April 8, 2015

Recent comments by the European Commissioner for Competition, Margrethe Vestager, indicate that European Commission staff still have some persuading to do over their proposal to extend the scope of European merger control to include the acquisition of non-controlling minority shareholdings. While this is to be welcomed, a new suggestion by the Commissioner that the merger control thresholds could be amended to include acquisitions of highly-valued companies with a small turnover has taken practitioners by surprise and will require more detailed consideration.

The current merger control regime

Mergers that affect markets within the European Union (**EU**) may be reviewed either by the national competition authorities (**NCAs**) of the 28 Member States, applying national merger control rules, or by the European Commission, applying the EU Merger Regulation (**EUMR**).[1] The EUMR applies when there is a lasting change in the control of an undertaking, with control being defined as the ability to exercise "decisive influence" over the undertaking in question, and the merger has an EU dimension[2]. The test of decisive influence is reasonably straightforward to apply and is met either if one company is able to make another company do what it wants or if it is able to stop the other company doing something that it does not want it to do (negative decisive influence). In essence, a merger will have an EU dimension if it involves at least two parties that have significant worldwide and EU revenues and the parties do not generate more than two thirds of their EU revenues in the same Member State.

EU merger control operates on a 'one stop shop' principle. In other words, if the EUMR applies to a transaction, it must be notified to the Commission for clearance before closing and may not be reviewed on competition grounds by any NCA. If the EUMR does not apply to a transaction, it may be reviewed by one or more NCAs, depending on whether their merger control rules apply. The EUMR allows for the Commission to review transactions that do not have an EU dimension but which are notifiable in at least three Member States, at the request of the parties, as well as providing for the 'reference back' to an NCA, at the NCA's request, of part or all of a transaction falling under the EUMR that affects competition in a distinct market within the Member State concerned.

While most national merger control regimes follow a similar approach to the EUMR to establish whether a company has acquired sufficient control over another for a merger to have arisen, the merger control rules of Austria, Germany and the UK may be triggered at a lower level than decisive influence. For example, in the UK the acquisition of 'material influence' over the affairs of another company, which can arise from shareholdings as low as 18%, will be sufficient.

Proposals for reform

In July 2014, the Commission published a White Paper[3] setting out a number of proposals to improve the effectiveness of the EU merger control regime. As well as proposing various largely technical improvements to the mechanism by which merger cases are allocated between NCAs and the Commission, the Commission more controversially proposed extended the remit of the EUMR to enable it to review acquisitions of non-controlling minority shareholdings. This proposal appears to have been triggered by the Commission's recent experience in the *Ryanair/Aer Lingus* case, in which it was unable to review Ryanair's acquisition of 29.8% of the shares of its rival airline Aer Lingus, on the grounds that the shareholding did not confer decisive influence. The UK competition authorities were able to review the transaction, however, due to the lower threshold for intervention, and ultimately forced Ryanair to reduce its holding to just 5%.[4]

According to the Commission, while cases in which the acquisition of a non-controlling interest raises competition concerns are rare, the fact that they can arise at all highlights a gap in its jurisdiction that needs to be filled. Recognising that applying the full weight of the EUMR notification regime to the acquisition of minority shareholdings could be viewed as disproportionate, the Commission proposed the introduction of a "targeted transparency" system.[5] Under such a system, the acquisition of a minority interest would need to be notified to the Commission by means of an information notice if it created a "competitively significant link". According to the Commission, such a link would arise if: (a) a company acquires shares in a competitor or vertically related company and (b) the level of the shareholding is either (i) above a set level (the Commission proposed "around 20%") or (ii) between that level and a *de minimis* floor (the Commission proposed 5%) where other factors such as board representation are present. The Commission suggested that parties might be subject to a waiting period of 15 days following receipt of an information notice, which would contain basic information on the transaction rather than a full market analysis as required for a formal merger notification. In addition, the Commission proposed that it should be free to investigate such a transaction for an additional period of between 4 and 6 months.

While the Commission presented its proposals as a reasonable and incremental extension of the EU merger regime, they were met with concern by businesses and practitioners. In particular, this move threatened to have a substantial impact on private equity and venture capital investors, who commonly acquire non-controlling minority interests and would therefore face a significantly greater regulatory burden. Although the Commission's preference for a lighter touch notification regime for such transactions—affecting only those giving rise to a competitively significant link—was welcomed, many more minority interest acquisitions would need to be assessed to establish whether any gave rise to such a link, which would in turn require some form of market analysis in each case. Given the large number of transactions affected, and the likely very small number of such transactions that might raise competition issues, at the very least the proposal was viewed as disproportionate. In addition, the effective removal of the ability of the German, Austrian and UK authorities to review at least some minority interest acquisitions seemed set to raise hackles.

Publication of the consultation responses to the White Paper on 16 March 2015 confirmed this. Businesses, law firms and trade associations objected, in particular, to the increased administrative burden and questioned whether this could be justified in light of the limited number of additional transactions that the Commission would review. A number of replies emphasised the difficulty of applying the concept of a "competitively significant link" and the need for a higher *de minimis* threshold. Many queried whether there was a case for reform at all or suggested that any new procedure should be limited to a self-assessment system with the possibility of voluntary notification at the parties' initiative. Most tellingly perhaps, the relevant ministries and competition authorities of Austria, Germany and the UK all criticised the Commission's proposal. The UK's Department for Business Innovation and Skills, for example, argued that minority shareholdings should continue to be reviewed at the Member State level only, whereas the joint submission of the German Federal Ministry for Economic Affairs and Federal Cartel Office queried whether there was even an enforcement gap to fill. In an unusual move, the Austrian Federal Competition Authority even sent in a supplemental English language summary of its initial comments, on the grounds that it considered that the Commission's own summary had not fully reflected its views. This did not bode well for the Commission, given the need for the support of the Member States to amend the EUMR. In essence, an irresistible force threatened to meet an immovable object.

The question of how to proceed with EUMR reform was therefore one of the many difficult issues for the new Competition Commissioner to tackle when she took office. No doubt realising the difficulties of proceeding with a reform in the face of such opposition, the Commissioner decided to pause and take stock. Speaking in Brussels on 12 March, she noted the "*widespread concern regarding the proportionality of the White Paper's approach*" and confirmed her conclusion the "*the balance between the concerns that this issue raises and the procedural burden of the proposal in the White Paper may not be the right one"* and risked "*adding too much red tape that would not be justified by the number of cases*". The whole issue has therefore been sent back for further consideration and discussion with Member States and stakeholders, with a clear steer from the Commissioner that this process should not be rushed.

It is unlikely that the Commission's plans to amend the EUMR are now dead. Indeed, the Commission's proposed changes to case

referral procedures were welcome and the sooner they can be implemented the better. The interesting question will be to see whether the Commission comes back with a lighter touch approach to reviewing non-controlling minority shareholdings of whether that aspect of the reforms is quietly dropped, enabling the Commission to move on more rapidly with the rest.

Interestingly, later in the same speech the Commissioner noted with apparent interest that its consultation on the White Paper had thrown up a suggestion that the Commission should be able to review deals where the target has low revenues but the transaction value is high. The Commissioner's decision to make this point suggests that this is not the last we will hear of this idea.

Introducing a 'size of deal' threshold into EU merger control would be potentially very significant, given the number of such high value/low revenues transactions that arise, particularly in the technology and life sciences sectors. While substantive competition concerns are likely to be rare, bringing such transactions within the Commission's jurisdiction would be likely to increase the regulatory burden on parties. On the other hand, it would enable parties who were keen to benefit from a merger approval process to take advantage of the Commission's one-stop shop, rather than making multiple national filings, in circumstances where this is currently unavailable or available only following a referral request. In light of recent experience, the Commission is willing to take a flexible and market-oriented approach to the review of mergers in innovative markets. As a result, such an outcome should be less worrying than the Commission's original proposal to extend its merger control regime to the acquisition of minority interests.

NOTES

1. Council Regulation (EC) No. 139/2004.
2. Although the EUMR text uses the term 'Community dimension', the 'European Community' to which this refers is now the European Union.
3. "***Towards more effective EU merger control***."
4. See the Final Report of 28 August 2013. The Competition Appeal Tribunal dismissed the subsequent appeal from Ryanair.
5. The Commission put forward a number of procedural options, including a notification system, a transparency system and a self-assessment system, with a preference for the second option.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our legal notices.

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.