Minority shareholdings might become subject to mandatory competition review

In a speech late last year the EU's Commissioner for Competition identified that the European Commission is considering a revision to the EU Merger Regulation that would mean acquisition of minority shareholdings require prior authorization by the Commission.

The question of minority shareholding control is not new, as it was debated during the revision of the current version of the EU Merger Regulation, adopted in 2004. However, the conclusion on this subject in the Green Paper revising the EU Merger Regulation was that, despite the absence of "*comprehensive data as to the prevalence of minority shareholdings and interlocking directorships*", "*it appears that only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 EC*".

The *Ryanair/Aer Lingus* merger saga brought the question of minority shareholding back on the table for discussion by the European Commission. This case highlighted the differences in merger control powers between some national competition authorities that are empowered to review a minority acquisition (the UK in the *Ryanair* case) and the European Commission, whose competence to review such matters is debatable. Indeed, it is noteworthy that at the EU Member State level, for those countries that do investigate minority shareholdings under their merger regimes, such cases represent a large proportion of prohibition decisions (for example, 11% of prohibition decisions in Germany between 1990 and 2008).

The *Ryanair* case concerns the Irish airline, Ryanair, which held an existing stake of just over 25% in Aer Lingus, a competing Irish airline. Ryanair sought to take full control of Aer Lingus, a transaction that was blocked by the European Commission under the EU Merger Regulation. Aer Lingus then applied to the European Commission, asking it to order Ryanair to divest its existing stake. The European Commission concluded that it did not have the legal powers to do so because it could only order divestment if the shareholding conferred control, defined as at least "decisive influence", and Ryanair's shareholding did not do so in the circumstances. In contrast, the UK's Competition Commission has the power to investigate a shareholding that confers material influence, and thus opened an investigation into the matter – an investigation that is currently suspended as Ryanair has again sought to acquire full control of Aer Lingus.

Following the European Commission's decision that it did not have the legal powers, the Commissioner for Competition stated that he had instructed his services, DG COMP, *"to look into this issue and see whether it is significant enough for us to try and close this gap in EU merger control."* As a result, the European Commission opened two calls for tender to deliver studies on the level of minority shareholdings in the EU and their anti-competitive impact, if any. The results of these studies are awaited.

The concerns that are attributed to minority shareholdings include those persons holding shares in a competing company who may want to 'soften' competition between both undertakings. Prohibited information exchanges and tacit collusion may also be eased. Some argue that these concerns can be handled on the basis of current Treaty provisions, and thus there is no need to include minority shareholding acquisitions within the mandatory prior-consent regime of the EU Merger Regulation. In particular, anti-competitive conduct deriving from a minority shareholding can fall under the scope of Articles 101 and 102 of the Treaty on the Functioning of the European Union. There are obvious limitations to the application of Articles 101 and 102. Application of Article 101 requires the existence of an agreement or collusion between undertakings, which is not the case if the shareholder is a natural person, and arguably does not apply to shares bought on an open market exchange. Article 102 requires that a dominant position is held by an undertaking, which is a rare

position to be in and would thus be relevant only to a few matters. For these reasons, current Treaty provisions do not ensure a systematic scrutiny of minority share acquisitions that might have an anti-competitive impact because there is no ex-ante automatic review and an ex-post review is subject to uncertainties, not the least of which is that the shareholding might not come to the attention of the European Commission.

Difficult issues will have to be addressed if the European Commission decides to launch a revision of the EU Merger Regulation. Assuming the DG COMP studies identify the existence of a gap, the size of the gap is also debated. Based on the experience of EU Member States that have minority shareholding control, two models could be followed by the Commission.

In the United Kingdom, the test for jurisdiction is met in the case of "*ability materially to influence the policy of the target firm*". Such criteria, much more flexible than the EU test, allow a review of minority share acquisitions as low as 15% in some cases. Whilst the UK test benefits from being broad and quasi-effects based, it arguably lacks certainty. In Germany, a share acquisition is considered as a concentration when the 25% threshold of the capital or the voting rights of the target company is reached, or when the shareholding allows the shareholder to directly or indirectly exercise a "*competitively significant influence*" on another company. The latter criteria, which also lacks certainty, has allowed the German competition authority to review minority share acquisitions far below 25%.

A revision of the EU Merger Regulation would have a significant impact on the administrative burden of companies and of the European Commission and raise compliance costs for companies. As an example of this, a co-operation agreement that is not a 'joint venture' (as that term is defined in the EU Merger Regulation) is not subject to the EU Merger Control regime, but it seems that it could be caught by a regime for minority share acquisitions.

The European Commission will, however, probably have to define a *de minimis* threshold if it does not want to raise its control activities to such proportions that it would lack the necessary resources and would give rise to concerns as to proportionality. This could be in the form of a market share or a voting rights threshold, or it may adopt a test similar to that in Germany, as described above.

A revision of the EU Merger Regulation requires adoption by both the European Parliament and the EU Council. However, in seeking a revision, other changes might be debated, such as those that reflect the argument by some politicians for a need to have European champions to be able to better compete in the global economy.

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