

Competition Law Forum

Introduction

This paper is submitted to the European Commission by the Competition Law Forum (CLF),¹ as a response to its public consultation “Towards more effective EU merger control”.²

The Commission is seeking views on possible improvements of the EU Merger Regulation, in particular:

- extending the scope of the EU Merger Regulation to the acquisition of non-controlling minority shareholdings; and
- reforming the referral system between the Commission and national competition authorities.

The CLF welcomes the opportunity to respond to the proposal to amend the European Union Merger Regulation (EUMR). This response does not purport to reflect the views of all CLF members or of their firms or necessarily the views of all individuals in the merger review group.

¹ The Competition Law Forum (CLF) was set up by the British Institute of International and Comparative Law in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum comprises of leading legal practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Liza Lovdahl Gormsen, at l.lovdahlgormsen@biicl.org or +44 207 862 5164.

² The members of the CLF merger review group are: Alexander Gaigl, OXERA; Mat Hughes, Alix Partners; Keith Jones, Baker & McKenzie; Adrian Majumdar, RBB Economics. The group’s chairman is Liza Lovdahl Gormsen, BIICL.

Extension of the EUMR to cover non-controlling minority shareholding

From a legal point of view, the concept of concentration used in the EUMR provides the basis for the Commission's powers under that regulation. The EUMR applies to all concentrations with a Community dimension.³ Under Article 3 of the EUMR any transaction or group of transactions which brings about 'a change of control on a lasting basis' by conferring 'the possibility of exercising decisive influence on the undertaking concerned' is a concentration which is deemed to have arisen for the purposes of the EUMR.

The EUMR also covers the review of minority acquisitions which cause a change of control.⁴ An acquisition of a minority shareholding can give rise to control on a legal basis depending on the rights attached to the shareholding, and minority shareholders may have sole control or joint control with a number of parties. For example, minority shareholders which have veto rights over the appointment of senior management or the determination of the budget usually have control for EUMR purposes, and this is normally also the case as regards veto rights over business plans (depending on the scope of these plans) . There is no prescribed minimum level of shareholding above which minority shareholding acquisitions will necessarily be caught by the EUMR or vice versa. It is a question of law and fact in each case. For example, in *CCIE/GTE*, a 19 percent share of the voting rights was found to give rise to control where the shareholder's prior written approval was required for all significant decisions and the shareholder had the right to appoint senior management.⁵

³ Article 1(1).

⁴ European Commission Jurisdictional Notice paragraphs 57-60.

⁵ Case NO IV/M.258.

Enforcement gap

A potential competition law problem arises where the shareholding does not confer control of the company, but merely gives the acquiring company substantial opportunities to seek to influence management and commercial strategy and the exercise of such influence can be expected to reduce competition notwithstanding that it falls short of control. The core basis for the Commission's proposals is that this may create an important gap in merger control enforcement; because where there is no concentration within Article 1(1) of the EUMR, the Commission does not have the legal power to request the acquiring company to divest its shareholding under Article 8(4) of the EUMR. This was the issue in the *Aer Lingus* case.⁶ The General Court made clear that the concept of concentration cannot be extended to cases in which control has not been obtained and the shareholding does not, as such, confer the power of exercising decisive influence on the other undertaking.⁷

The Commission is seeking views on whether to extend the scope of the EUMR to the acquisition of non-controlling minority shareholdings. It is the CLF's view that to broaden the Commission's power under the EUMR, there must be conclusive evidence of an enforcement gap and the new instrument must be capable of eliminating this gap.

The CLF questions how considerable this gap is or even whether there is a gap at all. We are not convinced, based on the evidence provided in the White Paper and the Commission staff working document, that there is a significant enforcement gap. Even if there is an enforcement gap, the CLF

⁶ T-411/07 *Aer Lingus v Commission*.

⁷ *Ibid*, paragraph 64.

wonders whether it is significant enough to require an extension of the EUMR or whether it is better dealt with under Company Law. If the legislature had wished to grant the Commission broader powers it would have added a provision to that effect.

Even if it is assumed that regulating non-controlling minority shareholding is a good thing, we need to better understand how big the problem is. The Commission estimates 20-30 cases annually. Our perception is that there are a large number of transactions, particularly where financial institutions and investors acquire minority stakes across portfolios of business, which would require review. This would include investments by pension funds, hedge funds, private equity funds, venture capital funds, and banks which acquire minority stakes in the context of debt to equity swaps in the context of re-financing or rescuing businesses.

Even if the Commission's estimate is reasonable – which we doubt it is based on the evidence provided in the White Paper – we need to be careful that perfection does not become the enemy of the good. While such an enforcement gap might exist in those Member States that do not, at present, have any means of reviewing non-controlling minority interests in the context of their national merger control regimes, it does not appear to be significant. For example, consider the recent merger reform in Italy, which took effect on 1 January 2013,⁸ even eliminating the need for smaller transactions to be notified.⁹ Like under the EUMR, the Italian Competition Act applies to the

⁸ Law No 27/2012.

⁹ This meant that the number of merger notifications decreased from 459 in 2012 to 57 in 2013.

acquisition of minority shareholdings which confer control, but the newly reformed Act does not regulate non-controlling minority shareholdings. The current review of the Italian merger regime contains three proposals, and non-controlling minority shareholdings is not one of them. This seems to indicate that acquisition of non-controlling minority shareholdings is not thought to be a major issue in Italy. Another example is the recent amendment of the Dutch merger control threshold, which has been increased to €150 million. Had the Netherlands Authority for Consumers and Markets considered non-controlling minority shareholding a problem, it would have been obvious to introduce a legislative change while it was amending the merger control thresholds, but no such change was considered necessary. The Irish Competition Authority's recent review of its merger guidelines did not include a discussion of non-minority shareholdings either.¹⁰ Looking at recent reforms on the national level, there appears to be little evidence that acquisitions of non-controlling minority shareholdings are causing major problems for individual Member States. Thus, the CLF would like to see the Commission provide some more examples of situations where there is likely to be a problem.

Administrative and regulatory burden

There must be a proper cost benefit analysis. Striking the right balance between the administrative burden of notification versus the problem is crucial. The Commission appears to underestimate the massive administrative burden that the proposed 'targeted transparency system' will impose on companies. While the White Paper acknowledges that 'only acquisitions of a "competitively significant link"' would require the submission

¹⁰ Notice N/13/001 of 20 December 2013.

of an information notice to the Commission', the information notice still requires companies to provide meaningful information, including describing an entire portfolio of investments to assess overlaps, and that is never going to be an easy task. The increased regulatory burden could have the unfortunate consequence of discouraging minority acquisitions, where minority shareholders may provide valuable funding and management expertise.

Besides the increased regulatory burden on companies, the Commission's administrative burden would increase. Comparing Germany, which operates with a system of mandatory notification of acquisitions of non-controlling minority shares if they qualify as a concentration under the German Competition Act (GWB),¹¹ with Spain, Italy, France and the EU all of which have no such regulatory power, Germany had the most merger notifications in 2013. Compared to Spain's 59 notifications, Italy's 57 notifications, France's 214 notifications and EU's 277 notifications, Germany had 1091 merger notifications.

Competitively significant link

If the EUMR is to be extended to include the regulation of non-controlling minority shareholdings, the CLF would strongly recommend setting a very clear and proportionate threshold. The current proposal of (i) 20 percent or (ii) 5-20 percent including some "additional factors" is too uncertain and likely to capture a significant proportion of harmless shareholdings between 5-20 percent. The Commission's proposal appears to be a mix of the

¹¹ GWB section 37(1) No. 3 lit b.

Germany system, which operates with plus factors and the UK system, which is concerned with material influence.¹²

A minority shareholding of 5-20 percent is generally unlikely to lead to significant competition concerns unless it is accompanied by a sufficient degree of corporate control. For example, in the case of a horizontal shareholding, the acquiring firm's financial incentives to compete less aggressively against the target — due to the (indirect) profits that it can expect to flow back through its shareholding — are likely to be very small. In the *Ryanair/Aer Lingus* case, the UK Competition Commission (CC) was not concerned that Ryanair's shareholding in Aer Lingus would provide it with an incentive to compete less aggressively against Aer Lingus.¹³

If the Commission decides to go ahead with its proposed approach, it is important that it provides clear guidance on how it defines 'additional factors' and through what mechanisms it expects those factors to impact the degree of control over the target. In our view, the current proposal is not sufficiently clear in this respect. The Commission proposes to consider a broad range of 'additional factors' in order to determine whether a minority

¹² In the UK, deciding whether a minority shareholding is capable of conferring material influence, the competition authority will consider several factors, including **1)** the size of the relevant shareholding, **2)** the identity of the shareholder, **3)** the way in which the other shares are dispersed, **4)** the existence of special rights attaching to the holding and **5)** restrictions on voting rights. The authority will also consider all surrounding factors such as whether **6)** the acquirer has board representation, **7)** the status and experience of the acquirer, **8)** the level of influence they have over shareholders and **9)** the existence of any consultancy agreement between the acquirer and the company.

¹³ See paragraph 7.148, Competition Commission (2013), 'A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc', 28 August.

shareholding of 5-20 percent qualifies as a ‘competitively significant link’, including information rights and historical attendance levels at shareholder meetings. In practice, the assessment of those factors may be subject to a significant degree of uncertainty. The self-assessment of the degree of influence resulting from a minority shareholding may therefore pose a significant regulatory burden on firms.

In the *Ryanair/Aer Lingus* case, the CC undertook a substantial piece of analysis in order to assess the degree of Ryanair’s control over Aer Lingus resulting from its minority shareholding — including an economic model to predict the impact of different voting scenarios on Ryanair’s effective voting power.¹⁴ The CC’s analysis accounts for a large number of factors which were considered to affect the level of Ryanair’s control, and the results of this analysis were subject to a significant degree of uncertainty.¹⁵ It would also be necessary to consider whether the votes in question would relate to matters which could be used to reduce competition appreciably in practice, and also make some assumptions about whether other shareholders which account for the majority of votes would not vote against such developments. We would expect that under the Commission’s current proposal firms would need to undertake similarly extensive pieces of analysis in order to assess the degree of control, and would face similar uncertainties. Moreover, the proposal offers no practical cut-off between cases that are likely to be “significant” and those that are not. This issue is increased given the wide scope of the proposed jurisdictional threshold.

¹⁴ Ibid, sections 4-8.

¹⁵ For example, the CC’s model suggests that Ryanair’s shareholding would need to be reduced to a level of somewhere between around 2-20 percent, depending on the underlying assumptions.

One solution would be to set out some market share thresholds. Obviously, any market share threshold might risk in some exceptional circumstances that the acquisition of a minority stake might be anti-competitive, perhaps particularly where the concerns relate to the risk of anti-competitive coordination. However, extending the scope of the EUMR as envisaged risks creating substantial legal uncertainty, and the Commission itself notes that the last case in which it had concerns as to coordinated effects was in 2008. Vertical and conglomerate mergers rarely raise concerns.

EUMR already effectively ignores market concentrations where the parties have a combined share below 20 percent and there are countless other market share thresholds to be found in EU competition regulations. A threshold or safe harbour would really assist businesses with the self-assessment process.

The other issue which arises is what process should be followed if the Commission wishes to review potentially problematic mergers involving minority mergers. The Commission proposes that a transaction will be subject to a compulsory waiting period (15 working days is proposed) once an information notice has been submitted, and the parties will be allowed to submit a full Form CO. The Commission will be able to investigate any minority stake acquisition (whether or not completed) within a period after the submission of an information notice (4-6 months is proposed). In the case of a completed transaction, the Commission will be able to impose interim measures to avoid the integration of the businesses pending its investigation. Any compulsory waiting period would not seem appropriate given that minority shareholding can readily be reversed, unlike full mergers.

Any cooperative agreements between a non-controlling shareholder and an undertaking will fall for consideration under Article 101.

Referral system

The CLF welcomes a simplification of the provisions governing the referral of merger cases from the national level to the European level (Article 4(5) and Article 22). To speed up these referrals, the White Paper proposes a single-stage procedure for referrals pursuant to Article 4(5). We support this change. The White Paper also lays out changes to referrals that are made at the request of one or more Member States (Article 22). The aim is to simplify the procedure and to allow for entire cases to be handed over to the Commission by way of a single referral. We welcome these changes.

Conclusion

One of the arguments for having a pre-notification system is the difficulty it causes having to divest following integration of two undertakings. There is no issue of integration following an acquisition of a non-controlling minority shareholding, which speaks in favour of having a self-assessment system. In such a system, the Commission would be able – if necessary – to investigate within a period of four months from the acquisition. Should the Commission however move forward with the targeted transparency system, the CLF would encourage the Commission to identify a very clear and proportionate threshold, which should not be lower than 25 percent, in addition to a well-defined list of additional factors to be taken into consideration.