Minority shareholdings in UK merger review

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Minority shareholdings and control

- Three levels of control:
    - Full (‘de jure’) control
    - De facto control
    - Material influence

Legislative framework

- A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise may be treated as having control of it

Material influence

- Material influence has been a feature of the UK merger regime since 1973 (with the current Act being from 2002)
- Situations can include:
    - Multiple shareholders with material influence (e.g. joint venture)
    - A shareholder with material influence whilst another shareholder has full control

Material influence

- What constitutes material influence will be considered on a case-by-case basis according to the particular circumstances of the case
- Would the acquirer have the ability to materially to influence the policy of the target, its strategic direction and/or its ability to meet its commercial objectives
- Typically look at shareholding and a ‘plus factor’

Relevant factors

- Level of shareholding (>25% to block special resolutions)
- Board representations
- Veto rights
- Financial arrangements

Case example 1

- *Transforming Pathology Partnership* (2014, pathology) – **No material influence**
  - 6 joint venture partners
  - Equal representation on the Board
  - No veto rights
  - No one JV partner has expertise beyond that of the other partners

Case example 2

- *Sky/ITV* (2007, TV broadcasting) – **Material influence**
  - 17.9% shareholding
  - Ability to block special resolutions based on historical voter turnout (i.e. effective vote of >25%): may be relevant to raising funds
  - Industry knowledge likely to influence other shareholders
- Competition concerns were identified

Case example 3

- *Ryanair/Aer Lingus* (2013, airlines) – **Material influence**
  - 29.8% shareholding
  - Ability to block special resolutions: may be relevant to raising funds (Ryanair had consistently blocked the exercise of pre-emption rights)
  - Ability to block sale of Aer Lingus’ slots at Heathrow Airport (provision from Articles of Association)
- Competition concerns were identified

Case example 4

- *Aggregate Industries/Foster Yeoman* (2007, asphalt) – **Material influence**
  - 33% shareholding in a joint venture (Lafarge also a JV partner)
  - Veto rights
- Parties accounted for 90% of asphalt production in the market
- Competition concerns were identified regarding coordination

Case example 5

- *AP Møller-Maersk/DFDS* (2010, shipping) – **Material influence**
  - 31% shareholding
  - One Board director
  - Veto rights which may have prevented DFDS expanding or entering new businesses
  - Similar to *Centria/Lake Acquisitons* (EDF) (energy supply, 2009)
- Case was cleared

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