

TOWARDS MORE EFFECTIVE EU MERGER CONTROL

On 9 July 2014 the European Commission issued the White Paper "Towards more effective EU merger control"¹. The White Paper proposes that the Commission be given jurisdiction to review acquisitions of certain minority interests similar to the current rules on the acquisition of control under the Merger Control Regulation.

Provided that the proposal is implemented in its current form, it may mean that any acquisition of as little as 5% of any competing business will be reviewed by the Commission. The following provides a review of the proposal and its potential consequences.

Applicable Law

Pursuant to the Merger Control Regulation², the European Commission may hear (approve or prohibit) transactions with a "Community dimension" within the scope of the Regulation. A transaction is assumed to have a "Community dimension" when certain turnover thresholds are exceeded in relation to the companies involved. Under certain circumstances, Member States may also refer a transaction to the Commission for the purpose of review.

The Regulation applies the term "merger" in regards to the covered transactions. This term includes not only mergers related to company law, but also e.g. the acquisition of direct or indirect control through a takeover.

The Regulation does not apply in situations where no change of control takes place. This means, for example, that the acquisition of a minority interest is not covered by the Regulation, unless the acquisition of such minority results in obtaining that control.

Transactions resulting in "material competitive Connection"

It is proposed that the Commission be given jurisdiction to review certain transactions that create a "material competitive connection". Firstly, this requires that there is a competitive relationship between the acquirer and the company in which a stake is being acquired. Then, one of the following conditions must be met (the materiality concept):

- A de facto ability to block (some) decisions.
- Directorship.
- Access to commercially sensitive information in the company in which a stake is acquired.

¹ http://ec.europa.eu/white-papers/index_da.htm

² The Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

Thus, it is crucial whether or not a "material competitive connection" emerges which will have to be assessed based on the above parameters.

Notification to the Commission

Initially, the proposal leaves it to the companies to assess whether there is a "material competitive connection". If the companies conclude that this is the case, they must notify the Commission of the proposed acquisition.

Companies may also voluntarily choose to submit a notification.

The notification must include information about the parties; the turnover; the transaction; the ownership before and after the transaction; the rights attached to the minority shareholder; and certain limited information on market shares. Based on this information, the Commission will determine whether it wishes to review the transaction and whether it will require a full notification.

Once the notification has been filed, the Commission proposes that the companies must wait approximately 15 working days before completing the transaction. The Commission may also decide to examine already completed transactions that have not been filed.

The next Steps

The White Paper advances previous ideas from an accompanying working paper by the Commission published 20 June 2013, and the Commission received comments from a large number of stakeholders, including the Member States. Comments on the White Paper were received by the Commission until 3 October 2014 and the Commission is likely to propose a bill, but the timing is not predictable. For example with regard to the proposed directive concerning damages for breach of competition law, which also sparked considerable debate, the Commission adopted a White Paper in 2008 and a proposal for a directive five years later, and it is now expected that the final text will be signed by the end of November 2014.

Our Assessment

In many jurisdictions outside the EU, including in the United States and Japan, the competition authorities have jurisdiction to review acquisitions of minority interests, but in Europe it is currently only in the UK, Germany and Austria that the competition authorities have that authority. The Commission aims to have authority to review non-controlling minority interests because, inter alia, the experience of the Commission and the Member States shows that in some cases they may have an adverse effect on competition and consequently the consumers. For instance, the British competition authority operates with a threshold of 15% for when to look into any transaction, and in the case of BSKyB/ITV (2007), a stake of 17.9% was found sufficient to give BSKyB material impact on ITV by virtue of the options which BSKyB was given to influence ITV's strategic decisions. The transaction was approved after a promise to reduce the shareholding to 7.5% was given.

The Commission's proposal may be problematic and burdensome for companies. The problem does not relate to the likely small number (approximately 20 to 30) of annual cases which the Commission expects to review, but the large number of transactions in which the parties will have to waste time and effort themselves on assessing whether to submit a notification. The proposed waiting period after submission of the notification and the possibility for the Commission to review already completed transactions means that any transaction may potentially be significantly delayed as there may be concerns regarding legal certainty.

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