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EU Merger Law May Soon Extend To Minority Acquisitions

Law360, New York (August 13, 2014, 10:14 AM ET) --

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Economically, minority shareholdings — ranging from minimal passive investments to strategic control — are a significant phenomenon. Globally, however there is a wide variety of approaches to antitrust regulation of these types of transactions: While antitrust agencies in Germany, Austria and a number of other countries require prior notification for acquisitions of minority shareholdings of 25 percent and above, others look at additional factors such as the rights gained through the minority shareholding (for example, the U.K.'s "material influence" test examines a combination of factors in ascertaining whether or not a particular minority acquisition is covered). In the U.S., Section 7 of the Clayton Act affords partial equity investors a safe harbor in the form of the "investment only" exception.

It is surprising that there is not a greater degree of uniformity in different antitrust agencies' treatment of minority shareholdings. It is well established that minority shareholdings that do not appear capable of conferring "decisive influence" over a firm may, under certain circumstances, still give rise to unilateral and coordinated effects. Economic research has shown that these concerns can sometimes arise even if a competitor holds an entirely passive minority interest in a competitor and is not represented in the competing company's board, nor has access to sensitive information.

In the EU, prior notification of a minority acquisition has only been required where it would lead to the acquisition of decisive influence over the target company. All of that, however, may be subject to significant change if draft proposals recently put forward by theEuropean Commission become legislative fact. These changes will, if adopted, affect in particular companies seeking to acquire minority interests in companies with EU operations.

The commission's potentially far-reaching proposals, set out in detail in a white paper published on July 9, would result in the extension of its merger control jurisdiction under the EU Merger Regulation (EUMR) to cover the acquisition of minority rights that would create a "competitively-significant link." The commission's white paper proposes a voluntary system of self-assessment, under which investors would analyze their proposed acquisitions and, on determining that the acquisition would give rise to a relevant "link", the investors should then submit an "information notice" to the commission, which could lead to a full merger notification under the EUMR.

The commission's white paper has been constructed off the back of a consultation that the commission launched in June 2013, seeking preliminary views from stakeholders as to how the commission should go about dealing with what it viewed as an "enforcement gap."[1] That consultation and the commission's perception of a gap in its enforcement powers find their roots in the commission's experience from cases such as Ryanair, where the General Court of the EU made clear that the commission has no power under the existing EUMR to require a divestment of minority shareholdings that do not confer "decisive influence" on the acquiring party.[2] If that "gap" is indeed closed, in the form set out under the commission's white paper, the resulting changes to the regulatory landscape in the EU — and in other jurisdictions where EU policy continues to bear significant influence — could be significant.

The white paper does include other proposed changes which are less likely to cause much controversy: The commission proposes to change the rules on how cases are referred between national competition authorities and the commission, as well as narrowing the scope of the commission's jurisdiction to review certain categories of joint venture transactions.

In this respect, the white paper does give encouraging signs of a conscious effort by the commission to lessen the regulatory burden on companies in terms of case referrals and transactions that have no real impact on the European Economic Area. However, the centerpiece of the commission's white paper — a significant extension of the commission's jurisdiction to review acquisitions of minority shareholdings — would represent an expansion of the administrative burden for companies and is all but certain to form the focal point of stakeholders' comments during the consultation period.

Proposed Expansion of EUMR to Cover Minority Acquisitions

Although the options proffered by the commission in its June 2013 consultation had included the fairly draconian approach of imposing a mandatory filing obligation on any company acquiring a minority shareholding above a certain percentage, the commission has, in the end, rejected taking this more severe route.

Instead, the white paper sets out a proposed hybrid of sorts, a "targeted transparency system." This equates to a requirement that an acquiring party submit an "information notice" to the commission if its acquisition would create a "competitively significant link" (assuming that the parties to the transaction also meet the existing revenues thresholds set out under the EUMR — generally parties who have less than €100 million each in the EU will not meet those thresholds).

The commission would then publish details of the transaction and would have 15 working days to assess whether or not the parties should be required to submit a full notification of the transaction (third parties and EU member states would also have the opportunity to contact the commission to voice their concerns or other comments). The parties would be required to suspend closing until the initial 15-working-day period lapses, unless the commission calls for a full notification, in which case closing would be suspended until the commission issues a formal merger clearance decision.

The commission proposes that companies determine for themselves whether or not their transactions will lead to the acquisition of a "competitively significant link." The acquisition of an interest in a competitor or a vertically linked company will qualify, provided that the shareholding is either 20 percent, or if it is between 5 and 20 percent with certain accompanying minority veto rights falling short of strategic control in the traditional sense (the right to appoint a board member or access to commercially-sensitive information, for example).

Challenges Inherent in the Proposed Self-Assessment System

The commission's proposed new system would be predicated on parties self-assessing whether or not their minority acquisitions meet the criteria for submission of an information notice. While the proposed new self-assessment system is, in theory, a more flexible approach than introducing a mandatory notification system for all acquisitions of structural links above a certain threshold, the proposals in the white paper still represent an addition to the existing administrative burden on companies.

The bottom line is that companies would need to analyze various minority acquisitions that they have not previously had to assess and potentially submit information (including market share data) to the commission that they have not had to submit before.

Experience at the national level in Germany and the U.K., which also treat minority acquisitions as potentially notifiable provided that they give rise to some sort of "competitive significant influence" ("material influence" in the case of the U.K. — Austria also captures acquisitions of 25 percent or more), would suggest that assessment of the significance of any given minority shareholding rights is a fact-specific exercise that is susceptible to multiple, alternative interpretations.

In practical terms, the potential for the implementation of these proposals to lead to increased legal uncertainty is clear, with parties caught between not notifying and facing the risk that the commission will investigate retrospectively, or choosing to notify even the most minor transactions in order to avoid that uncertainty.

Other concerns raised by the commission's white paper include the loss of confidentiality as regards transactions that are subject to an information notice: Parties who may otherwise have wished to retain a level of confidentiality for a particular minority acquisition will have its details made public upon filing of an information notice.

A further element of uncertainty concerns a proposed four- to six-month period following the submission of an information notice, during which the commission is entitled to begin an investigation into a transaction. Even if the parties have closed or begun to close a transaction, the commission will still be entitled to require the submission of a full notification and could, according to the commission's white paper, require the parties to enter into hold separate arrangements in order to prevent further implementation of any acquisition, until the commission approves the acquisition.

Conclusion

The draft legislation that would give effect to all of these changes will not appear for several months yet and, even when the commission does publish its formal legislative draft, adoption of the law will still be subject to political negotiation with the EU Council and Parliament, meaning that the draft legislation may not reflect the content of the final law. However, assuming that the commission's central proposition — a system of self-assessment and voluntary notification of certain minority acquisitions — becomes law, the new regulatory landscape in the EU will introduce increased uncertainty for potential minority investors in the not too distant future.

These proposed changes will potentially subject minority acquisitions to prior notification in the EU and therefore have a significant effect on companies around the world, including the U.S. One further, potentially profound, implication of these changes is the impact that they may have on other jurisdictions where EU policy has tended to have a strong influence on domestic merger control rules and practices.

In China, for example, China's Ministry of Commerce — the government department with responsibility for implementation of merger control rules — has not adopted a formal position on minority shareholdings, but it has tended to follow the EU approach of looking only at minority acquisitions which result in the acquisition of decisive influence. If a change of policy in the EU influences the Chinese approach, or indeed the approach in other jurisdictions (potentially even in individual EU member states), the ripples coming from the commission's proposed changes could end up being much greater than perhaps first anticipated.

Ultimately, any lack of clarity or increase in uncertainty in the EU as a result of a change in policy will be echoed — and perhaps magnified — in other jurisdictions that tend to follow or take into account merger control policy in the EU.

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[1] Commission's Staff Working Document "Towards improving EU merger control", available at http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.

[2] Case T-411/07 Aer Lingus v Commission, July 6, 2010.

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