New Challenges in Merger Control in Europe

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All views expressed are strictly personal and do not necessarily reflect the official position of the European Commission

Improving the functioning of EU merger control

- The EU Merger Regulation is well proven …
- … but all legal instruments should regularly be reviewed ("Refit" programme)
- 2 on-going policy projects:
  - Simplification
  - Possible reform of the Merger Regulation

Simplification – Objectives

- Streamline procedures
- Cutting red tape for businesses, in particular for non-complex cases
- Focus resources on problematic cases

Simplification

- Extending scope of the simplified procedure
  - Significant increase of market share thresholds and introduction of new category for small increments
  - Shifting ca. 10% of cases from normal to simplified procedure – resulting share expected around 70%
- Streamlining of Form CO, Short Form CO, Form RS
  - Significantly reduced information required
    - e.g. higher threshold for affected markets, overall less market shares
    - *De minimis* information requirements for JVs with no activities in EEA
  - More scope for waivers
- Accelerating pre-notification process
  - Continued to be offered as service, may not be needed in *all* categories of simplified cases

Simplification: State of Play

- Public consultation during 1st half of 2013
  - Overall very positive reaction
  - Critical comments focus mainly on:
    - » Concept of "plausible alternative" market definition
    - » Scope of requirement to supply internal documents
- Modifications envisaged following public consultation:
  - Address main points raised by stakeholders, in particular for information requirements
  - Some more flexibility for pre-notification – more responsibility of parties
- Adoption by Commission by autumn 2013

Possible reform of the Merger Regulation

- Consultation paper "Towards more effective EU merger control" published 20 June 2013
  - No need for a major overhaul of the EUMR (report on functioning of the EUMR, 2009).
  - Limited number of issues examined:
    - Minority shareholdings
    - Referrals
    - Technical issues
  - Open discussion launched on possible improvements. No decision taken yet on amendment of the EUMR.

Enforcement gap in relation to acquisition of non-controlling minority shareholdings?

- Under the EU Merger Regulation:
  - The Commission has no jurisdiction to examine cases of acquisition of minority stakes which do not confer control …

… but where it has jurisdiction, the Commission:

  - takes existing minority shareholdings into account when analysing effects of a merger on competition
  - may require divestiture of minority stake as condition for clearance

… leads to rather unsatisfactory situation that control depends on timing of acquisition of minority stake

- Articles 101 and 102 TFEU insufficient legal basis for comprehensive tackling of the problem

Minority shareholdings – theories of harm

Theory of Harm	Silent Stake	Rights short of control
Horizontal unilateral effects	✓	✓
Coordinated effects	✓	✓
Input foreclosure	(✓)	✓
Customer foreclosure		✓

Enforcement Gap – Findings

- Existing legal tools at EU level may not cover all possible anti-competitive effects deriving from acquisitions of minority shareholdings
- Need to extend EU merger control to the acquisition of non-controlling minority shareholdings
- Limited number of cases expected, but relevant enforcement activity
- Strike the right balance: Design system that
  - ensures to catch the (relatively small) number of potentially anti-competitive transactions
  - avoids unnecessary administrative burden
  - fits in the existing system of merger control at EU and national levels

Minority shareholdings – Design and Options

Two basic options:

- Notification system:
  - Extend current system of ex ante notification of mergers to minority shareholding
- Selective system:
  - Commission may investigate transactions most likely to raise competition concerns; Commission's discretion to examine cases
  - No stand-still obligation

Minority shareholdings – Design and Options (cont'd)

Selective system: possible designs

- Self-assessment system
  - No filing obligation for the parties
  - Commission relies on market intelligence and complaints
- Transparency system
  - Parties file short information notice (to be published on website)
    - to inform the Commission
    - to allow Member States to ask for referral

Minority shareholdings – Design and Options (cont'd)

- Commission's powers to examine structural links
  - Definition of transactions caught:
    - Quantitative threshold (10% like in US): high number of cases, of which only a small part may be problematic
    - Qualitative threshold (like material influence): small number of cases, most of which may warrant scrutiny
  - Delineation to Article 101 TFEU / joint ventures
- Delineation of competences between Commission/Member States
  - Turnover thresholds
  - Referrals
- Procedure
  - Voluntary notifications in selective system?

Referral system

- Pre-notification referrals from Member States to Commission (Article 4(5) EUMR):
  - Streamline procedure: maintain system, but parties can directly notify to the Commission
- Post-notification referrals from Member States to Commission (Article 22 EUMR):
  - Enhance legal certainty: only a competent Member State can refer case to Commission
  - Achieve "one-stop-shop": Commission can accept referral if no competent Member State opposes; then it has jurisdiction for the whole EEA
- Commission open to consider possible improvements for referrals from Commission to Member States

Next steps:

- Public consultation until mid-September
- VP Almunia to decide on the basis of the public consultation and the discussions with Member States whether to proceed with a legislative proposal