The legal treatment of minority shareholdings under EU competition law: Present and future*

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I. Introduction

The debate on the regulation of minority shareholdings as a type of "structural link" between competing undertakings is not a new one in the sphere of EU competition law. As a matter of policy, the incomplete and rather divisive treatment of minority shareholdings under the current EU merger control and antitrust rules is considered problematic. This is all the more true since this division is not based on sound economic grounds. Indeed, there are EU and non-EU jurisdictions that approach the problem of the competition law treatment of minority shareholdings rather differently for all good reasons. The need and desirability, however, to go beyond the existing status quo in the EU and ingrain innovation into the law is often challenged, either due to a theoretical opposition to the existence of a significant gap authorising regulatory intervention or due to fears of any change being overbroad and thus potentially doing more harm than good.

This paper provides an overview of the theories of harm and the potential anticompetitive nature of minority share ownership (Part II); analyses the existing EU competition law framework as it applies to minority shareholdings and outlines the extent of the gap in the law (Part III); draws a parallel with regulatory regimes dealing with this problem in other major jurisdictions (Part IV); presents the reform proposals put forward by the Commission and the progressive change of heart in terms of EU competition policy (Part V); and finally it concludes with some remarks as to the future outlook and possible challenges in addressing the legal gap (Part VI).

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II. Economic analysis of effects on competition

A. Financial interests and control rights

Economic research on the implications of minority share acquisitions in rival firms has indicated that they may give rise to substantial competition concerns[1], even though these are usually less likely to occur or less pronounced compared to fully-fledged mergers[2]. In a full merger scenario, the acquiring firm obtains 100% of the two following types of rights over the target: i) “control rights”; and ii) “cash flow rights”[3]. Control rights allow the acquirer to influence the target’s strategic decisions; hence they provide the acquirer the *ability* to raise the target’s prices. On the other hand, cash flow rights entitle the acquirer to have a financial interest - by means of its investment - and share in the profits of the target; hence they give the acquirer the *incentive* to raise the target’s prices. Importantly, in the case of partial share ownership these two types of rights do not necessarily coincide[4], and their relative proportions may be rather asymmetrical depending on the particularities of each commercial transaction, or may even change from time to time. It follows that partial share ownership leads to two variants of the above-mentioned usual merger situation: i) it either gives *only one type of rights* (e.g. financial interests) but not the other one (e.g. control/ influence); or ii) it gives *partially both* types of rights[5]. This is crucial because the existence and the degree of each type of rights in a partial share acquisition have distinct competition implications in that any combination of financial interests and control rights leads to different anticompetitive effects.

B. Theories of harm

Partial share ownership may potentially give rise to the whole range of anti-competitive effects, i.e. horizontal unilateral or coordinated effects, vertical effects,

1. OECD, ‘Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates’ (2008) Policy Roundtables, DAF/COMP (2008)30, p. 24-36.

2. Oxera, ‘Share and Share Alike? Unilateral Effects Analysis in Minority Shareholdings’ April 2012 <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Minority-shareholdings.pdf?ext=.pdf> accessed 20 December 2014.

3. Anne Perrot (MAPP), presentation at Concurrences Law & Economics Workshop: ‘Minority Shareholdings: Is There a Need for Reform?’, Brussels, 15 October 2013.

4. Ibid.

5. Ibid. According to the terminology consistently employed in the literature, minority shareholdings, which only allow for a pure financial interest without conferring any degree of influence over the target company, are characterised *passive*. By contrast, minority shareholdings, which provide for a financial interest in the target but are also accompanied by control rights, are dubbed *active*.

and entry deterrence[6]. These effects are qualitatively similar to full mergers, albeit quantitatively smaller[7]. As to horizontal unilateral effects, acquiring a minority shareholding in a competitor may lead to diminished or diluted incentives to compete aggressively on the market. If the minority shareholding is not accompanied by control rights, then only the acquiring firm will have its incentive modified[8]. Due to its financial interest in the target, the acquirer will be able, and find it profitable, to unilaterally raise prices and restrict output[9]. Any loss in revenues from customers switching to the competitor that the acquirer has the minority stake in will be in part compensated by the profits gained by that competitor in which the acquirer shares and thus internalises. By contrast, if the minority shareholding in addition confers control rights (e.g. material influence even if not "decisive")[10], this will have an impact on the competitive behaviour of both the acquiring and the target firm. This effectively means that the acquirer will be in a position to: i) raise its own prices; but also ii) influence the commercial strategy and hence raise the prices of its competitor. While in the first scenario (minority shareholding with no control) anticompetitive unilateral effects will be smaller than a full merger, in the second scenario (minority shareholding with control) these effects can be quite significant, since the acquirer will fully benefit from higher sales due to its competitor's price increase but will bear only part of the cost (in proportion to its financial stake in that competitor)[11].

Coordinated effects are not as certain as unilateral effects but may well also

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6. For an overview, see Annex I 'Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")' to European Commission, Staff Working Document, 'Towards More Effective EU Merger Control', Brussels, 25 June 2013, SWD(2013) 239 final ("2013 Consultation Paper").

7. Cf. US DOJ & FTC Horizontal Merger Guidelines 2010 §13.

8. Raphael De Coninck (Charles River Associates), presentation at Concurrences Law & Economics Workshop: 'Minority Shareholdings and Interlocking Directorates: Which Impact on Competition?', Brussels, 22 May 2013.

9. European Commission, Competition Policy Brief, 'Minority Power - EU Merger Control and the Acquisition of Minority Shareholdings', Issue 15, October 2014, p. 3.

10. It is important to understand that the economic concept of "control" does not overlap with the legal definition of control as "decisive influence" under the EUMR. The notion of economic control is broader and captures degrees of influence (e.g. material, significant) that fall below the "decisive influence" threshold. It follows from the above economic analysis that minority shareholdings conferring less than "decisive influence" may nevertheless give rise to significant competition concerns. See also Section III.A below.

11. Penelope Papandropoulos (European Commission), presentation at Concurrences Law & Economics Workshop: 'Minority Shareholdings and Interlocking Directorates: Which Impact on Competition?', Brussels, 22 May 2013.

arise in minority shareholding situations. First, minority shareholdings between competitors may increase the *ability* of firms to collude[12]. Unilateral or cross-shareholdings may facilitate information flows between the acquirer and the target. Access to and exchange of commercially sensitive information may enhance transparency and facilitate collusive outcomes as this will make it easier for colluding firms to monitor each other's behaviour on the market and detect any deviations[13]. The potential for anticompetitive information exchanges and coordination will be even greater in case minority shareholdings in competitors are combined with special corporate rights (e.g. information rights, board seats) or other structural links (e.g. interlocking directorates). Second, minority share ownership modifies the *incentives* of firms to collude. As in the case of full mergers, however, the overall effect on firms' incentives to sustain coordination is ambiguous[14] and will largely depend on the balance of short-term benefits from deviation vis-à-vis long-term losses (e.g. deterrence/punishment mechanisms through a price war) in the individual case. Generally speaking, the acquisition of a minority shareholding in a competitor lowers short-term gains from undercutting a collusive price, and thus produces fewer incentives to deviate, since any losses inflicted on the rival will be internalised by the acquirer[15]. At the same time, punishment for that deviation will be less costly given that the existence of the minority shareholding will have resulted in "softer competition" in the market[16]. This simply means that the deterrent effect of a long-term price war will be softer and as a result, the incentives to deviate potentially greater[17]. Notwithstanding the above analysis, economic theory credibly predicts that coordinated anticompetitive effects are particularly likely to materialise in case the "industry maverick", i.e. the firm most eager to price-cut, acquires a minority shareholding in a non-maverick competitor[18].

Partial vertical integration, by means of minority shareholdings linking firms at different levels of the supply chain, may also create anticompetitive effects. First, acquiring a minority shareholding in an upstream or a downstream firm may lead to

12. Competition Policy Brief (n 9), p. 4.

13. Ibid.

14. Annex I (n 6), p. 4.

15. Papandropoulos (n 11).

16. Ibid. See also the analysis on the unilateral effects of minority share ownership above.

17. Ariel Ezrachi and David Gilo, 'EC Competition Law and the Regulation of Passive Investments Among Competitors' (2006) 26(2) Oxford Journal of Legal Studies 327, p. 333.

18. Ibid, p. 332. Cf. Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C 31/03 §20, according to which a merger with a maverick firm may give rise to horizontal competition concerns even if below certain thresholds based on structural indicators (e.g. HHI levels).

input or customer foreclosure. The acquisition of such a vertical stake will generally reinforce the acquirer's *incentive* to foreclose its competitors[19]. In cases where the vertical shareholding confers material influence over the target's decisions and discrimination between customers, the acquirer will additionally have the *ability* to foreclose rivals from the target's inputs or access to customers[20]. In the presence of control, the risk of foreclosure is theoretically higher than a full vertical merger given that the acquirer fully benefits from increased profits on the market it is active by foreclosing its rivals while it only suffers part of the losses caused by the foreclosure strategy due to its vertical share participation[21]. Absent control, a vertical shareholding may still soften competition because the acquirer, through its minority stake, partially internalises the target's profits, gained from sales to the acquirer's competitors[22]. Furthermore, when firms lack the ability to discriminate, passive vertical shareholdings may improve coordination along the vertical chain and distort competition in bidding markets[23].

Lastly, minority share ownership may deter future entry, either of potential entrants (e.g. the acquirer of a minority shareholding in the incumbent) or of third firms[24]. In a vertical setting, the prospect of foreclosure as a result of the partial vertical integration may itself lead to entry deterrence[25]. Vertical shareholdings may also lead to a substantial entry deterrent effect if due to extensive information rights, third companies are discouraged to deal with firms that their competitors are partially vertically integrated because they fear that commercially sensitive information may end up at the hands of a competitor[26].

C. Magnitude of anticompetitive effects

In practice, the likelihood and magnitude of the potential unilateral or coordi-

19. Competition Policy Brief (n 9), p. 4.

20. Annex I (n 6), p. 15-18.

21. Competition Policy Brief (n 9), p. 4.

22. Annex I (n 6), p. 16. Under certain circumstances passive vertical minority shareholdings may also be used as a commitment device that allows the acquirer to protect its market power and charge higher prices. See ibid, p. 15-16 and 18.

23. Ibid, p. 5 and 17-18. These cases are unlikely to raise non-horizontal unilateral effects.

24. Ibid, p. 18-19.

25. Ibid, p. 19.

26. See Case COMP/M.5406, *IPIC/Man Ferrostaal AG* [2009] OJ C 114/8; and European Commission, Staff Working Document accompanying the White Paper, 'Towards More Effective EU Merger Control', Brussels, 9 July 2014, SWD (2014) 221 final, p. 22. In this case, the Commission also found an increased risk of horizontal coordination between the two market leaders in view of the particular market conditions (e.g. highly concentrated, transparent market).

nated effects of minority share acquisitions in competitors will depend on a number of factors that influence the firms' incentives to compete[27]. Such factors may be: i) structural (e.g. degree of market concentration, entry conditions, product differentiation or substitutability, diversion ratios, number of firms in the relevant market that are linked to each other); or ii) transaction specific (e.g. companies' costs and margins, their market shares, size of the minority shareholding, reciprocal nature of structural links, type of firm acquiring the minority shareholding such as a maverick[28])[29].

The competitive assessment will therefore focus on the same elements as in full mergers as well as on the particular characteristics of the minority shareholdings, including the degree of control conferred over the target. As to the latter, analysis of the ability to raise prices will also depend on and consider corporate governance rules[30]. Furthermore, there are important "real world" factors that should be taken into account in the assessment - such as: i) information deficiencies; ii) personal incentives of firm managers; iii) difficulty in capturing any predicted gains - as they may have a countervailing effect on the firms' incentives or ability to compete less aggressively[31].

III. The current legal approach under EU competition law

The current EU competition law framework extends to only some, but not all, cases of minority shareholdings with a potentially problematic nature as described in the previous section. *Ex ante* scrutiny of minority share acquisitions, under EU merger control, depends on the legal concept of "control"[32] whereas *ex post* scrutiny, under EU antitrust rules, is restricted by doctrinal, definitional and policy limitations.

A. EU merger control rules

EU merger control rules may capture acquisitions of controlling minority shareholdings and exceptionally some cases of non-controlling minority shareholdings.

27. OECD (n 1), p. 9.

28. Francisco Enrique Gonzalez-Diaz, 'Minority Shareholdings and Interlocking Directorships: The EU Approach' (2012) 1(1) CPI Antitrust Chronicle, p. 3.

29. OECD (n 1), p. 9.

30. Papandropoulos (n 11).

31. Gonzalez-Diaz (n 26), p. 3.

32. See n 10 above and analysis following at Section III.A below.

1. The "control" threshold

The EU Merger Regulation ("EUMR")[33] authorises the European Commission ("Commission") to exclusively scrutinise *ex ante* "concentrations" with an "EU dimension", i.e. transactions that meet certain turnover thresholds[34]. According to Article 3(1) of the EUMR, a concentration is considered a transaction that brings about a change of control in the undertakings concerned on a lasting basis. It becomes apparent that the concept of "control" is key to determine whether a transaction is notifiable to the Commission before its implementation[35]. Control within the meaning of Article 3(2) of the EUMR is defined as the possibility to exert *"decisive influence"* over the target undertaking and may be established either on a *de jure* (by means of "rights or contracts") or a *de facto* ("by any other means") basis[36].

It follows from the above that the Commission has exclusive jurisdiction to examine under the framework of the EUMR minority shareholdings that entail an acquisition of legal or at least *de facto* control (i.e. controlling minority shareholdings). It is important to note, and perhaps counterintuitive, that according to the Commission's decisional practice, control is a much lower threshold than one would have thought. Indeed, in certain cases control was concluded at unexpectedly low shareholding levels. In *CCIE/GTE*[37], the Commission found a minority shareholding of 19%, combined with certain veto and management rights and taking into account the structure and rights of the remaining shareholders, to amount to an acquisition of *de jure* control under the EUMR. Similarly, in the case of *KLM/Air UK*[38] a minority shareholding as low as 14.9%, together with a complex package of financial arrangements, was held to be sufficient to establish control on a *de facto* basis under the particular circumstances.

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33. Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings [2004] OJ L 24/1.

34. Defined in Article 1(2) and (3) of the EUMR.

35. Articles 4(1) and 7(1) of the EUMR provide for the mandatory notification process and the standstill obligation under EU merger control.

36. Articles 3(1)(b) and 3(2) of the EUMR. *De jure* control is usually established by means of special rights attached to the minority shareholding (e.g. voting, veto, management or representation rights). *De facto* control can be substantiated when the acquiring undertaking has in practice the largest stake in the target and other shareholders are widely dispersed. This effectively means that the acquirer of the minority shareholding is highly likely to achieve a lasting majority of the votes cast at the shareholders' meetings, given the evidenced presence of shareholders at past meetings and the voting patterns in previous years. See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings [2008] OJ C 95/1, paras. 56-57 and 59.

37. Case IV/M.258, *CCIE/GTE* [1992] OJ C 258/10.

38. Case IV/M.967, *KLM/Air UK* [1997] OJ C 372/20.

2. Indirect jurisdiction on non-controlling minority shareholdings

According to the basic jurisdictional test outlined above, acquisitions of non-controlling minority shareholdings are not captured by the EUMR. However, there are two limited exceptions to this general rule.

First, the Commission has the power to review non-controlling minority shareholdings that already exist at the time of a "concentration", which is notified under the EUMR as it meets the relevant criteria. Such pre-existing minority shareholdings of any of the parties to the concentration are relevant factors to be taken into account in the competitive assessment of that independent transaction. The Commission's decisional practice provides a long record of transactions where non-controlling minority shareholdings have been examined as part of the concentration under review[39]. Potential concerns arise particularly when the minority shareholding is held in a third undertaking active in the same market as the merging parties, meaning a direct competitor. In such cases, it is not rare for the Commission to order divestment of the non-controlling stake in order to overcome any competition concerns and allow the notified concentration to go through[40]. Remarkably, however, had the same non- controlling stake(s) been acquired post-acquisition (i.e. at a time subsequent to the clearance of the notified concentration) the Commission would lack any power to intervene[41].

Second, cases of "creeping" acquisitions of control, where the non-controlling minority share acquisition is part of several transactions that all together lead to a lasting change of control, can also be reviewed under the EUMR. Pursuant to the "single concentration" doctrine, it is appropriate for the purposes of asserting jurisdiction under Article 3 of the EUMR to treat as a single concentration "transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time"[42]. Accordingly, the "single concentration" doctrine applies to two types of cases, i.e. where: i) two or more legal transactions - given their economic purpose - are "interdependent", in the sense that one would not have been carried out without the other, and control over the target is acquired by the same undertaking(s)[43]; and ii)

39. See Annex II 'Non-Controlling Minority Shareholdings and EU Merger Control' to 2013 Consultation Paper (n 6), p. 5.

40. Ibid.

41. The Commission would lack jurisdiction to review the non-controlling minority share acquisition itself and would also have limited remedial powers under Article 8(4) of the EUMR. See Section III.A.3 below.

42. Recital 20 of the EUMR.

43. Jurisdictional Notice (n 34), paras. 38-47.

the acquisition of control over a target undertaking results from a series of transactions in securities from one or several sellers taking place within a reasonably short period of time[44]. In both instances, the Commission may review non-controlling minority shareholdings that are a step towards the "creeping" acquisition of control.

It follows from the above analysis that the Commission is competent to review: i) any non-controlling minority shareholdings that are *interrelated* to a "single concentration" as steps to the acquisition of control; but also ii) any pre-existing non-controlling minority shareholdings of the parties to a subsequent *unrelated* "concentration".

3. Remedial powers under the EUMR

Besides the limited jurisdiction, the Commission does not have full remedial powers with regard to non-controlling minority shareholdings. The Commission can order remedies only in cases the prohibited concentration has already been *implemented* in its entirety[45], since it is only then that a lasting change of control in the undertakings concerned arises. Such remedies may constitute to the dissolution of the notified concentration or the disposal of all shares or assets acquired with a view to restore the situation prevailing prior to the implementation of the concentration[46]. As a rule, a concentration under review will not be implemented before the Commission reaches a final decision on its compatibility with the common market[47]. There are limited exceptions though (e.g. public bids, series of securities transactions on the stock exchange) where the general standstill obligation does not apply[48]. For instance, in *Schneider/Legrand*[49] and *Tetra Laval/Sidel*[50] the Commission could impose remedies on the parties because they had already completed their mergers pursuant to the public bid exception in Article 7(2) of the EUMR and the French stock exchange rules that did not permit to make a bid conditional on merger clearance[51].

44. Jurisdictional Notice (n 34), para. 48. The Commission's assessment will analyse all securities transactions as a whole and will not be limited to the acquisition of the "one and decisive share" conferring control upon the acquirer. See Case COMP/M.4439, *Ryanair/Aer Lingus,* Commission Decision of 10 November 2007, para. 12.

45. Articles 8(4)(a) and 8(5)(c) of the EUMR.

46. Article 8(4) of the EUMR.

47. Article 7(1) of the EUMR.

48. Article 7(2) of the EUMR.

49. Case COMP/M.2283, *Schneider/Legrand* [2004] OJ L 101/134.

50. Case COMP/M.2416, *Tetra Laval/Sidel* [2004] OJ L 38/1.

51. Michael Reynolds and David G. Anderson, 'Acquisitions of Minority Interests in Competitors: The EU Perspective' (2005) American Bar Association, Spring Meeting, p. 6.

In contrast, the Commission lacks the power to intervene under Article 8(4) of the EUMR in cases of attempted acquisition of control, where the concentration is *proposed* but not yet completed. This means that the Commission cannot order remedies against a prohibited concentration that is not already implemented - even if it is *partially* implemented[52]. To be sure, the *Ryanair/Aer Lingus* case[53] crystallised that the Commission is unable to request divestiture of any previously acquired non-controlling minority shareholding that was part of a failed takeover attempt since: (i) the proposed takeover, which qualifies as a "concentration" under the EUMR, has been prohibited but not fully implemented; and (ii) the remaining minority stake itself does not confer control ("decisive influence") over the target and thus does not fall within Article 3 of the EUMR[54].

B. EU antitrust rules[55]

Recourse to EU antitrust rules can cover further cases of minority shareholdings that the EUMR cannot reach. While minority shareholdings in a competitor are not *per se* illegal under the competition provisions of the Treaty on the Functioning of the European Union ("TFEU")[56], they can be prohibited in the particular case if found to give rise to or strengthen the anticompetitive effects of restrictive agreements (Article 101 TFEU), or an abuse of a dominant position (Article 102 TFEU). This principle was established long ago in the *Philip Morris*[57] and the *Gil-*

52. Article 8(4)(a) of the EUMR. Similarly for interim measures, Article 8(5)(a) and (c) of the EUMR.

53. See Case COMP/M.4439, *Ryanair/Aer Lingus* (Commission Decision of 10 November 2007) [2008] OJ C 47/9; *confirmed* by the General Court in Case T-411/07, *Aer Lingus v Commission* (Judgment of the General Court of 6 July 2010) [2010] ECR II-3691. In *Ryanair/Aer Lingus* the bid was conditional upon the Commission's approval (which was allowed under Irish takeover rules); thus the merger was not completed and the Commission did not have jurisdiction to order divestiture of Ryanair's pre-existing minority shares.

54. Alec J. Burnside, 'Minority Shareholdings: An Overview of EU and National Case Law' (2013) e-Competitions Bulletin, N° 56676, p. 3.

55. Any mention to EU antitrust rules throughout the article specifically refers to the antitrust provisions enshrined in Articles 101 and 102 TFEU.

56. With regard to Article 101 TFEU, see Fausto Caronna, 'Article 81 as a Tool for Controlling Minority Cross Shareholdings between Competitors' (2004) 29(4) European Law Review 485, p. 491; and with regard to Article 102, see Ezrachi and Gilo (n 17), p. 343.

57. Joined Cases 142 and 156/84, *British American Tobacco Company Limited and R. J. Reynolds Industries Inc. v Commission* (Philip Morris Inc. and Rembrandt Group Limited intervening) [1987] ECR 4487.

lette[58] cases. This line of case law clarified in particular that an acquisition of a minority shareholding in a competitor can be captured by Articles 101 and 102 TFEU if it gives rise to "some (informal) influence" over the target, which could be lower than the "decisive influence" (control) threshold of the EUMR[59]. In addition, more recent EU jurisprudence has confirmed that Articles 101 and 102 TFEU can scrutinise anticompetitive conduct arising out of non-controlling minority shareholdings *following* their acquisition[60].

Despite the promising application of these rules, which could be very effective once in use, the Commission has consistently argued in recent years that in reality Articles 101 and 102 TFEU cannot capture all problematic cases of minority share acquisitions[61]. First, in terms of jurisdiction, Articles 101 and 102 TFEU present certain intrinsic limitations due to their definitional elements and their interpretation that are difficult to overcome in practice[62]. More specifically, Article 101 cannot be invoked unless there is a finding of an "agreement" and/or a "concerted practice" between two or more "undertakings" linked to the minority share acquisition. Similarly, Article 102 is not applicable to situations that the acquisition of the minority shareholding is not made by an already "dominant" undertaking or is not found to be "abusive". Furthermore, certain types of conduct such as "tacit collusion" - regardless of whether involving minority shareholdings or not-cannot be adequately addressed *ex post* by the statutory behavioural provisions[63]. It is therefore clear that the application of the EU antitrust rules is limited by design. Second, as a matter of policy, Articles 101 and 102 TFEU are not the most appropriate avenue to

58. Cases IV/33.440, *Warner-Lambert/Gillette* and IV/33.486, *BIC/Gillette* [1993] OJ L 116/21.

59. See Barry E. Hawk and Henry L. Huser, '"Controlling" the Shifting Sands: Minority Shareholdings under EEC Competition Law' (1994) 17 Fordham International Law Journal 294; and Ezrachi and Gilo (n 17).

60. Case T-411/07 R, *Aer Lingus v Commission* (Order of the President of the Court of First Instance of 18 March 2008) [2008] ECR II-411, paras. 103-104. These cases would escape scrutiny under the EUMR. See Section III.A above.

61. Competition Policy Brief (n 9), p. 2; Commission, White Paper, 'Towards More Effective EU Merger Control', Brussels, 9 July 2014, COM(2014) 449 final, p. 11.

62. Johannes Luebking, 'The EU Merger Regulation Ten Years after the 2004 Review' (2014) 5(4) Journal of European Competition Law & Practice 185; Staff Working Document (n 24), p. 22-23.

63. With regard to "tacit collusion", Article 101 TFEU is not applicable; the application of Article 102 TFEU is not excluded but is rare and limited. It must be noted, however, that the *ex ante* enforcement system under the EUMR is intended to capture and may fully apply to such cases.

challenge minority share acquisitions as such[64]. The competition concerns caused by minority share acquisitions are based on similar theories of harm to those in merger cases as they target structural changes in the market[65]. While antitrust rules aim to prohibit past anticompetitive conduct and only apply *ex post*, merger control is forward-looking and focuses on preventing market structures, which lead to potential distortions of competition[66].

The actual scope and the conceptual limitations of the EU antitrust rules are explained in further detail in the following sections.

1. Article 101 TFEU

Article 101 TFEU may apply to agreements between undertakings by means of which a minority shareholding is acquired, in case they prove anticompetitive. In the leading *Philip Morris* judgment, the European Court of Justice ("ECJ") ruled on the issue for the first time making clear that "although the acquisition by one company of an equity interest in a competitor does not *in itself* constitute conduct restricting competition, such an acquisition may nevertheless serve as *an instrument for influencing* the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business"[67]. The Court further noted that an infringement of Article 101 TFEU is substantiated only when it is shown that the agreement under review has "the *object or effect of influencing* the competitive behaviour of the companies on the relevant market"[68]. Therefore, the ECJ clarified that the mere holding of a minority stake in a competitor as well as the agreement to acquire such shareholding are not to be presumed illegal under Article 101 TFEU[69]. A minority shareholding will only come to restrict competition if it leads to *coordination* or exchange of commercially sensitive information, or to effective *control* or some degree of *influence* over the competitor's commercial conduct[70]. In the latter instance, however, it is unclear whether cases of passive minority shareholdings giving rise to purely unilateral anticompetitive effects

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64. Competition Policy Brief (n 9), p. 2; Staff Working Document (n 24), p. 22-23.
65. Staff Working Document (n 24), p. 23. See also Section II above.
66. Competition Policy Brief (n 9), p. 2.
67. *Philip Morris* (n 55), para. 37.
68. Ibid, para. 45.
69. Caronna (n 54), p. 491.
70. Ezrachi and Gilo (n 17), p. 342; Enzo Moavero Milanesi and Alexander Winterstein, 'Minority Shareholdings, Interlocking Directorships and the EC Competition Rules - Recent Commission Practice' (2002) 1 Competition Policy Newsletter, p. 15 (fn. 5). See also *Philip Morris* (n 55), paras. 38-40 and 45.

may or will be captured by Article 101 TFEU[71]. Accordingly, the "some influence" threshold established by *Philip Morris* - albeit lower than the "decisive influence" threshold of the EUMR - may still leave out minority share acquisitions that could cause competitive harm.

Naturally, before the enactment of the EUMR, the Commission was increasingly willing to apply the *Philip Morris* influence standard to a broad array of minority share acquisitions in a competitor[72]. But the *Philip Morris* doctrine has remained applicable despite the adoption of the EUMR as shown by the Commission's subsequent decisional practice[73]. For instance, a few notable cases that were examined under this analytical framework have been *Enichem/ICI*[74], *BT/MCI*[75], *Olivetti/Digital*[76], and *Phoenix/GlobalOne*[77]. It is important to note however that while there have been some intervention attempts against minority share acquisitions on the legal basis of Article 101 TFEU, since the entry into force of the EUMR, none of them led to a prohibition decision[78].

Furthermore, the applicability of Article 101 TFEU is generally limited given the definitional requirements of this provision. Article 101 captures "agreements", or "concerted practices", with the object or effect of restricting competition[79]. An agreement requires the "concurrence of wills" between independent economic operators. Similarly, a concerted practice presupposes that there is in practice some sort of mutual understanding or "mental consensus" between the undertakings[80]. Therefore, the element of reciprocity is of paramount importance for a finding of either concept under Article 101. It follows that minority shareholdings established as a result of unilateral acts - albeit restrictive of competition - cannot be challenged under Article 101[81]. For example, this is the case for "hostile" acquisitions of share-

71. Ezrachi and Gilo (n 17), p. 340 and 342; Gonzalez-Diaz (n 26), p. 12.

72. Hawk and Huser (n 57), p. 300.

73. Gonzalez-Diaz (n 26), p. 10; Francesco Russo, 'Abuse of Protected Position? Minority Shareholdings and Restriction of Markets' Competitiveness in the European Union' (2006) 29(4) World Competition 607, p. 620- 621.

74. Case IV/31.846, *Enichem/ICI* [1988] OJ L 50/18.

75. Case IV/34.857, *BT/MCI* [1994] OJ L 223/36.

76. Case IV/34.410, *Olivetti/Digital* [1994] OJ L 309/24.

77. Case IV/35.617, *Phoenix/GlobalOne* [1996] OJ L 239/57.

78. Reynolds and Anderson (n 49), p. 9.

79. Competition Policy Brief (n 9), p. 2.

80. Caronna (n 54), fn. 49.

81. Such minority share acquisitons may be challenged under Article 102 TFEU. See Section III.B.2 below.

holdings without the consent of the target undertaking[82], or minority share acquisitions on the stock exchange, where the buyer transacts with multiple unidentified counterparties[83]. In addition, Article 101 will not apply to instances of "tacit collusion" based solely on parallel market conduct without evidence of explicit contacts or mutual links between the undertakings[84].

In the same vein, Article 101 TFEU applies to agreements concluded between two or more "undertakings"[85]. Consequently, agreements for the acquisition of shares between the acquiring undertaking and one or more natural persons (e.g. shareholders of the target undertaking)[86] cannot be captured by Article 101. This arrangement will not qualify as an agreement between undertakings given that the target "company whose shares are acquired is not in itself involved in the sale and purchase agreement"[87]. Likewise, agreements between two or more (legal or natural) persons that form a "single economic entity" - such as agreements between companies that belong to a single economic group or are controlled by a single person[88] - fall outside the scope of Article 101.

2. Article 102 TFEU

Article 102 TFEU may cover unilateral acquisitions of a minority shareholding by undertakings with a dominant position in case such conduct is found to be abusive. This was first established in the seminal *Philip Morris* judgment, where the ECJ set the relevant legal standard under Article 102: "An abuse of such a [dominant] position can only arise where the shareholding in question results in effective control of the other company or *at least in some influence* on its commercial

82. ETIENNE PFISTER, 'Les Participations Minoritaires: Une Point de Vue de l'Autorité de la Concurrence' in Minority Shareholdings and Interlocking Directorates (2013) 3 Concurrences, N° 53019, p. 30.

83. BURNSIDE (n 52), p. 2; LUEBKING (n 60), p. 185.

84. See GERWIN VAN GERVEN AND EDURNE NAVARRO VARONA, 'The Wood Pulp Case and the Future of Concerted Practices' (1994) 31(3) Common Market Law Review 575; CARONNA (n 54), p. 491-495 and fn. 49.

85. The concept of an "undertaking" under EU competition law includes any entity engaged in economic activity regardless of its legal status or the way in which it is financed.

86. There are rare instances where natural persons or a controlling shareholder may qualify as "undertakings" for Article 101 TFEU purposes. See Case C-222/04, *Cassa di Risparmio di Firenze* [2006] ECR I-289; Case IV/28.996, *Reuter/BASF* [1976] OJ L 254/40; and Case IV/C-29.290, *Vaessen/Moris* [1979] OJ L 19/32.

87. CARONNA (n 54), p. 494-495.

88. Case T-9/99, *HFB Holding* v *Commission* [2002] ECR II-1487, paras. 51-53.

policy"[89]. In *Philip Morris* the ECJ found no abuse of dominance solely based on its preceding Article 101(1) TFEU analysis, where influence and control were not substantiated in the particular case[90]. The Commission's decision in *Gillette*[91] came to effectively expand the *Philip Morris* doctrine and confirmed that a lower "influence" threshold applies under Article 102[92].

Gillette is an important decision because it has been the only one where a minority share acquisition in a competitor, in the context of the overall arrangements, was found to infringe Article 102 and disposal of the equity stake and the financial link between the parties was ordered[93]. The facts in this case were quite particular. Under a complex series of agreements, Stora sold its Wilkinson Sword shaving business to Eemland, which then further sold the activities outside the EU and the US to Gillette[94]. Gillette acquired an indirect 22% minority shareholding in its main competitor (Wilkinson Sword) through Eemland (a shell company used for the buy-out)[95]. At the same time, Gillette was a major creditor of Eemland[96]. The transaction included additional agreements between Gillette and Eemland[97]. This decision is of even greater importance given the fact that: (i) the 22% minority shareholding acquired in Eemland by Gillette (the dominant undertaking) conferred no voting or board representation rights, and no access to confidential information; and (ii) Gillette has undertaken not to exert any influence over Eemland[98].

The Commission in *Gillette* found abuse under Article 102 based on the following reasoning. The creation of the link between Gillette and its leading competitor was considered to have changed the structure of the market with negative effects on competition. Therefore, by means of its minority share acquisition and its involvement in the overall arrangements, Gillette failed to respect its special responsibility as a dominant undertaking not to impair genuine undistorted competition in the

89. *Philip Morris* (n 55), para. 65.

90. Ibid. An analysis of the same criteria under Article 102 was considered redundant.

91. *Gillette* (n 56).

92. Ezrachi and Gilo (n 17), p. 343; Hawk and Huser (n 57), p. 320-324. The latter authors explain that in *Gillette* the Commission concluded that the non-voting minority interest and other limited links with Eemland would enable Gillette to exercise "some influence" over Eemland's commercial activities, in violation of Article 102, but not Article 101 TFEU.

93. *Gillette* (n 56), para. 42.

94. Ibid, paras. 10-11.

95. Ibid, par. 13. Gillette held a 22% non-voting "loan stock" equity interest in Eemland.

96. Ibid, paras. 15 and 25. The loans made to Eemland were basically unsecured.

97. Ibid, paras. 17-19.

98. Ibid, paras. 14 and 21.

EU[99]. In addition, given that Gillette was Eemland's largest creditor and a major shareholder with important pre-emption and conversion rights, the management would be "obliged to take into account" Gillette's position in determining its commercial conduct[100], and would not be able to ignore this financial dependence on Gillette[101]. As a result, Gillette would be able to exert *at least some indirect influence* on Eemland, even in the absence of any voting or other rights[102].

Interestingly, it is argued that *Gillette* explicitly went beyond the intentions of the ECJ in *Philip Morris* and in doing so, it effectively brought the doctrine more in line with economic theory[103]. The Commission acknowledged that the existing links, in the form of a minority shareholding and financial loan arrangements, between Gillette and Eemland would attenuate their incentives to compete vigorously on the market. As in a situation of cross-shareholdings between competitors, Gillette and Eemland were expected to have a mutual interest in the other company's performance[104]. This acknowledgement not only extended the "some influence" standard of *Philip Morris* to indirect types of influence (e.g. target's dependence on the dominant undertaking due to a financial link) but also lowered it to capture unilateral abuses by dominant undertakings, which would engage in these types of influence[105].

Notwithstanding its extensive applicability, Article 102 is equally limited in scope, since it requires a finding of both dominance and abuse. Therefore, Article 102 cannot apply to: (i) minority share acquisitions by non-dominant undertakings; or (ii) passive minority shareholdings acquired by dominant undertakings, which by definition create no influence (hence no abuse can be found), but may lead to substantial unilateral effects[106]. The collective dominance doctrine under Article 102 could be used to overcome some of these obstacles[107]. Undertakings found

99. Ibid, para. 23.

100. Ibid, para. 24.

101. Ibid, para. 25.

102. Ezrachi and Gilo (n 17), p. 343.

103. Robin A. Struijlaart, 'Minority Share Acquisitions Below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis' (2002) 25(2) World Competition and Economic Review 173, p. 193-194.

104. Russo (n 71), p. 622-623.

105. Ezrachi and Gilo (n 17), p. 343; Hawk and Huser (n 57), p. 320-324.

106. Ezrachi and Gilo (n 17), p. 344; Tommy Staahl Gabrielsen, Erling Hjelmeng and Lars Sorgard, 'Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention' (2011) 36(6) European Law Review 837, p. 853-854.

107. In practice, however, this is an area of low enforcement activity. There have been only few cases with rather particular circumstances that the collective dominance doctrine under

to be collectively - albeit not individually - dominant can also be examined under Article 102[108]. Indeed, the existence of economic or structural links (e.g. cross-shareholdings, interlocking directorates) will be an important factor in establishing that the undertakings concerned act as a collective entity and hold a collective dominant position on the market[109]. Creation of additional links between the undertakings may be found to unlawfully strengthen their collective dominant position[110]. Furthermore, depending on the (oligopolistic) structure of the market, cases of passive minority shareholdings that promote collusive outcomes may amount to an abuse of a collective dominant position[111]. Notably, the conclusion that even an individual abuse of a collective dominant position may be sufficient to trigger Article 102 TFEU provides additional flexibility in applying the collective dominance doctrine[112].

It follows from the analysis in the previous sections that Articles 101 and 102 TFEU are inadequate to cover all potentially harmful cases of non-controlling minority shareholdings that escape scrutiny under the EUMR.

Article 102 has been applied. See DAMIEN GERADIN AND OTHERS, 'The Concept of Dominance in EC Competition Law' (2005) Global Competition Law Center - Research Paper on the Modernisation of Article 82 EC, p. 27.

108. Joined Cases C-395 & 396/96 P, *Compagnie Maritime Belge Transports SA and others v Commission* [2000] ECR I-1365, para. 36: "A dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity".

109. Joined Cases T-68, 77 & 78/89, *Società Italiana Vetro SpA and others v Commission* [1992] ECR II-1403, para. 358; *Compagnie Maritime Belge Transports* (n 106), paras. 41-42, and 45; Opinion of A. G. Fenelly in *Compagnie Maritime Belge Transports* [1998] ECR I-1371, para. 28; Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para. 114.

110. GABRIELSEN, HJELMENG AND SORGARD (n 104), p. 854.

111. Ibid, p. 854. Generally speaking, merely parallel behaviour in oligopoly settings ("tacit collusion") will not automatically amount to an infringement of Article 102. An abuse of a collective dominant position will only be substantiated if the undertakings concerned are found to engage in abusive exploitative or exclusionary conduct. See RICHARD WHISH AND DAVID BAILEY, *Competition Law* (7th ed., Oxford University Press 2012), p. 571-582.

112. Case T-228/97, *Irish Sugar plc v Commission* [1999] ECR II-2969, para. 66: "… the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, *undertakings occupying a joint dominant position may engage in joint or individual abusive conduct*. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market".

IV. Comparative analysis

A comparison with other regimes reveals evidence that the perceived gap in EU competition law is real. Experiences from EU Member States and third countries indicate that minority shareholdings falling below the "decisive influence" (control) threshold of the EUMR may well worth scrutiny[113]. Indeed, many jurisdictions adopt lower thresholds that allow broader *ex ante* control of minority shareholdings. In the EU, Austria, Germany and the United Kingdom currently have national merger control rules that give them the competence to review acquisitions of non-controlling minority shareholdings[114]. Likewise, important jurisdictions outside the EU, such as the United States, Canada and Japan, examine structural links under merger control rules[115].

Below is an overview of the basic merger control framework in the United Kingdom, Germany and the United States, as applies to minority shareholdings regardless of the acquisition of control.

A. United Kingdom

In addition to acquisitions of *de jure* or *de facto* control, UK merger rules apply to transactions whereby one party acquires the ability to "materially influence" another party[116]. Material influence is the lowest level of control under the UK Enterprise Act 2002 and is assessed on a case-by-case basis taking into account all relevant circumstances[117]. In terms of jurisdictional assessment, *"material influence*" is presumed when a shareholding confers on the acquirer more than 25% of the voting rights in a company[118]. Moreover, the UK competition authorities may examine any case of a shareholding of 15% or more; and exceptionally even shareholdings below 15%, in particular when these are acquired in a direct competitor[119]. In the latter two instances, a number of "plus factors" will be considered, besides the absolute shareholding level, in order to determine whether the acquirer might be

113. Annex II (n 37), p. 10-18.

114. Staff Working Document (n 24), p. 17.

115. Ibid.

116. Enterprise Act 2002, Section 26(3). The Enterprise Act provides for three levels of control, i.e.: (i) *de jure* control ("controlling interest"); (ii) *de facto* control (ability to control); and (iii) "material influence".

117. Office of Fair Trading and Competition Commission, Merger Assessment Guidelines (2010), Section 3.2.8; OFT, Mergers, Jurisdictional and Procedural Guidance (2009), Section 3.15-3.17.

118. Jurisdictional Guidance (n 115), Section 3.19.

119. Ibid, Section 3.20.

able materially to influence the target's policy. Emphasis is placed on voting rights attached to the shareholding, board representation and any other - consultancy, supply, financial - arrangements between the parties[120]. To establish whether material influence can arise through voting rights in particular, the UK competition authorities will consider a number of relevant factors such as distribution of the remaining shares, patterns of attendance and voting at shareholders' meetings, existence of any special voting or veto rights, status and expertise of the acquirer, other special provisions in the target company's constitution conferring the acquirer material influence[121].

Notably, the UK not only has a wider and more flexible jurisdictional test compared to the EUMR but it also operates under a voluntary notification system.

B. Germany

Under the German merger regime codified in the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, "GWB")[122], the Bundeskartellamt can assess the acquisition of both controlling and non-controlling minority shareholdings, which qualify as a "concentration" within the meaning of §37 GWB[123]. All "concentrations" are subject to mandatory notification[124]. Minority shareholdings below the "control" threshold of the EUMR can be reviewed *ex ante* in case the relevant transaction: i) involves the acquisition of at least 25% of the shares (capital or voting rights) in another undertaking[125]; or ii) enables one or several undertakings to directly or indirectly exercise a *"competitively significant influence*" on another undertaking[126].

The acquisition of a competitively significant influence is a subsidiary catch-all provision that applies to transactions that do not reach the other established thresholds (i.e. §37 (1) No.1-3 GWB are inapplicable), but may nevertheless have

120. Ibid, Section 3.17; Merger Assessment Guidelines (n 115), Section 3.2.9 and 3.2.11-3.2.12. It is noteworthy that in *BSkyB/ITV* the UK authorities have rejected claims that investments in significant horizontal competitors are passive. See OECD (n 1), p. 167.

121. Jurisdictional Guidance (n 115), Section 3.21-3.22; Merger Assessment Guidelines (n 115), Section 3.2.10.

122. For an English version of the Act against Restraints of Competition, see: <http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0164> accessed 20 December 2014.

123. Annex II (n 37), p. 10-11.

124. §39 GWB.

125. §37 (1) No. 3 lit. b GWB.

126. §37 (1) No. 4 GWB.

a significant effect on competition[127]. As a result, the concept only applies to transactions between horizontally or vertically related parties as these are considered to have potential competitive implications[128]. In practical terms, the share acquisition must give the acquirer in light of additional legal or factual circumstances (so-called "plus factors") on a lasting basis the status of a minority shareholder with a blocking minority[129]. Plus factors include corporate links such as contractual rights, and factors significant for competition, e.g. special voting or veto rights, information rights, options or pre-emption rights, board representation and management rights, parallel interests or business relations[130]. All cases are analysed on a case-by-case basis, taking all relevant factors into account, but in practice it will be extremely rare that share acquisitions below 10% would meet the threshold of competitively significant influence[131].

C. United States

In the United States merger control extends to *any,* full or partial, acquisition that "*may* be substantially to lessen competition" under Section 7 of the Clayton Act[132]. The US Supreme Court has confirmed that the criterion of control is not dispositive[133]. The statute allows for a *"solely for investment*" exemption, which is construed to apply only if the acquirer does not (attempt to) gain control or influence over the target, or cannot access any commercially sensitive information[134]. By contrast, the exemption is presumed not to apply, for example: (i) to acquisitions between competitors; or (ii) in the presence of interlocking directorates[135].

The Hart-Scott-Rodino ("HSR") Act[136] requires notification of transactions prior to consummation based on a size-of-transaction test. The Act creates a safe harbour exemption for acquisitions of 10% or less made "solely for the purpose of

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127. OECD, 'Definition of Transaction for the Purpose of Merger Control Review' (2013) Policy Roundtables, DAF/COMP (2013)25, p. 92.

128. Jens Peter Schmidt, 'Germany: Merger Control Analysis of Minority Shareholdings - A Model for the EU?' (2013) 2 Concurrences, N° 51496, p. 208.

129. Ibid.

130. OECD (n 125), p. 92-93.

131. Ibid, p. 93.

132. Section 7 of the Clayton Antitrust Act of 1914, 15 U.S.C. §18.

133. *Denver & Rio Grande W. RR. Cov. U.S., 387 U.S. 485, 501 (1967); and U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957).*

134. OECD (n 1), p. 41-42.

135. Ibid, p. 42, fn. 83.

136. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a.

investment", and also for acquisitions of shareholdings of 15% or less by specific categories of "institutional investors". This exemption is also narrowly defined[137]. After recent amendments to the HSR notification form the acquirer is required to report on activities of its "*associates*" (i.e. entities not controlled by the acquirer), which are active in the same business as the target[138]. In addition, Section 8 of the Clayton Act[139] prohibits any director or officer interlocks between horizontal competitors[140].

V. Reform proposals

The debate on potential further regulation of minority shareholdings in the context of EU competition law has heated up over the last years culminating with the recent EUMR reform proposals by the Commission.

A. The long road to reform

The competition law treatment of minority shareholdings dates back to the subversive *Philip Morris* judgment, and its natural continuation in *Gillette*[141]. Both cases recognise the potentially anticompetitive nature of minority share acquisitions at a time before the official entry into force of the EUMR. In fact, *Philip Morris* was strategically used as leverage for its adoption[142]. After the EUMR became effective in 1990, however, the Commission has consistently shown self-restraint in pursuing, and even more prohibiting, anticompetitive minority shareholding cases on the basis of Article 101 or 102 TFEU[143]. Therefore, a *de facto* regulatory vacuum regarding

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137. The implementing regulations to the HSR Act provide that an acquisition is "solely for the purpose of investment" if the acquirer "has no intention to participate in the formulation, determination, or direction of the basic business decisions of the issuer" (16 C.F.R. § 801(1)(i)).

138. Press release of 7 July 2011, 'FTC, DOJ Announce Changes to Streamline the Premerger Notification Form' <http://www.ftc.gov/opa/2011/07/hsrform.shtm> accessed 16 August 2014. The EU has a similar, but narrower, reporting requirement under Section 3.5 of its revised "Form CO", which requires the parties to a notifiable concentration to disclose any shareholdings above 10% held by their "affiliates" in undertakings active in the affected markets.

139. 15 U.S.C. §19.

140. *In re Borg-Warner Corp.,* 101 F.T.C. 863, 932 (1983), *modified,* 102 F.T.C. 1164 (1983), *rev'd on other grounds,* 742 F.2d 108 (2d Cir. 1984).

141. See Section III.B above.

142. BURNSIDE (n 52), p. 2. The then EU Commissioner for Competition, Peter Sutherland, had notoriously stated in an official Commission press release, just a day after the ECJ judgment, that *Philip Morris* is an "unambigious confirmation that Article 85 and 86 apply to transactions relating to change in corporate ownership".

143. As to Article 101, see text accompanying n 76 above. As to Article 102, the *Gillette*

non-controlling minority shareholdings remained. The first systematic attempt to analyse this issue was in the 2001 Green Paper of the Commission, prepared in the process of review of the EU Merger Regulation leading to its amendment in 2004. While the “potential structural effects” resulting from minority share acquisitions were acknowledged[144], specifying the extent of the problem and designing an appropriate legal answer were considered a real challenge[145]. In view of the practical difficulties, the Commission - in consultation with the Member States[146] - decided not to further pursue a regulatory solution to the issue under the EUMR.

No action was taken until 2011 when Competition Commissioner Almunia redraw attention to a potential “enforcement gap” in the area of EU merger control as regards minority share acquisitions[147]. It followed shortly thereafter an economic study on the importance of minority share transactions in the EU[148] as well as two

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case (n 56) was filed in February 1990 before the official entry into force of the EUMR (21 September 1990). Therefore, *Gillette* was decided based on the pre-EUMR regime even though the official decision of the Commission was delivered at a later time (10 November 1992).

144. Commission, Green Paper on the Review of Council Regulation (EEC) No 4064/89, Brussels, 11 December 2001, COM(2001) 745 final, p. 5: “With regard to minority shareholdings [...], while acknowledging the potential structural effects of such transactions, the paper describes the difficulties in drawing borderlines with sufficient legal certainty”; and para. 107: “[...] a minority shareholding (potentially coupled with interlocking directorships) may alter the linked companies’ incentives to compete and thus have an impact upon market conditions”.

145. Ibid, para. 109: “At this stage the Commission is not in the possession of comprehensive data as to the prevalence of minority shareholdings and interlocking directorships. However, based on current experience, it appears that only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 EC. Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the *ex ante* control of the Merger Regulation. At the same time it appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings and interlocking directorships would warrant such treatment”.

146. See public consultation on the Green Paper on the Review of Council Regulation (EEC) No 4064/89 and responses of stakeholders: <http://ec.europa.eu/competition/consultations/2002 council regulation/index.html> accessed 20 October 2014.

147. Joaquin Almunia, Vice President of the Commission responsible for Competition Policy, ‘EU Merger Control Has Come of Age: “Merger Regulation in the EU After 20 Years”’, Brussels, 10 March 2011, <http://europa.eu/rapid/press-release SPEECH-11-166 en.htm?locale=en> accessed 14 January 2014.

148. For the Commission’s call for tender and the tender specifications, see COMP/2011/016 – Study on the importance of minority shareholdings in the EU: <http://ec.europa.eu/competition/calls/tenders closed.html> accessed 20 December 2014. The tender aimed at mapping minority share transactions across the EU; evaluating the extent of possible effects on competition

public consultations in 2013 and 2014 on possible ways to extend the scope of the EUMR to effectively control harmful acquisitions of non-controlling minority shareholdings[149]. The decisive factor for the sudden change of heart in terms of EU competition policy, after more than 10 years of inactivity, was the *Ryanair/Aer Lingus* case[150], which exposed in practice the weaknesses of the current regime.

B. Commission proposal for reform

The Commission had concluded that the existing legal tools were insufficient to cover all potential anticompetitive effects arising from minority share acquisitions in competitors[151], and put three alternative design options under the EUMR on the table: i) a notification system; ii) a self-assessment system; or iii) a transparency system[152].

Eventually, after taking into account the stakeholders' views, the Commission issued a White Paper on 9 July 2014 where it proposes a hybrid "targeted transparency system" to fill in the gap[153]. The new system is set to capture *"competitively significant links",* which arise if a transaction meets the following cumulative criteria: (i) a minority shareholding is acquired in a competitor or a directly vertically related company (i.e. where a *prima facie* competitive relationship exists between the parties); and (ii) the competitive link is significant enough to fall within certain

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and the conditions under which they arise; and providing an indication of the "EU dimension" of potentially problematic transactions.

149. See DG COMP's 2013 consultation 'Towards More Effective EU Merger Control' and stakeholders' responses: <http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html> accessed 14 January 2014; and its 2014 consultation 'Towards More Effective EU Merger Control': <http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html> accessed 20 August 2014.

150. In the *Ryanair/Aer Lingus* series of cases the Commission has blocked several takeover attempts by Ryanair; however it was confirmed that it lacked any power to intervene and order divestiture of Ryanair's remaining non-controlling minority shareholding under the EUMR. See pertinently n 51 above and accompanying text. In contrast, the UK competition authorities asserted jurisdiction over that minority shareholding as they had the power to do so under the broader UK merger control statute. After assessing the competitive implications at a national level, the UK Competition Commission concluded that Ryanair's minority shareholding in its competitor, Aer Lingus, had negative effects on competition and requested Ryanair to reduce its 29.8% shareholding down to 5% as well as not to have any board representation or acquire further shares in Aer Lingus. For an overview, see Staff Working Document (n 24), p. 19-20.

151. 2013 Consultation Paper (n 6), p. 3.

152. Ibid, p. 6-7.

153. White Paper (n 59), p. 12-14; Staff Working Document (n 24), p. 26-35.

thresholds, i.e. if the acquired shareholding is: a) around 20%, or b) between 5% up to 20%, but accompanied by additional factors[154]. Such plus factors may include rights which give the acquirer a *de facto* blocking minority, the right to nominate a member of the board of directors, exert influence, or obtain access to commercially sensitive information of the target[155]. A "safe harbour" is proposed for acquisitions of minority shareholdings below 5%[156].

In terms of procedure, in case a minority share acquisition qualifies as a "competitively significant link", the acquirer is required to submit a limited "information notice" to the Commission[157]. On the basis of the information notice the Commission would decide whether to further investigate a case and Member States whether to request a referral. Voluntary full notification will also be possible[158]. In addition, the Commission considers integrating a waiting period, e.g. of 15 working days, into the proposed targeted transparency system. During this period, starting with the filing of the information notice, the parties would not be able to close the transaction whereas EU Member States could request a referral[159]. Finally, the Commission would be free to investigate a transaction falling within its jurisdiction under a proposed prescription period, which could be of 4 to 6 months, following the information notice. Such provision would encourage potential complainants to come forward and would also deter any investigations initiated out of precaution during the initial waiting period[160].

Based on feedback received on the proposed EUMR reform, Competition Commissioner Margrethe Vestager and the new College of Commissioners are ultimately to decide whether to put forward a legislative proposal[161]. Next, any proposed legislation will require unanimity in the Council as well as the consent of the European Parliament to take effect[162].

VI. Conclusions and future outlook

The foregoing analysis in this paper has showed that there is indeed a substantive problem to be addressed at EU level. Potentially harmful acquisitions of non-

154. White Paper (n 59), p. 12-13.
155. Ibid, p. 13; Staff Working Document (n 24), p. 26.
156. Staff Working Document (n 24), p. 26.
157. White Paper (n 59), p. 13-14; Staff Working Document (n 24), p. 31-32.
158. White Paper (n 59), p. 14.
159. White Paper (n 59), p. 14; Staff Working Document (n 24), p. 32.
160. Ibid.
161. Staff Working Document (n 24), p. 51.
162. Articles 103 and 352 TFEU.

controlling minority shareholdings are not adequately or systematically addressed under the existing EU merger control framework. In practice, EU antitrust rules can only do little to cover some of the problematic cases. Both economic theory and experiences from other jurisdictions support the need for regulatory change. What remains at stake, however, is the most appropriate way to design and implement such change.

Understandably, the business and competition law community is now concerned as to how the Commission is to proceed with the proposed EU merger control reforms. What is critical for the EU authorities and all interested stakeholders is that any legislative change is analogous to the extent of the problem under review. Reform to address gaps and inconsistencies embedded in the law is to be welcome but the risk of over-regulation is acutely present. Best intentions often come with wide-ranging unintended consequences. This hints to the very basic point that just any change is not good.

Accordingly, legal responses to the problem of non-controlling minority shareholdings must be based on a carefully balanced framework with clear and solid assessment criteria (both economic and legal). The Commission's declared objective behind the latest proposed reform purports to strike the right balance in line with three overarching principles: i) prevention of competitive harm; ii) avoidance of undue administrative burden; and iii) fitness with existing systems of EU and national merger control[163]. It is doubtful, however, whether the Commission's preference for a "targeted transparency system" as a whole and certain substantive or procedural aspects of it are in proportion to the identified legal gap or put equal weight on the above principles[164].

It is submitted that it is non-obvious paths that sometimes more successfully lead to the desired goal. For example, a lighter voluntary system[165] or a staggered

163. Staff Working Document (n 24), p. 23-24.

164. Cf. Commission, Impact Assessment accompanying the White Paper, 'Towards More Effective EU Merger Control', Brussels, 9 July 2014, SWD(2014) 217 final. For some recent criticism and suggested refinements to the latest Commission reform proposal, see GIORGIO A. MOTTA, 'White Paper for a More Effective EU Merger Control: How to Review the Acquisition of Non-Controlling Minority Shareholdings?' (2015) 6(4) Journal of European Competition Law & Practice 253.

165. ANNE MACGREGOR AND ALEC J. BURNSIDE, 'In Favour of a Lighter Touch: A Response to the European Commission's July 2014 Proposed Measures on the Review of Minority Stakes under the EU Merger Regulation' (2014) e-Competitions Bulletin, N° 69383. See also NICHOLAS LEVY, 'Expanding EU Merger Control to Non-Controlling Minority Shareholdings: A Sledgehammer to Crack a Nut?' (2014) 12(1) CPI Antitrust Chronicle.

approach to change[166] could be preferable in view of the particularities of the problem and the Commission's assessment criteria. Moreover, given that the newly proposed system could have a chilling effect on innocuous business investment in Europe, this is an important additional factor that the Commission should effectively take into account. It is therefore desirable that the Commission takes a step back before concluding on the "optimal" solution and it reconsiders the alternative options following a truly coherent and principled approach[167].

166. Cf. OECD (n 125), p. 90. See Section 4.1 on the historic development of the "competitively significant influence" regime in Germany.

167. After this article was delivered to the editors, the Commission published a summary of stakeholders' replies to the public consultation on its EU merger control reform proposals presented in the 2014 White Paper: <http://ec.europa.eu/competition/consultations/2014_merger_control/summary_of_replies.pdf> accessed 18 March 2015. Given the stakeholders' comments, in a recent speech the new Competition Commissioner specifically recognised the need to further reflect on the proposed EUMR changes: «[...] my conclusion is that that the balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further. Any system for the control of minority shareholdings at EU level would need to be carefully designed. [...] There is no need to rush. What counts is that the new rules – when they are introduced – work well and are proportionate to the problem.» See Margrethe Vestager, Commissioner for Competition, 'Thoughts on merger reform and market definition', Brussels, 12 March 2015, <http://ec.europa.eu/commission/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en> accessed 18 March 2015. I could not agree more with the Commissioner's conclusions. It now remains to be seen whether and how the Commission will turn words into action.