Minority shareholdings in the EU – alive, yet still kicking?

Competition law – merger control – minority shareholdings – enforcement gap – Ryanair / Aer Lingus– proportionality – 'targeted transparency' control system – information notice – waiting period – ex-post intervention

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Introduction

On 7 October 2016 the European Commission launched a public consultation,[1] seeking feedback on certain aspects of EU merger control: the effectiveness of purely turnover-based thresholds in the EU Merger Control Regulation; the treatment of cases that typically do not raise competition concerns; and the referral mechanisms between Member States and the Commission. One may immediately observe that (some of) these issues were also tackled in the Commission's 2014 White Paper – *Towards more effective EU merger control*[2] (hereinafter WP). Surprisingly, the minority shareholdings issue, which featured prominently in the WP, does not return in the 2016 Consultation. This could have been interpreted as a sign that the Commission was inclined to abandon the potential EU merger control policy change regarding minority stakes, especially when also looking at the recent speeches of Commissioner Vestager, who seemed unconvinced of the necessity to alter the existing concentration control regime.[3] However, only a few weeks after the launch of the 2016 Consultation, the *Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings*,[4] completed (at the Commission's request) by the Spark Legal Network and the Queen Mary University of London, was published. This study points to the fact that the minority shareholding issue may still be on the Commission's agenda. Despite being 'alive', is the minority interests matter still 'kicking'?

Status quo

Acquisitions of minority stakes, common in day-to-day business life, are performed for a variety of reasons: access to specific assets, additional financial resources, innovative managerial practices, etc.[5] We are talking here about situations in which the acquirer holds less than 50% of the voting or equity rights in a target firm, or

about interests in a firm's financial performance, through share capital participation, insufficient to attribute control, as construed by the EU Merger Control Regulation. Yet, economic theory provides that such deals may nevertheless create competition (coordinated, unilateral, or vertical) effects, which in rare occasions may even be more serious than those resulting from fully-fledged mergers.[6] If this is the case, the natural question is how does the law deal with such effects?

At the domestic level there are plenty of examples of how national competition / merger control laws deal with minority shareholdings. The most prominent illustrations pertain to Germany and the UK. The German Act Against Restraints of Competition empowers the Bundeskartellamt to investigate acquisitions of 25% of an undertaking's capital or voting rights, or any other combination (independent of the acquired shareholding's level), enabling direct or indirect exercise of a 'competitively significant influence' on another undertaking. Such influence exists where the minority shareholder's interests need to be taken into account by the target's other shareholders and management. In the UK, the Enterprise Act 2002 applies to relevant merger situations, which, besides full-blown mergers, also include situations allowing for the ability to 'materially influence' an enterprise's policy. Such influence exists for shareholdings of 25% and more, and exceptionally even for shareholdings of less than 15% in a direct competitor, where other factors are present.

At EU level though, evaluating minority shareholdings under Article 3 (2) of the Merger Control Regulation 139/2004 depends on whether such acquisitions confer 'decisive influence' over the target's behaviour. This may be the case when specific rights (such as the power to veto the target's strategic commercial behaviour, or the power to appoint more than half of the target's board members) are attached to the minority shareholding.[7] In such a case, we are talking about *controlling* minority shareholdings. What about *non-controlling* minority stakes (which do not confer 'decisive influence' over the target)? Are such deals immune from EU competition law? The answer is no. Three settings have been encountered in practice, in this respect: first, Article 101 TFEU (the so-called cartel prohibition) was used in the past to tackle commercial cooperation between competing parties linked by a minority shareholding (*Philip Morris / Rothmans*)[8]. Second, Article 102 TFEU was also used to tackle abuses of dominant positions involving minority shareholding acquisitions (*Gillette*)[9]. Yet, these TFEU provisions (not necessarily designed to deal with acquisitions of shares) exhibit quite some limitations, which may render them less appropriate to deal with merger-like transactions.[10] This is where, thirdly, the EU Merger Control Regulation may be useful, however only if a minority shareholding is

somehow attached to another self-standing transaction which qualifies as a concentration. The so-called pre-existing minority shareholdings (of 10% or more) are substantively assessed by the Commission in the context of the concentration they are attached to, under the provisions of Regulation 139/2004. If the minority shareholding is part of such a concentration, which is notified to and then prohibited by the Commission, it can be divested by making use of Article 8 (4) of the said Regulation (*Tetra Laval / Sidel*)[11]. However, if the minority shareholding is acquired before a launched and then prohibited controlling bid (*Ryanair / Aer Lingus*)[12] the divestment process cannot be triggered, since the prohibition of the controlling bid means that control has not changed hands, and a concentration has not been fully implemented. The consequence of this setting is that the minority shareholding cannot be tackled by the Commission under EU law. This is where the infamous discussions over the 'enforcement gap' in EU merger control in relation to non-controlling minority shareholdings originate.

For the sake of completeness, domestic corporate laws may be relevant as well, simply because if such laws impose restrictions on the behaviour of the holders of minority shareholdings, anti-competitive effects may thus be prevented, and competition law tools may not be needed.[13] For example, the Dutch Corporate Governance Code limits individuals from acting as supervisory board members in too many companies for too long; also, in German stock corporations, the votes pertaining to a non-controlling minority shareholding can only block certain (limited) corporate matters, since shareholders' meetings do not decide in substance upon important business matters. This task is undertaken by the executive board members who are not subject to direct instructions by the shareholders or the supervisory board.[14] Despite the value of such domestic corporate law instruments (which are, by the way, neatly summarized in the *Support study* mentioned in the introduction of this post – see endnote 4), the outcomes of similar cases under this legal realm may vary in different domestic jurisdictions, due to the differing obligations imposed by the domestic corporate regulations, from Member State to Member State. It is for this reason that domestic corporate laws are in my opinion unlikely to fully close the EU 'enforcement gap'.

Discussion

If this is so, how should one deal with this 'enforcement gap' issue? Plenty of valuable contributions[15] have been published in the last few years, heavily debating the enforcement gap's actual existence, or if the gap indeed exists, its seriousness,

magnitude, and the potential solutions thereto. The opinions are still divided in this respect. For example, recently, I reviewed an interesting book on the legal and economic regime of minority shareholdings.[16] The authors (Fotis and Zevgolis) frame their main point in a colourful way: 'the million-dollar question is whether the existing regulatory framework is sufficient to cover all possible cases'. Their answer is straightforward: the existence of an enforcement gap under the EU merger control system is not confirmed. Yet, the *Support study* seems to point to a different direction. Nicely summarized, the study reads as follows: 'the reality [is that] there are, from time to time, minority acquisitions which give rise to competition concerns. Of particular note are those which could not be reviewed by the European Commission, since non-controlling minority shareholdings are outside the scope of the EU Merger [Control] Regulation. [...] In addition, there have been problematic cases in national jurisdictions [...], which suggests that some form of [EU] control of non-controlling minority acquisitions may be desirable. [...] There may be some merit in introducing the competence for the European Commission to assess some of these cases under the EU Merger [Control] Regulation (so long as they meet the turnover thresholds under which they have an 'EU dimension' according to the said Regulation). Furthermore, the European Commission might be better placed than one or several national competition authorities to assess the impact of acquisitions of non-controlling minority shareholdings on EEA-wide or cross-border markets.' All in all, the conclusion (that seems to be endorsed by the Commission) is that there may be room for non-controlling minority shareholdings in EU merger control.

Given the frequency and magnitude of such transactions though, I believe that one should tread carefully in designing the control regime: the key word here should therefore be 'proportionality'. I am talking about striking the correct balance between the administrative burdens placed on businesses and the need to cover the (existing) 'enforcement gap'. This is indeed what Commissioner Vestager also pointed to, when she called for less red tape and a better balancing exercise for all interests involved, when dealing with minority shareholdings. Proportionality plays a key role also when discussing which method of control is best suited to potentially tackle the minority shareholdings problem: should an *ex-ante* or *ex-post* intervention method be used? Which exact types of transactions out of the variety of minority stakes encountered in practice should be tackled? Where to draw the line between minor deals and those transactions worthy of investigation? The keen attention devoted to the proportionality issue stems also from the work done by former Competition Commissioner Almunia, when looking at the fine-tuning exercise performed on the control methods put forward by the 2013 Commission Staff Working Document –

'Towards more effective EU merger control'[17]: while in 2013 the Commission proposed three intervention alternatives, namely the 'notification', 'transparency', and 'self-assessment' control systems of 'structural links', the WP further refined these methods in the 'targeted notification' and 'targeted transparency' control systems of 'competitively significant links'. Last but not least, and on the same proportionality note, the *Support study* points out that 'if the Commission's initiative to develop jurisdiction over non-controlling minority acquisitions at EU level were to proceed, such a system would need to ensure an appropriate balance between the ability to review potentially anti-competitive transactions, while at the same time reducing administrative burdens to the minimum and fitting seamlessly with the existing systems of merger control at European and national level.'

It is by now common ground that the 'targeted transparency' control system would best fit these above-mentioned requirements. Briefly, this control method essentially entails the obligation to submit a short information notice to the Commission, if a 'competitively significant link' is created (WP, par. 49). Such a link is created when a shareholding of around 20%, or between 5% and 20%, if accompanied by additional factors (blocking *de facto* minorities, seats on the target's board of directors, or access to commercially sensitive information), is acquired in a competitor or a vertically related company (WP, par. 47). Once the information notice is submitted, the Commission decides within a 'waiting period' of fifteen days (during which the parties would not be able to close the transaction) whether the deal is worth investigating (WP, par. 50). If so, a full notification is required from the parties (WP, par. 49). Lastly, regardless of whether the transaction is implemented or not, the Commission could still investigate the transaction, within a limited period of time (four to six months) following the information notice (WP, par. 51).

Is this 'targeted transparency' control system proportional? The *Support study* focuses primarily on the thresholds potentially triggering the review by the Commission. This relates to the 'significance' dimension of the 'competitively significant link' concept. The *Support study* relies on a comparative analysis of the rights attached to minority shareholdings by various domestic (corporate) laws. It proposes that minority shareholdings of less than 10%-15% should not be investigated (i.e. 'safe harbour'), and stakes of 25% or more should be considered significant. Either way, further guidance on these concepts and thresholds is called for on the Commission's part, in order to determine whether a minority shareholding transaction should be reported or not. So far, so good. The question of whether the actual procedural hurdles (i.e. the design of the 'targeted transparency' method, the contents of the information

notice, the waiting period, and the possibility to intervene *ex-post*) are proportionate or not, remains. In the next paragraphs I will focus on the problems that the procedural steps of the projected 'targeted transparency' control system still raise.[18]

First, and closely connected to the *Support study's* findings, the parties must self-assess whether their deal qualifies as a 'competitively significant link'. My concern here is how does this exercise differ from the 'self-assessment' method put forward by the 2013 Staff Working Document? If the 'targeted transparency' method entails an element of self-assessment, what is the need altogether for submitting an information notice? This requirement may be viewed as disproportionate, especially if the Commission can examine the minority shareholding acquisition *ex-post.* Furthermore, such self-assessment places the ball in the parties' court, who must be careful in performing a correct evaluation of their transaction. By way of analogy to the *Schenker* ruling of the CJEU,[19] a faulty self-assessment cannot be attributed to the lawyers that performed the assessment, since that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe EU competition law. Also, needless to say, such self-assessment is not cheap. In the event of such faulty self-assessment, or if the parties choose to keep their transaction hidden (this possibility should not be excluded altogether), the burden will shift to the Commission's shoulders, since it will have to monitor the markets in order to uncover the problematic deals. Either way, the self-assessment exercise in the 'targeted transparency' control system seems to provide an indication of disproportionality.

Second, once the parties' self-assessment reveals that a competitively significant link is created, a short information notice should be submitted to the Commission. How burdensome will it be to fill in such an information notice? A simple comparison with the requirements imposed in Form CO (used for notifying concentrations under Regulation 139/2004) shows that there is not much difference between the breadth of the information that needs to be submitted in the information notice, and that in Form CO.[20] This may seem disproportionately onerous on behalf of the parties, especially if one thinks about the fact that minority shareholdings are allegedly less problematic transactions than full-blown concentrations. The consequence of this disproportionality is, in my opinion, that the market players will value legal certainty more than the costs they incur, and will consequently choose to voluntarily fully notify the transaction to the Commission (a possibility not excluded by the WP). When faced with a notification, the Commission must, at the end of the day, adopt a decision,

which is again a costly and time-consuming exercise. Either way, disproportionality seems to creep in here with regard to the Commission's workings too.

Third, the waiting period and the possibility for the Commission to intervene *ex-post* should be evaluated together. This is so, since in my opinion, this procedural setup seems to leave the impression that the Commission wants to have its cake and eat it too. First, once the information notice is submitted, the parties have to hold off the minority shareholding acquisition implementation for fifteen days. The Commission argues (amongst other issues) that this would allow the Member States to request case referrals and would also avoid full notification costs for the parties. Second, after the waiting period has passed without the Commission requesting a full notification, the deal may be implemented. However, in the third place, the Commission may (if for example new evidence comes to light, or complaints about the deal are formulated) still investigate the acquisition, even if it is implemented, within a four to six month timeframe. The waiting period may indeed give the Commission a cosy position, by granting it some breathing room in order to decide which of the announced transactions merit further scrutiny. Yet, delaying the transaction implementation with fifteen days is definitely uncomfortable and costly for the parties. Again, in search for celerity and legal certainty, the parties may opt for a voluntary full notification right away. This overrides the waiting period requirement, and also the possibility for the Commission to intervene *ex-post*, because a full notification clearly requires an *ex-ante* examination, to be concluded with a (yet again costly and time-consuming) Commission decision. Furthermore, the possibility to intervene *ex-post* seems to me as an odd addition to the 'targeted transparency' method, given that the 2013 Staff Working Document accepted potential retrospective action only under the 'self-assessment system', and also given that merger control in the EU was traditionally conceived as an *ex-ante* exercise. The Commission argues that the possibility to intervene retroactively, would make it be less tempted to start proceedings in a precautionary manner. To my mind, this argument does not stand, especially since the Commission has a fifteen day timeframe (the waiting period) to decide whether the deal is worthy of investigation. The Commission also argues that four to six months is enough time for complainants to come forward. Again, this argument seems shaky: think, for example, of the *Kone* ruling,[21] which demonstrates that complainants may not always be inclined to come forward if they can raise their prices under the umbrella effect created by their competitors' behaviour. Last but not least, it goes without saying that the combination of a waiting period with the potential *ex-post* intervention reduces the parties' legal certainty, increases their costs, and delays their deal's

implementation severely (in the most extreme cases, this period can last twice as long when compared to an allegedly more problematic full-blown concentration). In my opinion, this setup needs to be rethought, since it is evidently disproportionate, at least from the market players' perspective.

Conclusion

Summing up, I believe that the minority shareholdings discussion in EU law has not yet been exhausted. It is true that there are plenty of legal tools available to tackle the effects that such deals may have on competition. Yet, their appropriateness to deal with minority stakes does leave room for the 'enforcement gap' discussion. Should the endeavour be to close this (potential) gap, it is my opinion that this should be done in a proportional and balanced manner. In this respect, I submit that the already-embraced 'targeted transparency' control system needs more work. Amongst other issues, the contents of the information notice, the waiting period, and the possibility to intervene *ex-post* need to be refined. All in all, I think that yes, the minority shareholdings issue is still alive and kicking, although not with the same liveliness as back in 2013-2014.

[1] See European Commission, Public Consultations - Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, available at: http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html, accessed on 16.11.2016.

[2] COM/2014/0449 final.

[3] See, for example, M. Vestager, Thoughts on merger reform and market definition, Keynote Address at *Studienvereinigung Kartellrecht Brussels,* 12.03.2015, available at: http://ec.europa.eu/commission/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en; M. Vestager, Refining the EU merger control system, *Studienvereinigung Kartellrecht Brussels,* 10.03.2016, available at: https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en, both accessed on 16.11.2016.

[4] See http://ec.europa.eu/competition/publications/reports/KD0416839ENN.pdf, accessed on 16.11.2016.

[5] See also C.S. Rusu, (Non-Controlling) Minority Shareholdings as Self-Standing Transactions under EU Merger Control Analysis – Prospective Solutions, 37 *World Competition Law and Economics Review* 4*, Wolters Kluwer*, 2014.

[6] The Annex I (Economic Literature on Non-Controlling Minority Shareholdings – Structural links) of the 2013 Commission Staff Working Document – 'Towards more effective EU merger control' (SWD (2013) 239 final) contains a comprehensive literature review discussing at length the competitive effects of minority shareholdings.

[7] See par. 57 of the Consolidated Jurisdictional Notice, OJ C95, 16.04.2008.

[8] Cases 142/85, 156/84, *British American Tobacco Company and R. J. Reynolds Industries. v. Commission* [1987], ECR 4487.

[9] Case IV/33.440.

[10] For further details on this matter, see C.S. Rusu, EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play, *CLaSF WP Series* 10, 2014 and C.S. Rusu, European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience*, Wolters Kluwer Law & Business / Kluwer Law International BV*, *European Company Law / CECL Series* 7, 2010.

[11] Case COMP/M. 2416 *Tetra Laval / Sidel*; T-5/02 *Tetra Laval v. Commission* [2002], ECR II-04381; C-12/03 P, [2005], ECR I-00987; C-13/03 P [2005], ECR I-01113.

[12] Case COMP/M.4439; T-342/07*, Ryanair v. Commission* [2010], ECLI:EU:T:2010:280.

[13] See also Schmidt, J. P., *Germany: Merger control analysis of minority shareholdings – A model for the EU?*, Horizons - Concurrences – Revue des droits de la concurrence, no. 2/2013, p. 207.

[14] See also A. Dorresteijn, T. Monteiro, C. Teichmann, E. Werlauff, European Corporate Law, 2nd Edition, *Wolters Kluwer - Company Law Series*, 2009, p. 172.

[15] See, for example, N. Levy, EU Merger Control and Non-controlling Minority Shareholdings: The Case against Change, 9 *European Competition Journal* 3, 2013 and

A. Toth, TEU Competition Law Aspects of Minority Shareholdings, 35 *World Competition* 4, 2012.

[16] P. Fotis, N. Zevgolis, The Competitive Effects of Minority Shareholdings. Legal and Economic Issues, *Hart Publishing*, 2016. The book review will be published in 54 *Common Market Law Review*2*, Wolters Kluwer*, forthcoming 2017.

[17] See note 6 above.

[18] For a more comprehensive discussion of these matters, see C.S. Rusu, Targeted Transparency Control of Competitively Significant Links: Heading Towards Regulatory Overkill?, *Romanian Competition Journal* 1-2, 2015.

[19] Case C-681/11 *Schenker & Co. and Others,* ECLI:EU:C:2013:404, par. 41.

[20] See par. 104 of the Commission Staff Working Document, SWD (2014) 221 final and par. 105 of the Commission Staff Working Document – Impact Assessment, SWD (2014) 217 final. Both these documents accompany the WP.

[21] Case C-557/12 *Kone AG and Others v. ÖBB-Infrastruktur AG,* ECLI:EU:C:2014:1317.