration, notably in respect of minority shareholdings, may have the effect of increasing the number of transactions which require notification in one form or another. Most likely, the overwhelming majority of such cases will be completely benign in nature, and will never be able to raise any competition concerns. Indeed, the Commission has itself pointed out that the anti-competitive effects stemming from structural links are likely to be less pronounced than

[1] Available at <http://ec.europa.eu/competition/consultations/2013_merger_regulation/jbce_en.pdf>

in the case of an acquisition of control, and that the actual number of cases creating problems is rather limited.

This is further evidenced by the paucity of situations in which the absence of rules on minority shareholdings has had any impact. Indeed, JBCE finds that the number of situations in which structural links might have created or caused considerable anticompetitive effects is insufficient to justify any legislative steps which seek to expand the scope of the EU Merger Regulation. In this respect, the Commission has primarily relied on its experience in the case of *Ryanair / Air Lingus*. Although the Commission's concerns in that case may be valid (JBCE refrains from taking a position in this respect), it nevertheless points to very few other cases in which the authority found itself 'empty handed' in the face of a competition concern significant enough to justify a considerable increase in the red-tape for business as a whole.

JBCE feels that such an increase in the overall burden on business would go against the Commission's stated objective, and run contrary to the Commission's efforts – as expressed in another public consultation[2] – to make the merger control rules simpler and precisely less burdensome for businesses.

Creating new rules in such circumstances would therefore seem to be redundant and indeed disproportionate, in particular in light of the fact that adequate measures addressing most scenarios of concern already exist. Specifically, companies are already bound by the broad application of Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU). To this end, for those structural links that do not fall within the ambit of Articles 101 and 102 TFEU, it would be difficult to imagine how any serious anticompetitive concerns would at all be present.

In addition, JBCE notes that any new rules introducing additional obligations for companies are likely to have the undesirable effect of increasing the costs of doing business in the EU. To this end, JBCE would like to stress that the Commission should instead aim at reducing the administrative burden that is negatively affecting businesses throughout its merger control regime, thus stimulating investments by foreign companies in the EU, in particular during such difficult economic times.

It is against this background that JBCE has made its previous submission concerning the simplified merger procedure (on 19 June 2013) and that it is making the present submission, focusing on the issue of minority shareholdings and extraterritorial joint-ventures.

3. Nature of Japanese business presence in Europe

JBCE's members regularly acquire 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. However, these acquisitions are frequently not associated with a change of control and hence do not require notification or approval by the Commission. JBCE's members would thus be directly affected by the introduction of the currently consulted rules and would bear the additional burden of making more notifications concerning transactions, which are unlikely to have *any* impact on competition in Europe.

[2] Draft revision of simplified procedure and merger implementing regulation

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 the largest level since 1996 of 457 (totalling over ¥ 9 trillion in value). Of those transactions, between 34-39% are capital participations (i.e. acquisitions of no more than 50% stakes), and 3-6% are increases in capital contributions.[3] 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 potentially affect approximately 40% of all overseas mergers and acquisitions carried out by Japanese businesses.

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.

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 less rational commercially given the additional cost associated with merger control.

3.1 Current rules are already imposing a disproportionate burden over certain non-EU joint ventures

Another issue that JBCE would like to point out is that, under the current merger control rules, certain joint ventures are captured even if they have no activities or sales in or into the EEA. Japanese companies with large sales in the EEA therefore have to incur significant costs relating to EU filing obligations (such as costs for external lawyers) even if the transactions do not concern competition in the EU in any conceivable way.

Japanese companies frequently create small joint ventures in Asia. Typically, the transaction value for each such joint venture tends to be rather low. Under the current rules, however, when such a small joint venture (worth only a few million Euros) is created in Asia and has no sales or activities in the EEA,[4] an EU filing obligation nevertheless applies due to the mere fact that the parents of the venture have a large turnover in the EEA (even if this turnover is attained in areas unrelated to the business of the joint venture in question). Obliged to observe the notification requirement, the parties are therefore forced to incur significant legal costs which represent a substantial part of the total investment cost.

The currently proposed rules will further increase such unreasonable burdens. This would be beyond what is justifiable as being proportionate to the purpose of the EU Merger Regulation. There are jurisdictions, such as Germany and the UK, where the concept of a concentration is

[3] 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>

[4] See, for example, Case COMP/M.6647 – MITSUBISHI CORPORATION / MITSUBISHI ELECTRIC CORPORATION / MITSUBISHI ELEVATOR (SINGAPORE)

more broadly defined, but these jurisdictions have a local effects test exempting non-EEA joint ventures from a mandatory filing requirement.

Furthermore, non-EEA joint ventures (such as those described above) can presently be structured without obtaining joint control in order not to trigger any EU filing obligations. However, the proposed extension of the definition of a concentration would eliminate such rational and desirable solutions.

Therefore, JBCE feels that the imposition of any additional obligations and/or costs as regards such transactions would indeed have serious implications for its members, and for Japanese businesses overall, in particular inasmuch as they could contribute to a drop in the external investments that are increasingly carried out by Japanese companies and that are favourable to the European economy. Indeed, JBCE fears that, as a result of the proposed changes, EU-based target companies would become significantly less attractive commercially, thus forcing Japanese businesses to consider equity investments elsewhere.

As further discussed in section 4.3 below, JBCE members respectfully request that the Commission introduces a reasonable mechanism to alleviate the disproportionate burden for non-EU joint ventures - not only for "below-control" concentrations but also for concentrations that involve an element of control and that are already captured under the current rules.

4. Responses to individual questions

4.1 II. Merger control for the acquisition of non-controlling minority shareholdings ("structural links")

1. In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?

JBCE would like to invite the Commission to abstain from proposing any measures that would further increase the administrative burden placed on businesses, such as by way of introducing a new category of notifiable concentrations.

JBCE and its members feel that one of the main merits of the current EU merger control regime is that it is very clear when the rules become applicable to a transaction and when not. Understandably, when setting merger control thresholds or defining "control", there may always be scenarios where a transaction that does not meet the thresholds or that does not confer 'control' in the defined sense, may upon close consideration have an effect on the structure of competition in the EEA, despite not meeting the criteria set.

By setting thresholds, the Commission made a reasoned, yet arbitrary choice. It is a trade-off between many factors, including enforcement efficiency offset against the chilling effect that merger control may have on deal-making. It may not be perfect or watertight, but it could be considered efficient.

By including further types of transactions, the Commission shifts the borderline, but will still not be able to create a 'watertight' system of control; it will undermine its own enforcement efficiency and increase the chilling effect on deal-making as a result of the increased cost

associated with transactions that will often be limited in size (particularly in the event of minority shareholdings).

Moreover, in light of the fact that the EU Merger Regulation imposes a *mandatory* system of notification, the introduction of a novel and separate approach towards the concept of "control" in order to tackle perceived problematic structural links might lead to significant uncertainty. In most cases, any such problematic situations are already capable of being addressed under Article 101 TFEU and are subject to self-assessment and *ex post* enforcement.

Therefore, JBCE is of the opinion that the inclusion of minority shareholdings in the framework of the Commission's merger control assessment would institutionally, structurally and practically blur the clear distinctions that now exist between the *ex ante* test of the EU Merger Regulation and the *ex post* application of Article 101 TFEU.

Such difficulties could be seen, for example, with reference to the treatment of non-controlling stakes in joint ventures (i.e. would structural links in non-full-function joint ventures become notifiable, or remain subject to scrutiny under Article 101?). JBCE also notes that the very definition of a "structural link" will be challenging to develop.

JBCE moreover regards that also at the enforcement level, there appears to be little support for the Commission's intention to introduce a one-stop-shop for minority acquisitions, since only few Member State merger control regimes actually regulate the creation of structural links – i.e. there does not seem to be a commonly shared need for such a development.

Finally, JBCE wishes to observe that the concept of control is currently treated in the same way under the EU and national merger control regimes. National merger control regimes have often followed the changes in the EUMR. Examples of this are the shift in the distinction from concentrative/cooperative joint ventures to full-function / non-full function joint ventures in 1998, and the move from the dominance test to the SIEC test in 2004, which were largely followed by similar changes at the national level.

Over time, therefore, the EU Member States, despite the fact that they have not felt a compelling need to do so thus far, are likely to follow the trend of the Commission by introducing corresponding national mechanisms, thereby capturing, at much *lower* thresholds, those transactions that would not otherwise have an EU dimension (i.e. not caught by the EU turnover thresholds). This would, in turn, potentially significantly multiply the companies' expenses relating to filing of notifications (in terms of time, costs and other resources) which may then have to be done in multiple EU Member States.

2. Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?

JBCE regards that the current EU Merger Regulation adequately regulates those transactions which would significantly impede effective competition, as such requiring no further amendments. Any rare and exceptional case that would escape this test does not justify the significant burden placed upon the industry as a whole by virtue of the extended notification burden at EU and ensuing national levels (as set out above).

3. Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:

a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,

b) the administrative burden on the parties to a transaction,

c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;

d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;

e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

The Commission is proposing to extend the scope of the EU Merger Regulation by enabling it to investigate and/or intervene against anti-competitive structural links. Specifically, the Commission is considering three options: (i) that of mandatory notifications, (ii) self-assessment by the companies, or (iii) transparency (i.e. "prima facie problematic" test).

JBCE would like to firstly reiterate that it does not consider it necessary or appropriate to extend the EU Merger Regulation to structural links. As such, the three options proposed by the Commission do not reflect the position that is preferred by JBCE or its members.

However, JBCE has assessed the Commission's proposals and has the following comments in relation thereto. First of all, the self-assessment and transparency options - whereby the Commission is vested with the discretion to investigate certain structural links - are already to a large extent possible under the current laws.[5] In light of the wealth of precedents, soft law, and experience, the Commission is therefore more than adequately equipped to deal with any anti-competitive structural links. From this perspective, extending the scope of the EU Merger Regulation is unnecessary, and would come at the cost of the companies. In addition, the self-assessment and short information notice procedures, although providing a more relaxed approach as compared to option (i), are nevertheless associated with a considerable risk and uncertainty, since the Commission may decide to investigate a deal *ex post*. In addition, companies will still be required to invest a lot of time and resources to provide all the relevant information to the Commission. Moreover, JBCE is not sure about the Commission's understanding of "a prima facie problematic structural link", and invites the Commission to provide a clear position as to its understanding thereof.

As regards the proposition to notify all acquisitions prior to their execution, this option seems most radical, burdensome and commercially disadvantageous for businesses. Indeed, of the proposed options, a mandatory pre-notification system would offer the most legal certainty

[5] In Joined Cases 142 and 156/84 *British-American Tobacco v Commission* [1987] ECR 4487, the Court of Justice of the EU has pointed out that structural links can indeed fall within the scope of Article 101 TFEU. See also JBCE's general comments in Section 2 above.

for all stakeholders, but it would at the same time be the most disruptive one, in particular if the Commission were to consider the imposition of a standstill obligation. An *ex ante* mandatory notification obligation would therefore result in an increase in the number of notifiable concentrations, with no corresponding benefit to justify such a step.

In conclusion, JBCE finds that the burden (administrative, financial and otherwise) imposed on the companies far outweighs any conceivable benefits of the Commission's proposed way of dealing with structural links. In particular, given the already existing mechanisms for dealing with issues such as information exchanges or coordination between competitors, any new requirements imposed on companies would be disproportionate and futile.

4. In order to specify the information to be provided under the transparency system:

a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?

b) What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?

Given the views expressed above, JBCE does not wish to respond to Question 4.

5. For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the Commission decides to investigate a case, or under the notification system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.

It is not appropriate for JBCE to respond in general terms to Question 5.

6. Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?

Yes.

7. Regarding the Commission's powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?

As explained in its response to Question 3 as above, JBCE strongly encourages the Commission not to extend its merger notification obligations to minority shareholdings, i.e. not to capture "structural links". JBCE does not, therefore, propose any concrete definition of a "structural link".

However, if the Commission were to proceed with either one of the three proposed options for dealing with minority shareholdings, JBCE would strongly encourage the Commission to consider introducing safe harbours, below which structural links would always fall outside of the scope of the updated EU Merger Regulation.

In this respect, JBCE proposes that:

- for transactions between competing companies, acquisitions of less than 25% of the shares of a company should not require notification to the Commission; and

- for transactions between non-competing companies in a vertical position on the market, acquisitions of less than 50% of the shares of a company should not require notification to the Commission. JBCE is aware that such a safe harbour would limit the jurisdiction of the Commission to situations in which a *non-controlling* stake of at least 50% is acquired. However, given that vertical mergers do not meet the same level of competitive concern as horizontal concentrations (as recognised by the Commission in its non-horizontal merger guidelines), JBCE believes that non-controlling acquisitions of below 50% should not merit a review by the Commission.

- Transactions between non-competing companies that have no potential effect on the EU market should never require notification.

In addition to such safe harbour thresholds, JBCE also strongly encourages the Commission to consider publishing guidelines as regards its enforcement priorities.

8. In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.

The Commission has referred in its Staff Working Document to national merger control rules which give competition authorities the competence to review structural links, e.g. the United Kingdom. JBCE would like to point out in this respect that the United Kingdom offers a voluntary system of notification, as opposed to the EU mandatory one.

If the Commission were to proceed in the direction of extending the scope of the EU Merger Regulation to also cover structural links (which JBCE encourages the Commission not to do), then it would indeed be preferable to provide companies with the possibility to notify a transaction voluntarily. Indeed, if a company were to foresee potential issues or a borderline situation, it would be in its own interest to obtain legal certainty by means of a notification. In those cases where there clearly is no problem, companies would have the possibility to forego the cost and effort of notifying a transaction that has no possible competitive impact. This would combine an element of self-assessment and the possibility of review.

However, even if businesses were able to confirm that their acquisitions would not cause any problems from a competition law perspective by filing a voluntary notification to the Commission, such a notification would nevertheless still require significant time and resources to be invested. Compared to the situation as the law stands today, where control,

even for minority shareholdings, is the distinguishing factor for notification, this would present a considerable change and an additional burden.

Overall, JBCE is of the opinion that it is more appropriate to intervene against structural links *ex post* their creation, instead of creating an *ex ante* mandatory notification requirement. Voluntary notifications should not, however, trigger any standstill obligations.

9. Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?

If the Commission were to extend the scope of the EU Merger Regulation to also cover structural links, JBCE would advocate the introduction of a limitation period, after which structural links would no longer be possible to be investigated. This would be necessary in order to ensure legal certainty and a more efficient application of the EU merger control rules.

JBCE would propose a limitation period of 4 months from the date of the conclusion of the transaction, whereby a non-controlling stake has been acquired.

Should the Commission opt for a voluntary notification system, the limitation period should be one month, i.e. the duration of a regular Phase I investigation, as of the receipt of a voluntary notification.

4.2 III. Referral of merger cases

JBCE has no specific comments in relation to the questions on the case referral system. JBCE would only like to note that it would strongly support the move towards a "one-step" approach of merger notification, i.e. the notifying parties only having to file one notification form.

4.3 IV. Miscellaneous

1. How could the jurisdictional rules of the Merger Regulation be modified in order to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not have to be notified to the Commission? Please take into account the need for jurisdictional rules to be clear and easy to apply.

Few justifications exist in compelling businesses to incur the expense of notifying a transaction which will be taking place outside the EEA, and which will not have any conceivable effects on any market within the EEA.

JBCE proposes in this respect, the introduction of a voluntary mechanism of notification for joint ventures which have activities solely outside the EEA (e.g. having no sales in or into the EEA and the geographic market not including the EEA. Any standstill obligations should furthermore only be applicable once the Commission considers investigating the transaction further. A limitation period of 4 months should likewise apply.

JBCE members also recognise the need for jurisdictional rules to be clear and easy to apply. An alternative solution would be 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". In addition, the Commission should provide guidance as to how it would interpret this rule.

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