

# European Merger Control Developments

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# Agenda

- Stakebuilding
- “Gun jumping”
- Key developments overview – EU
- Key developments overview – Germany

# Stakebuilding (1)

- *Ryanair / Aer Lingus*
  - 27 Sept 06 – 5 Oct 06: Ryanair acquired 19.16% of Aer Lingus
  - 5 Oct 06: Announced public bid for Aer Lingus
  - Interest increased to 25.17% during bid period
  - Commission concluded purchase of shares in market and public offer constituted single concentration (proximity and rationale)

## Stakebuilding (2)

- *Ryanair / Aer Lingus*
  - Acquisition prohibited, but no direction to divest of 25.17% interest
  - Art. 8(4) ECMR: Where a concentration has been implemented, Commission may require the parties to dissolve the concentration “...so as to restore the situation prevailing before the implementation of the concentration”
  - Aer Lingus appealed (CFI, interim measure)

## Stakebuilding (3)

- UK: *BSkyB / ITV*
  - November 2006 BSkyB acquired 17.9% of ITV; strategic stake
  - UK jurisdiction triggered by ability to “*materially influence*” management of the target
  - BSkyB held to have “*material influence*” over ITV
  - Substantial lessening of competition
  - Remedy = Complete Divestment
  - Under appeal

## Stakebuilding (4)

- Germany: *A-TEC / NA* - Facts
  - June 2006: Copper producer A-TEC acquired 13.75% of the shares in its rival Norddeutsche Affinerie (NA)
  - July 2007: “precautionary” notification of intention to appoint 3 of the 12 members of NA’s supervisory board
  - February 2008: acquisition of minority shareholding and appointment of the supervisory board members prohibited by Bundeskartellamt
  - Bundeskartellamt required A-TEC to divest all the shares held in NA

## Stakebuilding (5)

- *A-TEC / NA* – Formal
  - Concentration: acquisition of competitively significant influence („catch all clause“)
    - A-TEC’s minority shareholding in NA was tantamount to a blocking minority
    - A-TEC largest shareholder
    - A-TEC only shareholder with market knowledge: special weight for supervisory board members
    - Consequence: close competitors A-TEC and NA would no longer act independently of each other on the market

## Stakebuilding (6)

- *A-TEC / NA* – Substantive
  - Creation of a dominant position:
    - market structure
    - no constraints by in-house production
    - no potential competition / high entry barriers
    - no countervailing buyer power
  - No clearance subject to commitments possible



## Stakebuilding (7): Lessons Learned

- The acquisition of a minority shareholding may be subject to merger control review:
  - EU: acquisition of minority shareholdings that do not confer control are not notifiable – but: minority shareholding can confer control
  - UK: acquisition of minority shareholding below 25% may need to be notified
  - Germany: acquisition of a minority shareholding below 25% may need to be notified (also: if not / no longer part of a single concentration notifiable at EU level)

# “Gun Jumping” (1)

- Suspension obligation under EC Merger Regulation (and most national regimes; dialogue between competition authorities)
- Fine of up to 10% of turnover for non-compliance
- Commission inspection powers to monitor compliance under ECMR
- *Ineos/Kerling*
  - Notified to Commission on 19 July 07; but Phase II investigation opened
  - Commission carried out unannounced inspections 12/13 December 07
  - Investigating both violation of suspension obligations and breach of Article 81 due to information exchange
  - Phase II clearance on 30 January 2008
- Past cases of NCAs – Germany (Hamburg Hospitals)

## “Gun Jumping” (2)

- Global M&A increases pressure for early integration
- Transitional planning must comply with applicable competition laws
- Scenarios:
  - **Significant contract put out to tender by customer. Can purchaser direct target not to bid?** *No, parties must continue to behave as competitors until transaction is closed.*
  - **Commercial team want to start developing marketing strategies for consolidated business. Permissible to review target’s current marketing strategies with prices and m/s redacted?** *No, such strategies are still proprietary in nature and should not be shared.*
  - **The market customarily operates on basis of 6 monthly supply contracts. Transaction scheduled to close in 3 months. Permissible for directive to be issued to target’s sales team stating that new contracts only to be of 3 month duration?** *No, parties, must continue to behave as competitors until the transaction is closed.*

# Key Developments Overview - EU (1)

- Reassessment of transactions by Commission:
  - *Sony/BMG*
  - *TUI/First Choice* (following annulment of *Airtours/First Choice*)
- Review of EC Merger Regulation
  - By 1 July 2009, the Commission must report to the Council of Ministers on the operation of the turnover thresholds

# Key Developments Overview - EU (2)

- Commission Notices
  - Commission Jurisdictional Notice
    - Consolidation
    - Updated guideline (e.g. full function JV, successive transactions, inter-related transactions)
  - Guidelines on Non-horizontal Mergers
    - Vertical and conglomerate mergers
    - “safe harbour”
  - Draft Remedies Notice
    - Reflects Commission’s and Court’s approach (preference for structural remedies)
    - General trend: Commission adopts a critical approach to remedies (extensive economic analysis)

# Key Developments Overview - Germany

- Mini market exemption
  - Federal Court decision of January 2008: market (older than 5 years) with less than € 15 mio. sales volume in Germany
- Review of merger control thresholds
  - **Additional domestic threshold?**
    - 1) Combined turnover > € 500 mio. worldwide
    - 2) One party turnover > € 25 mio. in Germany
    - 3) ***Other party turnover > € 5 mio. in Germany***
  - Entry into force unclear

**THANK YOU!**

**Questions?**