2 October 2014

European Commission
Directorate-General for Competition, Unit A-2
White Paper "Towards more effective EU merger control"
B-1049 Brussels
Belgium
Email: comp-merger-registry@ec.europa.eu

By email

Re: White Paper – “Towards more effective EU merger control”

Dear Sirs,

We refer to the above White Paper, which covers reforms of the EU merger control regime concerning non-controlling minority shareholdings and case referrals between the Commission and Member State competition authorities. We deal below only with issues around minority shareholdings.

It is clear that the Commission has made its mind up on amending the Merger Regulation to encompass an ability for the Commission to examine non-controlling minority shareholdings. As we stated in our submission to the Commission dated 6 September 2013, Member States are free to legislate so that national competition authorities can examine non-controlling minority stakes. The fact that only the UK, Germany and Austria have actually done so is illustrative of the minor effects on competition generally arising from minority stakes in competitors. There is therefore no legislative lacuna in terms of scrutiny of minority shareholdings, only the choice of sovereign national legislatures not to apply national merger control to this particular area.

The Merger Regulation has worked well over the past ten years, and amending it to allow the Commission to scrutinise non-controlling minority stakes is disproportionate when one weighs up the costs of changing the Regulation versus the benefits accruing from such a change. The initiative by the Commission to expand the Merger Regulation to encompass non-controlling minority shareholdings was provoked by one situation (Ryanair/Aer Lingus I), where the Commission clearly would have liked to have acted on Ryanair’s minority stake, but did not have the power to do so. The UK competition authorities (the Office of Fair Trading and Competition Commission (now the amalgamated Competition and Markets Authority)) subsequently opened an investigation under the UK Enterprise Act, and ordered that Ryanair sell its minority stake down to under 5%. Whatever about the efficacy of the UK investigation (the order to divest our stake in Aer Lingus is currently under appeal to the UK Court of Appeal), it demonstrates that the minority stake held by Ryanair in Aer Lingus did not escape the scrutiny of competition authorities.

The Commission points out a number of cases where it can review non-controlling minority stakes. It can use Articles 101 and 102 TFEU under certain circumstances, but can also review pre-existing minority shareholdings in the context of a notified concentration under the Merger Regulation., e.g., where one of the merging parties holds a non-controlling minority stake in a
competitor of the other merging party. Remedies encompassing, e.g. divestment of the minority stake, may be made conditions of Commission approval of the concentration.

Between national scrutiny of non-controlling minority stakes, and the tools already possessed by the Commission, minority shareholdings are already subject to competition law review, and there is no need for the Commission to amend the Merger Regulation on this basis.

The “targeted” transparency system chosen by the Commission as the method of review of non-controlling minority stakes raises a number of questions and concerns.

The Commission envisages a 15 working day “stand-still” period following submission of an information notice before which completion of an acquisition of a minority shareholding cannot take place. It appears that, after this period, if the Commission is still reviewing the proposed acquisition, the parties can implement the transaction, but at the risk of being ordered by the Commission to unwind the acquisition. The White Paper also proposes to give the Commission 4 to 6 months, following submission of an information notice, in which to investigate the transaction. This may result in minority stake transactions that are unproblematic being held up unnecessarily for months.

While the information provided in the White Paper is vague, it appears that parties entering into a transaction involving the acquisition of a non-controlling minority stake that is creating a “competitively significant link” run the risk of not notifying the proposed acquisition to the Commission. There is scant detail on what the Commission may do in the scenario where no information notice is submitted, other than a short reference to applying interim measures (such as “hold-separate” orders) following the initiation of an investigation of a fully or partially implemented acquisition.

It is also unclear what the turnover thresholds will be (or whether there will be any such thresholds at all) for notification of a proposed acquisition of a minority stake creating a competitively significant link.

It appears that the Commission is therefore creating a greater bureaucratic burden for itself, for no good reason, as well as creating an atmosphere of uncertainty for businesses seeking to engage in M&A in Europe. It appears that parties will need to self-assess whether their acquisition of a minority stake creates a “competitively significant link” (albeit with rough guidance from the Commission as to when this link may be created), and whether to submit an information notice to the Commission, which will delay completion of the transaction. Parties may then face a dilemma as to whether to complete the transaction following the expiry of the 15 day “stand-still” period (if the Commission is still examining the transaction, or a Member State has requested that the transaction be referred to it). The White Paper is vague on whether and under what conditions the Commission has the power to open investigations into non-notified completed acquisitions, other than a reference to applying interim measures. For example, there is no information on how long the Commission retains powers to open investigations into non-notified completed acquisitions of non-controlling minority stakes.

While the White Paper is light on detail and incomplete, it is clear that the new regime will create more uncertainty for businesses and constitutes an unjustified increase in bureaucracy at EU level, with no discernible benefit for businesses or consumers. If the Commission wishes to remain faithful to its Better Regulation agenda, it should immediately scrap these proposals.

Yours sincerely,

[Signature]

Juliusz Komorek

Director of Legal & Regulatory Affairs