AntitrustConnect Blog

Mama Mia, Here We Go Again

Gavin Bushell (Baker & McKenzie) · Wednesday, September 24th, 2014

Just over a year ago, I wrote (rather extensively) on the European Commission's public consultation entitled "Towards more effective EU Merger Control" in which the Commission proposed to (i) expand its powers to review non-controlling minority interests and (ii) streamline the case referral system between the European Commission and NCAs.

Our regular readers will note that Mark Jones alerted them to the European Commission's second public consultation on this subject. As Mark noted, the deadline for this consultation closes on 3 October 2014.

The purpose of this post is not to repeat Mark's (or indeed my prior 2013 post). Rather I thought that it may be useful to put down some thoughts to assist those business readers who may be in the process of compiling a response to the consultation.

In short, this author remains opposed to further legislation and a broadening of European Commission competence over non-controlling minority shareholdings. I know that a number of readers feel the same way. However, I have been stunned on occasion when attending various legal conferences in the past year at the level of simple acceptance in fellow practitioners towards the notion that non-controlling minority shareholdings give rise to anticompetitive concerns and need regulating – without due consideration of the global picture. In addition, there is a quiet inevitability about all of this which is also rather worrisome.

My my, how can we resist you?

I agree with Mark that change is likely on the cards – albeit in a new European Commission, with a new hand on the tiller. If her appointment is confirmed, Margrethe Vestager (who graduated in economics) is more likely than not to seek to push through the house's demand for legislative change in this area.

Whilst it is true that three Member States have merger control laws containing definitions of "concentration" (or the equivalent notion) that include acquisitions of minority shareholdings in certain circumstances (i.e. Austria, Germany and the UK), the remaining 27 EEA national merger control regimes do not (Luxembourg does not have merger control law). Therefore, it is somewhat misleading to claim that the designed system "fits within the existing EU and Member State merger control regimes". In fact, it conflicts with those Member States' regimes that do not attach to non-controlling minority shareholdings – with the only implication being that all of these regimes should be subsequently amended to be brought into line with the EU Merger Regulation (i.e. more red tape for clients).

But my real concern has been that such legislation is likely to entail a disproportionate burden on companies doing business in Europe at a time when economies should be encouraged to flourish and grow. As I wrote previously, structural links of the type embodied by non-controlling minority shareholdings play a very important role in the market place. My fear has been that to catch that one egregious (*Ryanair*) case that may arise ever so once in a while, the new rules – if adopted – will make more difficult and uncertain the process for many other companies doing daily business in Europe. One case – *Ryanair* – does not make a crisis.

Of course the "targeted transparency system" proposal outlined by the public consultation is less burdensome than the notification system originally contemplated. But it nonetheless and invariably results in an increase in regulation (even if it is primarily self-regulation in the first instance) and potential legal uncertainty for businesses in the complex web of deal-making and captial investment. There is a material risk that the European Commission's estimate that "roughly 20-30 minority shareholding cases per year will meet the…criteria of the targeted transparency system as well as the turnover thresholds of the Merger Regulation" is very conservative.

This is particularly so given the European Commission's intention – buried deep in footnote 67 in the Staff Working Document – "this approach [to non-controlling minority shareholdings] would also capture an acquisition of a minority shareholding by one company which itself does not compete with the target, but which already holds a minority stake (or more) in one or more other firm(s) competing with the target".

Therefore, the proposals would extend not only to acquisitions of minority shareholdings that create a "competitively significant link" between the acquirer and the target company, but acquisitions creating a link between two or more minority shareholding interests.

This raises not only the practical difficulties and legal uncertainties in the self-assessment regime generally, but is also likely to disproportionately impact any financial buyer (interpreted to include conglomerates with a dedicated capital investment arm) with an active and acquisitive portfolio of interests (and whose activities cannot be slotted underneath the banking clause).

A few suggestions for the scope of the proposal (if the European Commission insists on proceeding)

• A "competitively significant link" should be re-defined so that it can ONLY arise between the **controlled activities** of the acquirer (on the one hand) and the activities of the target company in which the proposed acquisition of non-controlling minority shareholding is to be acquired/acquired (on the other hand). Links that arise between the activities of two companies in which only non-controlling minority shareholdings are held should be explicitly excluded.

• In addition, "competitively significant link" should also be re-defined so as to explicitly exclude in any event indirect links between two companies (e.g. two portfolio companies which are held indirectly through various holding companies for **investment purposes** not falling within the banking clause of the EU Merger Regulation). Therefore, financial buyers acting in good faith purely for the purposes of capital investment purposes should be given legal certainty and regulatory freedom to pursue such activities. Thus, as a consequence, a "competitively significant link" should ONLY catch *Ryanair/Aer Lingus* type fact patterns (i.e. a direct acquisition of a non-controlling minority shareholding in a competitor or directly vertically-related company).

• The criteria for establishing a “competitively significant link” should be refined so as to only attach where (i) the acquired shareholding is **25%** or more (so as to coincide with “the upper limit for a threshold”) and (ii) between **15% and 25%** if accompanied by the additional factors identified by the European Commission (so as to mirror the UK 15% threshold – but without the discretion to “dip below” – so as to ensure legal certainty). Access to **commercially sensitive information** should not be relevant to EU Merger Regulation jurisdiction here because this risk is covered by Article 101 TFEU.

• The submission of an information notice should **not trigger a suspensory obligation** on the parties (i.e. to standstill). This suggestion should be deleted because such acquisitions should be prima facie considered non-problematical (and the European Commission has the burden of overturning that presumption) and in any event such links can be easily unwound unlike full concentrations (see note on powers below).

• The discretion of the European Commission to “decide whether further investigation of the transaction is warranted” should be narrowly defined and limited to circumstances to ensure that the European Commission cannot investigate if it simply wishes to do so (e.g. go on a fishing trip). The European Commission should be required to (i) adopt **a short formal decision** requiring the parties to formally notify (a decision that would could be appealed to the European Court of Justice) and (ii) demonstrate that it has **serious doubts as to the compatibility of the acquisition** before adopting such a decision (in accordance with the burden of proof standard set out generally by the General Court in *Microsoft/Skype*). This will avoid wanton requests for full notifications by case teams.

• A non-suspensory period of 15 working days from the date of the submission of the information notice is sufficient for the proposals in the point above to be given effect and for any Member State to request a referral. Following the expiry of the 15 working day after submission of the information notice without such a decision requesting a full notification, the acquisition should be deemed compatible. Parties that have not yet completed their proposed acquisition can subsequently decide upon investigation whether to voluntarily suspend their project in consultation with the case team. Parties that have completed their acquisition will fall under the scrutiny of the European Commission in any event during the notification period (query what harm can arise in such a short period of time and under the scrutiny of a regulator? If concerns persist, the party could agree not to exercise its voting and other rights pending clearance by the European Commission).

• The European Commission should only be “free to investigate a transaction” otherwise if the acquisition has already been implemented and has not been notified pursuant to an information notice. Such an investigation can only arise within a limited period of time, such as **four months**. Following the expiry of the four months after European Commission becoming aware of/should be aware of an acquisition, however, it should be deemed compatible.

• The formal notification of an acquisition of the non-controlling minority shareholding should fall within **the Simplified Procedure** *ab initio* – to allow the parties to take advantage of the Short Form CO and the faster review period – unless the European Commission requires a full Form CO – in exceptional circumstances.

• Finally, if the European Commission’s final decision in the investigation concludes that the acquisition of the non-controlling minority shareholding is incompatible with the (to-be-revised)

EU Merger Regulation – it should have the **same powers** to deal with the non-controlling minority shareholding as it currently enjoys in respect of implementation of incompatible concentrations in Articles 6 and 8 of the EU Merger Regulation.

Whilst my preference would be for these proposals to be dropped in their entirety, with these amendments, the “targeted transparency system” may be more appropriately tailored to attach to those types of transactions which the European Commission has identified as being of the most concern (a la *Ryanair/Aer Lingus*).

The Information Notice should be limited

In today’s world, clients are dealing with an increasing miasma of national, supra-national and international regulations that imposes a significant burden on them – this proposal simply adds to that burden and the complexity of doing business in Europe.

The scope of the information notice should be narrowly tailored. It should focus only on the activities giving rise to the competitively significant link – and not to extraneous and unrelated activities. In essence, the information notice should be as “light touch” as possible so as to reduce the administrative burden for companies and their internal counsel.

Therefore, the information notice should only contain summary information on the parties, their turnover, a description of the transaction, the level of shareholding to be acquired or acquired, and the rights (if any) attaching to the shareholding. Basic market information should be provided for the competitively significant link – on the most plausible market definition only where it arises. Parties should not be required to provide reams of market share data on every conceivable or plausible split in such a notice (e.g. in the pharmaceutical sector ATC3 level IMS data should suffice without the need to provide ATC4, molecule, OTC/Rx and galenic form splits).

The European Commission can impose the same obligations on the parties to provide correct, accurate and not misleading information in the information notice as currently exists in respect of the Short Form CO and the Form CO. This will give the European Commission comfort that parties are being “truly transparent” and that the identification of cases in which the European Commission is justified in investigating is properly made.

I do not agree with a U.S. HSR style of document disclosure in these circumstances. The retrieval, review, catalogue and production of such documents is likely to be highly burdensome for the parties. Market-related documents would ultimately be made available to the European Commission should it decide to request a notification (such documents are already within the scope of the Short Form CO for those transactions involving a competitive link).

Finally a word on referrals and other animals

I support the proposal to allow direct notification to the European Commission without using the Form RS and the clarification to the Article 4(4) EU Merger Regulation substantive thresholds. These make common sense.

I also agree with the proposal for an information system between Member States and the European Commission to ensure that cases that involve prima facie wider than national or cross-border issues are alerted to all relevant competition authorities as early as possible. Greater cooperation and communication between the NCAs and the European Commission to ensure the timely, fair and consistent application of national merger control regimes in the EEA is to be welcomed. Divergent outcomes – as witnessed recently in the maritime sector – should be avoided.

The European Commission's proposal to exclude the creation of full-function joint ventures located and operating outside of the EEA from the scope of the EU Merger Regulation is to be welcomed. Such concentrations are incapable of constituting an impediment to effective competition in the EEA where they do not alter the structure of, or have any effect on, any market in the EEA.

However, I would recommend that any legislative change in this area is precisely and clearly drafted. For example, the primary focus should be on determining whether or not the full-function joint venture will have, or is capable of having, any market-facing operations that will impact on any market in the EEA. The location of assets or companies contributed to the joint venture is therefore largely irrelevant if actual marketing and sales activities are conducted outside of the EEA.

In addition, I would suggest that *de minimis* full-function joint ventures should also be excluded from the scope of the EU Merger Regulation (for example where turnover or contributed assets fall below EUR 25 million). I recently had experience of notifying the creation of a full-function joint venture to the European Commission where the total capital contribution from each of the parent companies (two very large multinational companies with vast revenues) was less than EUR 5 million and the joint venture's sales were forecast to remain below EUR 5 million for the first three financial years. In these circumstances, the cost and burden of making a formal filing (even within a Simplified Procedure) is excessive. Such an approach would allow the creation of joint ventures (particularly in new technology areas) to be treated in a more proportionate manner, as well as reducing legal and other costs for the parties in the case of small joint ventures.

In a similar vein, I would suggest that notifiable concentrations that clearly fall within paragraph 5(b) of the European Commission's Notice on a Simplified Procedure (i.e. not involving any horizontal or vertical overlap), should be wholesale excluded from the application of the EU Merger Regulation (currently they can benefit from a Super-Simplified Procedure). Such cases are inherently non-problematical, and cannot raise competition concerns under any circumstances if one assumes there is no conglomerate or portfolio effect.

Concluding remarks

European merger control law is evolutionary. With decisional practice and Court of Justice judgment should come development and refinement. Like a strong tool being carefully honed on a lathe. Legislative change can also make important improvements to the shape and the design of the tool.

My fear is that these proposals will lead to a broadening and a blunting of the tool in a way that will not contribute to the economic welfare of Europe on balance overall. Whilst it may protect the structure of markets in a few notable cases on the odd occasion from time to time, it is very likely to cause a significantly greater inconvenience and burden for companies doing business in Europe on a daily basis. Mama Mia, indeed.

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