EU Proposals to Regulate the Acquisition of Minority Shareholdings

WEDNESDAY, OCTOBER 15, 2014

The EU is currently planning to introduce a new merger control-based filing requirement for acquisitions of minority shareholdings.

There has been much debate about this in Europe in the last few years. There was particular focus on the issue after Ryanair bought a stake in Aer Lingus and then, when the European Commission ("EC") refused to authorize it to take over Aer Lingus, bought additional shares which gave Ryanair nearly a 30% shareholding in Aer Lingus.

Ultimately, the UK's Competition Commission initiated proceedings against Ryanair and required Ryanair to reduce its shareholding in Aer Lingus to 5%. The Competition Commission found that Ryanair had been able to exercise some influence over Aer Lingus through its minority shareholding by, amongst other things, blocking adoption of special resolutions in shareholding meetings (which it had done some 13 times).[1]

Unlike the UK Authority, the EU was unable to require Ryanair to sell its minority shareholding and this led to an initiative at EU level to introduce a new review system by which the Commission could conduct "*ex ante*" (i.e., before consummation), examinations of acquisitions of minority shareholdings. Some jurisdictions already have similar authority, including the UK, Germany and the United States.

The EC's current proposal is that companies that acquire a 20% stake in a competitor or vertically related company would have to submit a short "information notice" to the EC. The EC would then have authority to require a full notification, if it determines there is a substantive competition concern. The EC is also proposing that a similar process would apply to acquisitions of 5% to 20% stakes, if there are additional factors such as board seats or special voting rights, which give the prospective minority shareholder more ability to influence the competitor or vertically related firm.

After submitting the notice, there would be a mandatory waiting period, currently proposed to be 15 working days, while the Commission decides whether to require a full notification. If the acquisition

is completed without Commission action, there would also still be a further four to six month "prescription period" during which the Commission could investigate the transaction. (Further information is available here).

WilmerHale has just participated in the second round of consultation with the EC on its proposal. The EC's consultation materials are available here, and WilmerHale's comments are available here). (We also address issues on proposed changes to the rules on referrals of merger cases between the EC and the Member State Competition Authorities.)

WilmerHale's main recommendations on minority shareholdings are:

- If the EC decides to expand its jurisdiction to include acquisitions of non-controlling minority shareholdings, the EC must be mindful not to impose unnecessary and disproportionate administrative burdens on business.
- The EC should adopt "Guidelines on the Acquisition of Minority Shareholdings." These should address, in particular, the EC's potential theories of harm and the key criteria that determine whether an acquirer of between a 5% and 20% shareholding would obliged to submit an information notice.
- There should be a safe harbour, below which no information notice could be required, set at a 10% shareholding, not 5% as proposed.
- The information notice to the EC on the acquisition of a minority shareholding should be accompanied by the acquirer's internal presentation documents to management regarding the share acquisition; or, if not available, market share estimates. Publicly available information should normally suffice as estimates.
- There should not be a prescription period during which the EC can investigate an acquisition of a minority shareholding after the acquisition, provided that the acquirer has correctly informed the EC of this transaction. The requirement that the acquirer file an information notice and the mandatory waiting period should be sufficient.
- The EC should have to adopt a reasoned decision if it requires that an acquisition of a minority shareholding be notified in full under the merger rules.

This issue has momentum. It appears likely that legislation will be introduced in the next year or so, although the details are still being discussed.

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[1]The Competition Commission's report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc. The UK Competition Appeal Tribunal rejected Ryanair's appeal of the Competition Commission's decision. Ryanair has now appealed to the Court of Appeal.

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