The concept of control in UK merger transactions

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MOFCOM, Beijing, 16 March 2015

Ceasing to be distinct

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

Relevant merger situation

- Enterprises ceasing to be distinct; and either
  - The target enterprise has turnover of >£70 million; or
  - The parties supply at least 25% of a good or service in the UK (or a substantial part of it); and
- The CMA is within time limits to make a decision
- Mergers can be anticipated or completed

Full control

- Only one entity can have full control
- Shareholder of more than 50% of voting rights

De facto control

- Shareholding of <50% of voting rights
- But nevertheless controls the target company
- Typically examine what proportion of votes the acquirer would account for at general meetings based on historical shareholder turnout (i.e. not the proportion of potential turnout)
- De facto control can be treated the same as full control

Material influence

- Would the acquirer have the ability to materially to influence the policy of the target, it strategic direction and/or its ability to meet its commercial objectives
- Relevant factors are typically:
  - Level of shareholding (>25% to block special resolutions)
  - Board representations
  - Veto rights
  - Financial arrangements

Different levels of control

- Can examine moves to different levels of control as different mergers (this is a discretion)
- Can examine multiple transactions over 2 year period

Assessing control

- Done on a case-by-case basis
- Look at substance over legal form
- Published guidance
- Published decisions

Substantive analysis

- Full control and de facto control will typically use the same theories of harm (unilateral effects, vertical effects, coordinated effects and conglomerate effects)
- Material influence: no day-to-day control of the company so theories of harm relate to behaviour of acquiring company (e.g. price rises) or effect on the strategy of the target. For example, in *Ryanair/Aer Lingus* and *BSkyB/ITV*
- For de facto control and material influence, need to adjust for level of shareholding (i.e. not full internalisation)

Case examples

- *JC Decaux/Concourse* (2012) – Board representation without shareholding
- *Project Canvas* (2010) – no joint venture party had the ability to materially to influence the JV
- *Chelsea & Westminster Hospital/West Middlesex University Hospital* (2014) – different models of hospital management coming together despite both being owned by the state
- *Ryanair/Aer Lingus* (2013) – material influence from shareholding

Case examples

- *Moller Maersk/DFDS* (2010) – material influence based on shareholding, veto rights and the right to Board representation
- *Travis Perkins/ToolStation* (2012) – discretion applied when moving through levels of control
- *Sports Direct/JJB Sports* (2009) – multiple transactions being treated as one

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