CLIENT UPDATE

CASTING A WIDER NET – EU MERGER CONTROL REVIEW OF MINORITY SHAREHOLDING ACQUISITIONS?

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The European Commission is considering amending the EU Merger Regulation ("EUMR") to allow it also to review certain acquisitions of non-controlling minority shareholdings. This update briefly summarizes the various possible review mechanisms being considered by the Commission as well as the major concerns raised by third parties in a recently completed consultation process.

CURRENT STATUS

Under the current EUMR regime, the Commission can only review the acquisition of a minority shareholding and possibly prohibit it *ex ante* where it confers control. Control is currently defined in the sense of "decisive influence" over the target. There is no set level of shareholding that is considered to give rise to decisive influence. Acquisitions of non-controlling minority shareholdings are not subject to a merger review process.

The Commission may also intervene with respect to certain acquisitions of a minority shareholding *ex post* under the EU's antitrust provisions (Article 101 or Article 102 TFEU), but its ability to do so is limited.

The Commission considers the existing legal tools at the EU level do not sufficiently cover all possible anti-competitive effects that may arise from an acquisition of a minority shareholding. It has concluded that the enforcement gap is significant enough at least to consider seriously an extension of its merger control review powers.

At the EU Member State level, only the merger control laws of Austria and Germany require notification of certain minority acquisitions. UK law does not require notification but allows for an *ex post* review of possibly anti-competitive acquisitions. The Commission is considering both options.

COMMISSION PROPOSALS

The Commission's first proposal is simply to extend the current system of mandatory notification to all structural links where the parties meet the jurisdictional thresholds. All relevant acquisitions of minority shareholdings would have to be notified to the Commission in advance. A transaction could not be implemented before clearance.

The alternative is a discretionary review model. The Commission would decide whether and when to investigate the acquisition of a minority shareholding, either on the basis of its own market intelligence and complaints received (the "self-assessment system"), or by requiring parties to transactions that raise *prima facie* concerns to submit a short information notice (the "transparency system"). The notice would then be published in order to make third parties and Member States aware of the transaction.

If the discretionary model is adopted then a decision will also need to be taken as to whether to allow the parties to a transaction the ability to make a voluntary notification.

The Commission is considering quantitative as well as qualitative thresholds to determine which acquisitions of minority stakes should qualify for review. The UK system uses a qualitative threshold ("material influence"). The German system has both a qualitative ("competitively significant influence") and a quantitative (25%) threshold which work independently of each other.

The substantive test for review is anticipated to remain the same as for the examination of 'full' mergers; *i.e.* whether a transaction "significantly impedes effective competition". It is hoped that the Commission will also provide guidance on how this test will apply in the context of structural links, including as regards the quality of control acquired and how such links may generate anticompetitive effects.

MAJOR CONCERNS

The proposed reform could have a significant impact on many corporate transactions and make minority shareholdings a less attractive investment option. At the least, the Commission's proposals could increase legal uncertainty and transaction costs and complexity. Further, it is doubtful whether the proposals are proportionate to the scale of

the problem identified. The vast majority of minority shareholdings do not raise competition issues. Finally, it can be expected to have a disproportionate impact on those industries where, for one reason or another, minority interests are commonplace – for example, as a risk-sharing mechanism.

There is also the question of whether such a change to the EU merger regime could have wider implications. There seems to be a real possibility that an extension of the Commission's jurisdiction could result in the individual Member States within the EU doing the same at the national level. The EU is also influential in terms of affecting the policy approach taken by national regulators on a wider, global basis.

These and other concerns have been raised in a recently completed consultation process. It remains to be seen how the Commission will react to these comments. In his 2013 State of the Union address, President Barroso stressed the importance of smart regulation and declared that the European Union needs to be "big on big things and smaller on small things". It is hoped that any legislative proposal to amend the EUMR will live up to this promise.

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Please do not hesitate to contact us with any questions.

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