REGULATORY RISK UPDATE

Proposed changes to EU Merger Control - the minority upgrade?

The European Commission (the Commission) has just published a consultation entitled "*Towards more effective EU Merger Control*" and invites all interested parties to submit comments on proposed changes to the EU Merger Regulation in two areas:

- Non-controlling minority shareholding ("**Minority Shareholdings**"); and
- Transfer of cases between the Commission and national competition authorities ("**NCAs**").

Of the two issues, the most likely to provoke debate and receive substantive submissions will be the proposal that the Commission's remit should also include the review of certain Minority Shareholdings. This will be the natural focus of this alert but we will also give a quick overview of the proposal regarding transferring cases between the Commission and the NCAs at the end.

MINORITY SHAREHOLDINGS: WHAT'S THE ISSUE?

Non-controlling minority stakes of one firm in another are quite a widespread phenomenon in many industries with Ryanair's existing 29.4% stake in Aer Lingus being a current example. The Commission asserts that "*in some specific instances the acquisition of a non-controlling minority stake can harm competition and consumers.*"

The consultation document discusses a number of options how the Commission could review Minority Shareholdings "*without creating an undue burden for businesses*".

MINORITY SHAREHOLDINGS: QUICK RECAP ON THE EXISTING REGIME

The current EU Merger Regulation (139/2004) has been in place since 2004 and is well proven (it was the successor to Regulation 4064/89) The Commission only has jurisdiction to review transactions leading to an acquisition of control (*de jure* or *de facto* - legal or actual) over another company.

The only circumstances when the Commission can review *existing* Minority Shareholdings is in the context of another transaction leading to an acquisition of control. Continuing with the Ryanair/Aer Lingus example, while the Commission could (and did twice) prohibit Ryanair from acquiring control, it could not order Ryanair to divests the minority shareholding because, until Ryanair had control (*de jure* or *de facto*) over Aer Lingus, the commission did not have jurisdiction. However, hypothetically, if Ryanair were to try to acquire another airline, then, under the current regime, the Commission could (when conducting its substantive assessment) take into account the effect of the minority shareholding in Aer Lingus, and could potentially, as one of the conditions for clearance, require Ryanair to divest the shares in Aer Lingus and undertake not to acquire any share in Aer Lingus for a defined period of time.

The Commission, unlike some NCAs (e.g. UK or Germany), actually does not have the tools to systematically prevent anti-competitive effects arising from the acquisition of Minority Shareholdings. The consultation document notes that the "*established economic theory*" is that structural links might lead to competitive harm by various means, including:

- reducing competitive pressure between competitors (horizontal unilateral effects);
- substantially facilitates coordination amongst competitors (horizontal coordinated effects); and
- in the case of vertical links, allows companies to hamper competitors' access to inputs or customers (vertical effects).

The literature on economic effects of Minority Shareholdings is all set out in Annex 1 to the consultation document (**available here**)[1]. The Commission has also set out an overview of merger cases that deal with pre-existing minority shareholdings and how minority shareholdings are dealt with in certain other jurisdictions in Annex II to the consultation document (**available here**)[2].

In order to address this, the Commission is exploring the possibility to extend the scope of the Merger Regulation to give the Commission "*the option to intervene in a limited number of problematic cases of structural links, in particular those creating structural links between competitors or in a vertical relationship.*"

The Commission cites various examples of potential anti-competitive effects including "*if in a concentrated market one firm acquires a 20% stake in a competitor, it may influence the latter's competitive conduct even without gaining control, for example through having a seat on the board, or it may have fewer incentives to compete because it shares the target's profits. A minority stake owned by a firm in a company that supplies an important input to the acquirer's competitors may lead to supply problems for those competitors*."

The UK's Competition Commission is currently reviewing Ryanair's minority shareholding in Aer Lingus and noted various theories of harm, including that:

- Ryanair might have weakened Aer Lingus as an effective competitor by using the minority stake to get access to Aer Lingus' confidential strategic plans and business secrets, block resolutions at meetings etc;
- Ryanair might not have competed as aggressively with Aer Lingus because of Ryanair's desire to maintain the value of its investment and/or potentially share in any profit distribution; or
- Any existing coordination between Ryanair and Aer Lingus would be more effective or coordination would be more likely in the future.

MINORITY SHAREHOLDINGS: THE PROPOSED "UPGRADE"

The Commission notes that Article 101 and 102 could only be used to a limited extent to deal with acquisitions of Minority Shareholdings and it therefore proposes that an "upgrade" to the merger Regulation would be more appropriate. The following options are being considered:

- Notification: acquisitions would be notified and cleared by the Commission;
- Self-assessment: the Commission would have discretion to investigate; and
- Transparency: parties to "*prima facie problematic*" transactions would complete a short information notice which would be published (online and possibly in the OJ).

The Commission is considering also applying the current substantive test i.e. whether a transaction "*significantly impedes effective competition*" to the analysis of Minority Shareholdings, and potentially clarifying some of its current Commission guidelines along the way.

In the case of joint ventures, the Commission would also assess whether the structural link might have the object or effect of coordinating the parents' conduct, and if so, whether such coordination infringes Article 101 TFEU (as is currently the case).

MINORITY SHAREHOLDINGS: MORE SAFE HARBOURS

The Commission recognises that some jurisdictions have safe harbours based on a given level or shareholding (e.g. 10% where there are no special shareholder rights to that shareholding e.g. veto rights) while other jurisdictions apply a "*competitive significant influence*" or "*material influence*" test (Germany and the UK respectively). If the

1. http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex1_en.pdf
2. http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex2_en.pdf

self-assessment or transparency options are pursued, then the Commission might issue guidance about the types of case that it might be most likely to examine. For the parties involved, the latter options would create the greatest legal uncertainty.

MINORITY SHAREHOLDINGS: EXPANDING THE "ONE-STOP-SHOP"

The jurisdiction of the Commission and the NCAs under the current regime are clearly delineated based on turnover thresholds (the "EU dimension" test) and the Commission considers that the same test could also apply to Minority Shareholdings and that the "one-stop-shop" for transactions with an EU dimension would therefore remain. In the same way, the consultation proposes that referral system currently in operation (whereby a case can be referred from NCAs to the Commission or vice versa) could be adapted for the acquisition of Minority Shareholdings (irrespective as to whether Minority Shareholdings are notified, self-assessed or subject to the transparency requirement).

MINORITY SHAREHOLDINGS: VOLUNTARY NOTIFICATION?

In the case of the proposed self-assessment or transparency systems, the Commission moots the possibility that voluntary notifications might be permitted. However, the justification for voluntary notification is lower given the relative ease of which shareholdings can be sold compared to completed mergers. (It might also be queried whether the notification system would introduce an element of price risk to acquisitions insofar as share prices can fluctuate quite significantly from day to day.)

MINORITY SHAREHOLDINGS: SIMPLIFIED NOTIFICATIONS?

The Commission has also mooted the possibility that a short form notification could be used. It also proposes that the standstill obligation that exists under most merger regimes (i.e. no gun jumping) might not apply, but that the Commission could impose a standstill obligation (similar to Hold Separate Undertakings applied to completed transactions in the UK system).

MINORITY SHAREHOLDINGS: SPECIFIC QUESTIONS FOR INTERESTED PARTIES

The Commission has set out nine specific questions to which interested parties are invited to respond **on or before 12 September 2013**. These are set out at pages 10 to 11 of the consultation document.

CASE REFERRALS BETWEEN THE COMMISSION AND NCAS

The Merger Regulation allows cases to be referred from Member States to the Commission or vice versa, provided none of the authorities involved objects to the referral. It appears that referrals have become much more common and the Commission's consultation seeks interested parties' views on potential ways to streamline this system and avoid delays. The paper (pages 12 onwards) discusses whether merging parties might notify a case to the Commission that otherwise would be examined by three or more NCAs.

The paper suggests that instead of preparing a reasoned submission (why the Commission is the appropriate body to review the transaction), and then preparing a full submission (Form CO), only one submission would be prepared and that this submission would include a short statement containing the reasons why the Commission is the appropriate body to review the transaction. This appears to be a logical development and would very likely result in some cost savings to the notifying parties.

The Commission notes that while Member States can oppose the Commission’s jurisdiction, this only happens in a very small number of cases. For cases referred to the Commission by one or several national competition authorities, the consultation paper considers whether the review could cover the whole of the European Economic Area (EEA) and not just the territory of the Member State requesting the referral, in line with the “one-stop-shop” principle.

The consultation documents are here:[3]

The Commission has also recently consulted stakeholders on a separate proposal to simplify certain procedures for notifying mergers within the current EU Merger Regulation (see IP/13/288).

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3 http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html