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Law and Economics Workshop

European Commission White Paper: "Towards more effective EU merger control"

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Concurrences

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The problem with minority shareholdings

- **Currently, most minority shareholdings are not caught under EUMR review.**
  - **Test = "control", i.e. a shareholding that allows the acquirer to exercise "decisive influence" over the company.**

- **But even short of conferring decisive influence, minority shareholdings can cause harm to competition.**

  Regarding "the issue of minority shareholdings, […] we are probably looking at an enforcement gap".

  Commissioner Almunia, 10 March 2011

- **A non-negligible problem – example of the Bundeskartellamt:**
  - **Non-controlling shareholdings represent 13% of notifications.**
  - **Cases involving *competitively significant influence* (holdings under 25%) represent only 1% of notifications but 10% of prohibitions.**

Recent significant minority shareholdings

- **Horizontal examples**

x ➢ ***A-TEC/Norddeutsche Affinerie***

x ➢ ***Sky/ITV***

x ➢ ***Ryanair/Aer Lingus***

? ➢ ***VW/Suzuki***

? ➢ ***Telefónica/Telecom Italia***

? ➢ ***Air France/Alitalia***

? ➢ ***Intel/ASML***

? ➢ ***Marine Harvest/Grieg Seafood***

? ➢ ***LVMH/Hermes***

- **Vertical examples**

? ➢ ***BMV/SGL Carbon***

? ➢ ***Nestlé/Givaudan***

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Targeted Transparency – How would it work? (1)

- **A new jurisdictional (substantive?) test – "competitively significant link"**
  - **Minority shareholdings caught if there is a *prima facie* competitive relationship (horizontal or vertical) between acquirer and target.**

- **Obligation to file an "Information Notice"**
  - **To enable EC to decide whether to investigate → full notification**
  - **To enable Member States to consider referral request**

Targeted Transparency – How would it work? (2)

- **Suggested Suspensions**
  - **Statutory waiting period during which transaction cannot close (e.g. 15 WD)**
  - **National deadlines in case NCA indicates intent to make upward referral request (to avoid conflicting rulings)**

- **Penalty for failing to file Information Notice?**

Practical difficulties with Targeted Transparency (1)

- **Determining when filing an Information Notice is necessary**
  - **"Competitively significant link" lacks clarity as a jurisdictional standard:**
    - **Shareholding "in a competitor or directly vertically-related industry"**
      - **would take into account "whether the companies are active in the same sector and the same geographic area and, based on the self-assessment of the parties, whether the acquirer has a competitive relationship to the target".**
      - **Meaning of "sector"? "Directly vertically-related industry"?**
      - **Actual competitors only; or also potential competitors?**
  - **Acquirer's (lack of) knowledge of target's business (especially venture capital transactions)**

Practical difficulties with Targeted Transparency (2)

- **Compare UK "share of supply" criterion**
  - **Similar lack of certainty – but in a voluntary filing system**
  - **Horizontal only, not vertical**

- **Practical consequences for business and for the Commission:**
  - **Creating undue costs, delays and execution risks for simple investments**
  - **Many filed Information Notices will not be objectively necessary as they relate to innocuous transactions.**
  - **Avoidable costs and burden for all concerned**

Philip Morris remains… (1)

- **White Paper sidesteps question to what extent Art. 101 may apply to minority shareholdings:**

> **"Regarding Article 101 TFEU, it is not clear whether acquiring a minority shareholding would constitute an "agreement" having the object or effect of restricting competition in all cases."**
>
> **EC White Paper "Towards more effective EU merger control", para. 40.**

Philip Morris remains… (2)

- ***Philip Morris*: Minority shareholding assessed under Art. [101]**

  An "*unambiguous confirmation that Article [101] and [102] apply to transactions relating to change in corporate ownership*".

  Peter Sutherland, Competition Commissioner,
  EC Press Release, 18 November 1987

  "In the *Philip Morris* Judgment the Court of Justice acknowledged that the acquisition by one company of an equity interest in a competitor may serve an instrument for influencing the commercial conduct of companies in question so as to restrict or distort competition on the market on which they carry on business".

  EC Decision in *Warner-Lambert/Gillette and Others* of 10 November 1992

Philip Morris remains … (3)

- **What would constitute the restrictive "agreement" for the purpose of Art. 101?**

"When it comes to the purchase of minority shareholdings, it is difficult if not impossible to identify a relevant "agreement" in the first place, for instance in the case of purchases via the stock exchange or from multiple sellers. Even where a share purchase agreement exists, these transactions are on the face of it competition-neutral, which makes it in most cases legally difficult to prove an anti-competitive object or effect. Alternatively, one would have to demonstrate that the articles of association or by-laws of a company were anti-competitive. This is far-fetched, as their purpose is to organise the corporate governance of a legal person."

EC Policy Brief *Minority Power – EU Merger Control and the acquisition of Minority Shareholdings* (emphasis added)

Philip Morris remains … (4)

- **Distinguish "purpose" (= object) from effect.**
- **Can Art. 101(2) nullity be limited?**
- **Different substantive test of Art. 101 vs. EUMR**
- ***Philip Morris* wrongly neglected, but not a sufficient solution**

Voluntary notification of minority shareholdings – a viable alternative

- **Parties themselves choose whether to notify their minority shareholdings.**
  - **System already in use in the UK**
    - **"Share of supply" defines jurisdiction, but filing is never mandatory.**
- **No suspension period – no delay for investments**
  - **EC would have limited period for consideration post-implementation (4-6 months).**
- **Natural incentives to notify**
  - **Shareholding by agreement → investors want legal certainty**
  - **Adversarial shareholding → victim will come running**

Ensuring coherence with existing review regimes (1)

- **Concern: German and Austrian NCA require compulsory notification of minority shareholdings in certain situation.**
  - **Exclusivity of EC review**
  - **Under voluntary notification, certain shareholdings that would at present require notification to NCAs would perhaps not receive review.**

Ensuring coherence with existing review regimes (2)

- **Solution = where a mandatory NCA filing would be pre-empted, require parties to choose between EC or NCA notification:**
  - **Either by reference to jurisdiction**
    - **exclusive jurisdiction resides with regulator to which parties notify**
    - **still subject to possibility of referral**
  - **Or by reference to the referral procedure**
    - **exclusive jurisdiction with EC, but**
    - **notification to NCA would be deemed to be referral from the EC to the NCA.**
    - **transfer back to EC would be possible**
- **Parties have incentive to notify to regulator which is best placed to assess transaction.**
  - **Pre-notification contacts would permit advance verification.**

Welcome extension of Article 8(4) EUMR (1)

- **Currently allows EC to unwind a concentration:**
  - **Following a prohibition decision (where the concentration has already been implemented)**
  - **Following contravention of conditions**

- **But does not extend to a non-controlling shareholding**
  - **e.g. Case T-411/07 *Aer Lingus Group v Commission***

Welcome extension of Article 8(4) EUMR (2)

- **Extension of Article 8(4) EUMR to minority shareholdings would:**
  - **Provide EC with tools to address even those minority shareholdings which are not notified**
  - **Enable EC to order divestiture of initial stake where full takeover fails**
  - **Create incentive for parties to notify their potentially problematic minority acquisitions**

Referrals – Proposed reform

- **Referrals up from NCA to EC (by request of the parties) – Art. 4(5)**
  - **Abolish Form RS**
  - **Instead, direct notification to EC, which then forwards it to the NCAs.**

- **Referral down from EC to NCA (by request of the parties) – Art. 4(4)**
  - **No need to state "significant effect in a market" at the national level.**

- **Referral up from NCA to EC (by request of an NCA) – Art. 22**
  - **Referral would be EEA-wide, unless another NCA objects**
  - **Suspension of other NCA decision deadlines to avoid contradictory holdings (i.e. clearance in one Member State prior to referral request by another)**

Additional EC suggestions (1)

- **Further simplifications for "no overlap" cases**
  - **EC would have power to adopt block exemptions under EUMR.**
- **Extra-EEA JV not caught under EUMR, even if turnover thresholds met**
- **Increase of (available) voluntary suspension days for Phase II investigations**
  - **20 WD → 30 WD**
  - **More flexibility for commitments (compare *Liberty Global/Ziggo* vs. *Telefonica/E-Plus*)**

Additional EC suggestions (2)

- **Warehousing transactions (banks holds shares/assets interim) assessed as first step of ultimate acquisition.**

- **Sanctions for misuse of confidential information received through an EC proceeding**
  - **covers the parties as well as third parties (e.g. complainants)**

Questions?

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