Substantial Reform of EU Merger Control on the Cards

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On 9 July 2014, the European Commission published a White Paper setting out proposals to amend the EU merger control system. The proposed reform of the system is the most significant in the last 10 years and could have an impact on many corporate transactions.

The proposals

The proposals deal with the following:

- the expansion of the Commission's powers to review the acquisition of non-controlling minority shareholdings;
- the streamlining of the case referral system between the Commission and the EU Member States; and
- measures aimed at simplifying merger procedures, including amending the EU Merger Regulation so that extra-EEA joint ventures do not require notification, and the introduction of block exemptions for simplified merger cases.

This White Paper follows from a consultation document that was published by the Commission in June 2013 and attempts to include feedback from that consultation.

Minority shareholdings

The Commission believes that it does not currently have adequate tools for dealing with anti-competitive acquisitions of minority shareholdings.

The Commission can investigate agreements for the maintenance of minority shareholdings under Article 101 TFEU. But in the absence of such an agreement, under the current EU Merger Regulation, the Commission only has the power to review transactions which lead to an acquisition of control. This contrasts with some other national jurisdictions round the world (such as Austria, Germany, the United Kingdom, Canada, and the United States) where national merger control law does allow the review of share acquisitions that create non-controlling structural links.

This perceived enforcement gap came to a head in the recent Ryanair/Aer Lingus case where the Commission was not able to review and remedy Ryanair's stock-market acquisition of a 29.82 per cent minority stake in Aer Lingus, while the UK authorities were able to investigate and order a divestment down to a 5 per cent holding.

A "targeted transparency system"

The Commission proposes a "targeted transparency system". Under this system, an undertaking would be required to submit an information notice to the Commission if it proposes to acquire a minority shareholding that qualifies as creating a "competitively significant link".

Definition of a "competitively significant link"

The Commission proposes the following cumulative criteria for determining whether a transaction creates a "competitively significant link".

- First, the minority acquisition must be acquired in a competitor or in a directly vertically-related company (ie a supplier or customer).
- Second, the acquired shareholding must be (i) around 20% or (2) between 5% and around 20%, but accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target.

The Commission proposes to clarify the definition of a "competitively significant link" in the articles of the Merger Regulation, the recitals, a guidance document, or a future implementing regulation.

The Commission estimates that 20 to 30 minority shareholding cases per year will

meet the above criteria as well as the turnover thresholds of the EU Merger Regulation, which corresponds to approximately 7-10% of the merger cases currently examined by the Commission each year.

The "targeted transparency procedure"

Under the proposed procedure, the parties will be required to self-assess whether a transaction creates a "competitively significant link", and if so, submit an information notice to the Commission. Alternatively, parties may voluntarily provide a full notification under the normal procedure.

The information notice will contain information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some limited market share information.

The Commission will then decide whether further review of the transaction under a Phase I investigation is warranted, and EU Member States will consider whether to request a referral back of the transaction to their national merger control jurisdictions. The Commission will publish a notice about the transaction in order to allow complainants to come forward and to allow Member States to consider a referral request.

If the Commission decides to open an investigation, the parties will be required to submit a full notification. This will initiate the normal Phase I investigation procedure. If the Commission does not initiate an investigation, it will not issue a decision.

Once an information notice has been submitted, it is proposed that there will be a mandatory waiting period of at least 15 working days during which the parties will not be able to close the transaction.

It is further proposed that the Commission will be free to investigate a transaction, whether or not it has already been implemented, within a period of 4 to 6 months from the date of submission of the information notice. The Commission states that this is to allow the business community to come forward with complaints, and "to reduce the risk of the Commission starting precautionary [Phase I] investigations during the initial waiting period so as not to be blocked from investigating a transaction in case complainants come forward later on".

The Commission also considers that it should have the power to issue interim measures, such as an order for the merging businesses to be held separate, in the event that the Commission initiates an investigation of a transaction which was already implemented.

The existing SIEC assessment test (does the merger give rise to a significant impediment of effective competition?) would be applied to the assessment of acquisitions of minority shareholdings caught under the procedure.

Joint ventures which are not jointly controlled but instead have several shareholders with minority stakes who make decisions through changing majorities will also fall within the new procedure as long as the joint venture performs on a lasting basis all the functions of an autonomous economic entity (a so-called "full function" joint venture).

Where a joint venture is newly established and two of the shareholders acquire joint control (triggering a notification) while a third shareholder acquires a minority stake without control, the third shareholder should join the notification rather than submit a separate information notice, assuming that all of this constitutes a single transaction.

Referral system

The Commission proposes simplifying the mechanisms by which mergers that do not trigger the jurisdictional thresholds under the EU Merger Regulation and instead fall for review under the national merger control regimes of EU Member States can nevertheless be referred up to the Commission. The Commission is looking at both the pre-notification and post-notification referral mechanisms.

Pre-notification referral

Under the system of pre-notification referrals, the merging parties can, during the pre-notification period, request the referral of their merger to the Commission if, although not triggering the jurisdictional thresholds of the EU Merger Regulation, it is notifiable under the merger regimes of at least three Member States. This gives the parties the benefit of a one-stop shop review rather than having to deal with several authorities.

The Commission is proposing to drop the procedure of two submissions under this

system. Currently, parties have to submit a "reasoned submission" ("Form RS") making the referral request. If no Member State that is competent to review the transaction under national law opposes the request, the Commission obtains jurisdiction for the entire EEA and the parties proceed to submit a notification to the European Commission ("Form CO").

The Commission is proposing that the reasoned submission to the Commission and the subsequent consultation of the Member State as a preliminary step be abolished. Instead, the parties would be allowed to notify directly the Commission which would immediately forward the notification to the Member States.

To allow prompt information exchange, the Commission proposes that it would send the parties' initial briefing paper or case allocation request to the Member States in order to alert them about the transaction during the pre-notification contacts.

Post-notification referral

The Commission has also proposed a number of changes to the post-notification referral system. Currently national competition authorities can refer to the Commission those cases which the Commission is the "more appropriate"/"better placed" authority to deal with, even if parties did not or could not request a pre-notification referral of the case to the Commission. Most appropriate for such a referral are cases which pose serious competition concerns and have cross-border effects.

One of the most important suggested changes is that the Commission's decision to accept a referral in this situation will give it jurisdiction for the whole of the EEA (and not only competence for the Member States making or joining the referral request). However, if at least one competent Member State opposes the referral, the Commission would renounce jurisdiction for the whole of the EEA, and the Member States would retain their jurisdiction.

Miscellaneous "simplifying" amendments

The Commission proposes a number of "simplifying amendments". These include two important changes:

1. **Extra-EEA joint ventures**. The Commission suggests amending the EU

Merger Regulation so that the creation of a full-function joint venture located and operating outside the EEA that would not have any effects on markets in the EEA would fall outside the Commission's competence, even if the turnover thresholds are met

2. **Block exemptions**. The Commission is considering exempting certain categories of transactions that normally do not raise any competition concerns (such as those transactions which do not involve any horizontal or vertical relationships between the merging undertakings and are currently dealt with under a simplified procedure) from the mandatory prior notification requirement. Such cases might be subject to a procedure similar to the "targeted transparency system" envisaged for dealing with acquisitions of non-controlling minority shareholdings.

Action required

Business needs to consider whether to take up the opportunity to influence the Commission's thinking at this important moment for the reform of the EU merger control system, in particular to ensure that any new rules do not lead to unnecessary burden and costs in the future. This is particularly important as many other countries around the world may take the EU's lead and make similar changes to their national merger control regimes.

Key areas for focus include:

- The establishment of bright line thresholds for the review of non-controlling minority acquisitions (e.g. by ensuring the definition of a "competitively significant link" is sufficiently clear and limited).
- The information requirements in the new "information notice"
- The practicality of including a 15 working day standstill period following submission of an information notice
- The duration of the subsequent period in which the Commission can (e.g. following a complaint) open an investigation under the EU Merger Regulation
- The exclusion of extra-EEA joint ventures from the scope of the EU Merger Regulation
- The new block exemption categories for simplified merger cases – to ensure that they offer real reductions in administrative burdens, costs, and delays for parties to a transaction.

The consultation deadline is Friday 3 October 2014. In light of the comments received, the Commission may then put forward a legislative proposal to revise the EU Merger Regulation.

This post originally appeared in the Kluwer Competition Law Blog.