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Merger Control for the Acquisition of Non-controlling
Minority Shareholdings:
Using a Sledgehammer to Crack a Nut?

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Table of Contents (1)



- I. Introduction
- II. The question of enforcement gap: the current scope of the EU Merger Regulation and possible anticompetitive effects of structural links
 - 1. Objectives and scope of the EU Merger Regulation
 - 2. Possible anticompetitive effects of non-controlling minority shareholdings
 - 3. Application of Articles 101, 102 TFEU to concentrations
- III. Policy options for implementing a system for the control of structural links
 - 1. Overview
 - 2. The Commission`s Consultation Paper
 - 3. The proposed “targeted transparency system” in the Commission`s White Paper of July 9, 2014

Table of Contents (2)



- IV. The concept of “competitively significant link”
 - 1. Definition by the Commission
 - 2. Comment
 - 3. A comparative view to the enforcement practice of the German Federal Cartel Office (FCO)
- V. Summary and Conclusion



I. Introduction

- Many national merger control regimes are applicable to the acquisition of non-controlling minority shareholdings, e.g. Japan, USA, Canada, UK, Germany, Austria
- The EU Merger Regulation (EUMR) (“Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings”) only applies to the acquisition of “direct or indirect control of the whole or parts of one or more undertakings” (Art. 3 para. 1 lit. b).
- In contrast to its earlier view the Commission newly is of the opinion that its lacking competence to intervene against the acquisition of non-controlling minority shareholdings (“structural links”) is a serious enforcement gap.
- In its recent White Paper (“Towards a more effective EU merger control”) the Commission proposes the introduction of a “targeted transparency system” with regard to “competitively significant links”.

II. The question of enforcement gap: the current scope of the EUMR and possible anticompetitive effects of structural links (1)

■ Objectives and scope of the EUMR

- Merger control as the third pillar of competition law has the task to preserve a competitive market structure and prevent that competition and consumers are harmed by excessive concentrations of market power
- Minority shareholdings lie in the borderland of cooperation and concentration
- In some instances the competitive effects of structural links can be taken into account within the current scope of the EUMR. That is the case if the minority shareholding, in combination with other factors, confers decisive influence (= control) over the target or if the competitive effects of a pre-existing minority shareholding of one of the parties to a transaction involving the acquisition of control are evaluated

II. The question of enforcement gap: the current scope of the EUMR and possible anticompetitive effects of structural links (2)

- Possible anticompetitive effects of non-controlling minority shareholdings

- Non-coordinated/unilateral effects

The acquirer may gain some degree of influence over the target firm's decisions and weaken its competitive activities

Horizontal effects in case of competitors

Vertical foreclosure effects in case of a vertical relationship

Horizontal non-coordinated effects also possible without significant influence on the target due to an increase of the acquirer's incentive and ability to unilaterally raise prices or restrict output ("financial interest theory of harm") ?

- Coordinated effects

Access to strategic information about the commercial activities with the consequence of enhancing the ability and incentive of the parties to tacitly or explicitly coordinate their market behavior

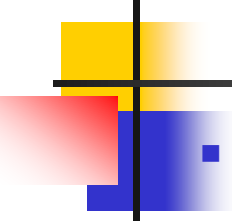
II. The question of enforcement gap: the current scope of the EUMR and possible anticompetitive effects of structural links (3)

- Application of Articles 101 and 102 TFEU to concentrations
 - Possible in principle

ECJ “Continental Can” (1973) with regard to acquisitions by an already dominant firm which may be qualified as an abuse of market power pursuant to Art. 102 TFEU

ECJ “Philipp Morris” (1987) (= BAT/Reynolds) with regard to acquisitions of minority shareholdings which may be qualified as a violation of Art. 101 TFEU under certain circumstances; scope of the doctrine still unclear in particular with regard to acquisitions via stock exchanges
 - “Dormant” doctrines since the EUMR came into force in 1990
 - In any case not well suited to for application to concentrations because they could be used only for a rudimentary form of ex post control.
- Conclusion: enforcement gap (+)

III. Policy options for implementing a system for the control of “structural links” at EU level

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- Overview
 - Different approaches in national merger control regimes
 - The Commission`s Consultation Paper of 2013
 - Policy choices for discussion:
 - Notification system
 - Transparency system
 - Self-assessment system
 - The proposed “targeted transparency system” in the Commission`s White Paper of July 9, 2014 (“Towards a more effective EU merger control”)
 - Information notice with reduced scope of information as compared to a full notification
 - Applicable only in cases where the acquisition of a non-controlling minority shareholding is to be qualified as creating a “competitively significant link” .

IV. The concept of “competitively significant link”

- Two cumulative criteria according to the Commission:
 - Competitive relationship between acquirer and target:
The minority shareholding must be in a competitor or in a vertically related company
 - The structural link is significant if the acquired shareholding is
 - either around 20% or
 - between 5% and around 20% but accompanied by additional factors such as rights which give the acquirer a de facto blocking minority, a seat on the board of directors, or access to commercially sensitive information
 - Comment: The necessary qualitative assessment of the significance of the link requires a fact specific evaluation which is connected with a lot of legal uncertainty
 - This view is confirmed by a comparative view to the enforcement practice of the German Federal Cartel Office (FCO) (“Bundeskartellamt”) with regard to the equivalent provision “competitively significant influence” (Sec. 37 para. 1 No. 4 German Act against Restraints of Competition)

V. Summary and Conclusion

- Currently there is a certain enforcement gap in the EU merger control which should be closed by extending the applicability of the EU Merger Regulation to certain non-controlling minority shareholdings
- The introduction of a “targeted transparency system” as proposed in the Commission`s White Paper of July 9, 2014 (as opposed to a full notification system) appears to be sufficiently lean to avoid unnecessary administrative burdens.
- The decisive substantial criterion in this concept, the creation of a “competitively significant link” is still rather vague and connected with a lot of legal uncertainty; the decisional practice of the German Federal Cartel Office with regard to the similar criterion “competitively significant influence” shows that a very far reaching application is possible.
- Further discussion to concretize the criterion of “competitively significant link” seems necessary; a safe harbor for acquisitions below a certain threshold, e.g. 10% or 15%, at least in the form of a presumption, may be advisable.



Thank you very much for your attention !

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