THREAT OR OPPORTUNITY?

ACQUISITIONS OF MINORITY SHAREHOLDINGS

IN THE CONTEXT OF COMPETITION LAW,

IN LIGHT OF THE EUROPEAN COMMISSION'S WHITE PAPER

European Commission's White Paper: Towards more effective EU Merger Control (COM (2014) 449 final)

Master's Thesis

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ABSTRACT:

Lapin yliopisto, oikeustieteiden tiedekunta

Työn nimi: Threat or opportunity? Acquisitions of Minority Shareholdings in the context of Competition law, in light of the European Commission's White Paper: European Commission's White Paper: Towards more effective EU Merger Control (COM (2014) 449 final)

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Tiivistelmä:

Käsittelen Pro Gradu tutkielmassani vähemmistöosuuksien hankintoja Euroopan Komission Valkoisen Kirjan (COM (2014) 449 final) valossa. Valkoisen kirjan mukaisesti Komissio ehdottaa uutta kohdennettua avoimuusjärjestelmää, jonka avulla kilpailuhaittoja aiheuttavat vähemmistöosuushankinnat saatettaisiin EU:n Sulautuma-asetuksen piiriin. Tutkielmani tavoitteena on osoittaa, miten kilpailuhaittoja aiheuttavat vähemmistöosuuksien hankinnat on mahdollista estää nykyisen lainsäädännön avulla.

Teen aluksi lyhyen katsauksen sulautumien valvonnan historiaan, jonka jälkeen keskityn tärkeisiin käsitteisiin, kuten määräysvalta ja yhteenliittymä, jotka ovat tärkeitä termejä jotka muodostavat Sulautuma-asetuksen ytimen. Tämän jälkeen suoritan katsauksen nykyiseen lainsäädäntöön ja tutkin sen mahdollisuuksia säännellä ja estää haitalliset vähemmistöosuuksien hankinnat.

Tämän jälkeen käyn läpi tapauksia koskien vähemmistöosuuksien hankintoja sekä suoritan oikeusvertailua kohdennetun avoimuusjärjestelmän ja Saksassa, Isossa-Britanniassa ja Yhdysvalloissa voimassa olevien järjestelmien välillä. Lopuksi paikallistan ehdotetun kohdennetun avoimuusjärjestelmän heikkoudet ja esittelen vaihtoehtoisia ratkaisuja kyseisen järjestelmän parantamiseksi.

Tutkielmani johtopäätökset ovat, että Komissio on jo nykyisen lainsäädännön valossa tarvittavat työkalut tarkastella vähemmistöosuuksien hankintoja EU:n Sulautuma-asetuksen ja SEUT 101 ja 102 artiklojen avulla. Komission tulisi selkeyttää ohjeistustaan ja ennemmin kuin lisätä sääntelyä Komission tulisi antaa ohjeistusta vähemmistöosuuksien hankinnoista. Lopuksi teen parannusehdotuksia kohdennettuun avoimuusjärjestelmään sen varalta, että Komissio saattaisi kyseisen järjestelmän voimaan.

Avainsanat: Vähemmistöosuuden hankkiminen, Vähemmistöosuus, Yrityskauppa Valkoinen kirja, Kilpailuoikeus

Muita tietoja:

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Summary:

In this thesis, I will focus on the acquisitions of minority shareholding. In the European Commission's White Paper (COM (2014) 449 final), the Commission proposes a new targeted transparency system. This system, which would capture the acquisitions of minority shareholdings under the EC Merger Regulation, has raised anticompetitive concerns, my aim is to demonstrate how the acquisitions of minority shareholdings can find valid solution through existing jurisdiction.

I will present a historical survey of Merger Regulation and define essential concepts - such as control and concentration - that form the backbone of the EC Merger Regulation. Then I will present an overview of the binding jurisdiction and research its capability to capture acquisitions of minority shareholdings. I will then review existing case law and compare them to the jurisdiction of Germany, United Kingdom and United States. Finally, I will locate the weaknesses of the targeted transparency system and propose alternative solutions.

My conclusion, firstly, is that the Commission already has adequate tools to oversee acquisitions of minority shareholdings under EC Merger Regulation and Articles 101 and 102 of the TFEU; and secondly that the Commission should clarify its guidance and rather than increase regulation, and create guidelines for the assessment of the acquisitions of

minority shareholdings. In the end I suggest improvements for the targeted Transparency System, should it be approved.

Keywords: Acquisition of Minority shareholding, Acquisition, Minority Shareholding, White Paper, Competition Law,

Others:

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BIBLIOGRAPHY

A) LITERATURE:

Aarnio, Aulis: Oikeussäännösten systematisointi ja tulkinta. Teoksessa: Häyhä, Juha (toim.), Minun metodini, WSOY, Porvoo 1997 (*Aarnio 1997)*

Areeda, P; Turner, D.F.: Antitrust Law, Little Brown and Company, Boston 1980 (*Areeda – Turner 1980)*

Cook, C.J.; Kerse 1996, C.S.: Merger Control. Sweet & Maxwell. London 1996 (*Cook – Kerse 1996)*

Cook, C.J.; Kerse 2000, C.S.: E.C. Merger Control. Sweet & Maxwell. London 2000 (*Cook – Kerse 2000)*

Ioannis, Lianos; Ioannis Kokkoris: The Reform of EC Competition Law, New Challenges. Wolters Kluwer Law & Business, The Netherlands 2010 (*Ioannis – Ioannis 2010)*

Jones, A.; Sufrin, B.: EU Competition Law. Text, Cases and Materials, 4th edition, Oxford University Press, 2011 (*Jones – Sufrin 2011*)

Leivo, K.; Leivo, T.; Huimala, H.; Huimala, M.: EU:n ja Suomen Kilpailuoikeus. Talentum, Helsinki 2012 (*Leivo et al 2012)*

Navarro, E.; Font, A.; Folguera, J.; Briones, J.: Merger Control in the EU, Second Edition, Oxford University Press 2005 (*Navarro et al 2005)*

Pöyhönen, J.: Filosofia – Minun metodini. Teoksessa: Häyhä, Juha (toim.), Minun metodini. WSOY, Porvoo 1997 (*Pöyhönen 1997)*

Pöyhönen, J.: Uusi Varallisuusoikeus, Kauppakaari, Lakimiesliiton kustannus, Helsinki 2000 (*Pöyhönen 2000)*

Tirole, J: The Theory of Industrial Organization, MIT Press 1988 (Tirole 1988)

Verloop, P. (ed): Merger Control in the EEC: A survey of European Competition Laws, Kluwer Law and Taxation Publishers, Deventer, Boston 1993 (*Verloop 1993)*

Wik, Christian; Alkio, Mikko: Kilpailuoikeus, Talentum Helsinki 2009 (*Wik – Alkio 2009)*

B) ARTICLES

Ezracji, Ariel; Gilo, David: EC Competition Law and the Regulation of Passive Investments Among Competitors, Oxford Journal of Legal Studies 26(2) 2006 (*Ezrach – Gilo 2006)*

Friend, M.: Regulating minority shareholding and unintended consequences, European Competition Law Review 2012, Volume 33(6) (*Friend 2012)*

Gabrielsen, Tommy Staahl; Hjelmeng, Erling; Sorgard, Lars: Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention, European Law Review 2011, 36(6) (*Staahl – Hjelmeng – Sorgard 2011)*

Gilo, David; Moshe, Y; Spiegel, Y: Partial Cross Ownership and Tacit Collusion, 37, RAND Journal of Economics 2006 (*Gilo – Moshe – Spiegel 2006)*

Grenfell, Michael: Mergers and acquisitions – The "failing firm" defence: How should competition authorities treat acquisitions of companies in financial difficulty? Published in Norton Rose Antitrust, competition and regulatory Bulletin, January 2013 (*Grenfell 2013)* Available at: http://www.nortonrosefulbright.com/files/competition-world-newsletter-january-2013-74736.pdf

Hukkinen, Niko; Troberg, Maria: Vähemmistöomistusten kilpailuoikeudellisesta merkityksestä (Über die fusionskontrollrechtliche Bedeutung con Minderheitsbeteiligungen), Defensor Legis N:o 3/2012 (*Hukkinen – Troberg 2012)*

Milanesi, E.: Minority shareholdings, interlocking directorships and the EC Competition Rules –Recent Commission practice, Competition Policy Newsletter Number 1 – February 2002 (*Milanesi 2002)*

Miller, S.R.; Raven, M.E.; Went, D.: Antitrust Concerns From Partial Ownership Interest Acquisitions: New Developments in the European Union and United States, CPI Antritrust Chronicle, January 2012 (1) (*Miller – Raven – Went 2012)*

O'Brien, Daniel; Salop, Steven: Competitive Effects of Partial Ownership: Financial Interest and Corporate Control, Antitrust Law Journal 2000 (*O'Brien – Salop 2000)*

Reynolds, M.; Anderson, D.G.: Acquisition of minority interests in competitors – The EU perspective, American Bar Association, Section of Antitrust Law Spring Meeting 2005, Allen & Overy, Brussels 2005 *(Reynolds – Anderson 2005)*

Reynolds, R.J.; Snapp, B.R.: The Competitive Effects of Partial Equity Interest and Joint Ventures, International Journal of Industrial Organization, Vol. 4 pp. 141-153, 1986, Elsevier Science Publisher, Holland (*Reynolds – Snapp 1986*)

Riis-Madsen, C.; Stephanou, S.; Kehoe, K.: Reform of the Eu Merger Regulation: Looking Out for the Minority, Competition Policy International Antitrust Chronicle, January 2012 (1) (*Riis-Madsen – Stephanou – Kehoe 2012)*

Rusu, C.S.: EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings - The State of Play, Competition Law Scholar Forum, Working Paper Number 10, February 2014 (*Rusu 2014) available at:* http://www.clasf.org/assets/CLaSFWorkingPaper10.pdf

Sousa, Pedro Caro: Minority Shareholdings and the Competing Merger Control Jurisdictions of the EU and National Competition Authorities: The Ryan Air / Aer Lingus Case, Linklaters LLP 2012 (*Sousa 2012)*

Weitbrecht, A.: Horizontals revisited – EU Merger Control in 2010, European Competition Law Review Issue 3, Sweet & Maxwell 2011 (*Weitbrecht 2011)*

C) OFFICIAL SOURCES

European Union

Primary legislation:

Consolidated version of the treaty on the functioning of the European Union, 9 May 2008. (TFEU)

Secondary legislation:

Council Regulation (EEC) No 4064/89, 21 December 1989

Council Regulation (EC) No 1310/97, 30 June, 1997

Council Regulation (EC) No 139/2004, 2 January, 2004: On the control of concentrations between undertakings

Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1

Memorandum on the Problem of Concentration in the Common Market (1966), EEC Competition Series, Study No. 3, Brussels 1966

European Commission

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008)

Commission Notice on the Notion of a Concentration 1994, OJ C385/5 (*Commission Notice on the Notion of Concentration 1994*)

Commission Notice on the concept of concentration 1998, OJ C66/5, (*Commission Notice on the concept of concentration 1998)*

2013/C 366/04: Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366/5 14.12.2013

Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Single Market Act II, Together for new growth, COM (2012) 573 final

European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, SWD (2014) 217 final

European Commission Staff Working Document: "Towards more effective EU merger control", SWD (2013) 239 final, part 1/3 Brussels, 25.6.2013

Annex to the European Commission Staff Working Document: "Towards more effective EU merger control", SWD (2013) 239 final, part 2/3 Brussels, 25.6.2013

Annex to the European Commission Staff Working Document: "Towards more effective EU merger control", SWD (2013) 239 final, part 3/3 Brussels, 25.6.2013

European Commission’s White Paper: “Towards more effective EU merger control, COM (2014) 449 final, Brussels, 9.7.2014

European Commission’s 25th Report on Competition Policy 1995, Published in conjunction with the "General Report on the Activities of the European Union - 1995". (*25th Report on Competition Policy 1995*)

Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final, 11 December 2001

Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03 (*Commission Horizontal Merger Guidelines 2004)*

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2008/C 265/07, 18.10.2008, OJ C 265/6 (*Commission Non-horizontal Merger Guidelines 2008*)

Guidelines and Discussion papers:

OECD Policy Roundtable concerning minority shareholdings (2008), OECD Report (DAF/COMP (2008) 30): Available at: www.oecd.org/dataoecd/40/38/41774955.pdf

Germany

Primary Legislation:

Act against Restraints of Competition (ARC) (Gesetz gegen Wettbewerbsbeschränkungen), English version available at: http://www.gesetze-im-internet.de/englisch_gwb/act_against_restraints_of_competition.pdf

United Kingdom

Primary Legislation:

Enterprise Act 2002

Secondary Legislation:

OFT Mergers – Substantive Assessment Guidance (2003)

United States

Primary Legislation:

U.S. Code, Clayton Act (Oct. 15, 1914), ch. 323, 38 Stat. 730 (15 U.S.C. § 12 et seq.)

Hart-Scott-Rodino Premerger Notification Act (September 30, 1976), 15 U.S.C. § 18a

U.S. Code, Sherman Act (July 2, 1890), ch. 647, 26 Stat. 209 (15 U.S.C. § 1 et seq.)

Secondary Legislation:

Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010 (*U.S. Horizontal Merger Guidelines 2010*) Available at: http://www.justice.gov/atr/public/guidelines/hmg-2010.html

D) ONLINE SOURCES

Bushell, Gavin: The one-handed European Merger Simplification Project, Kluwer competition law blog, Baker & Mackenzie 11.6.2013 , [Retrieved 2.1.2015] Available at: http://kluwercompetitionlawblog.com/2013/06/11/the-one-handed-european-merger-simplification-project/

DG Competition information note on Art. 6 (1) c 2nd sentence of Regulation 139/2004 (abandonment of concentrations), Available at: http://ec.europa.eu/competition/mergers/legislation/abandonmnet.pdf

European Commission Press Release, Mergers: Commission consults on proposal for simplifying procedures under EU Merger Regulation, Brussels, 27 March 2013, [Retrieved 5.1.2015] Available at: http://europa.eu/rapid/press-release_IP-13-288_en.htm

European Parliament Press Release: MEPs zero in on internet search companies and clouds, Brussels 27.11.2014 [Retrieved 6.1.2015] Available at: http://www.europarl.europa.eu/news/en/news-

room/content/20141125IPR80501/html/MEPs-zero-in-on-internet-search-companies-and-clouds

EU Merger Control statistics until November 30th, 2014 [Retrieved 29.12.2014] Available at: http://ec.europa.eu/competition/mergers/statistics.pdf

J. Almunia, SPEECH 2011/166: EU merger control has come of age, Brussels, 10 March 2011, [Retrieved 13.10.2014], Available at: http://europa.eu/rapid/press-release_SPEECH-11-166_en.htm

J. Almunia, SPEECH 2012/773: Merger review: past evolutions and future prospects, Cernobbio, 2 November 2012, [Checked 13.10.2014], Available at: http://europa.eu/rapid/press-release_SPEECH-12-773_en.htm

Press release of the OFT 112/10, ”OFT statement of its investigation of Ryanair’s minority shareholding in Aer Lingus” 29.10.2010

Simplification of merger procedures: Brief Summary of Responses by Subject Matter, [Retrieved 3.1.2015] available at: http://ec.europa.eu/competition/consultations/2013_merger_regulation/summary_of_responses_en.pdf

The Organisation for Economic Co-operation and Development (OECD) official webpages, Available at: http://www.oecd.org/

Hukkinen, Niko: Kilpailuviranomaisen syyniin myös vähemmistöomistukset, Board View-lehti 2/2014. [Retrieved 2.1.2015], Available at: http://dif.fi/wp-content/uploads/boardview-lehti/2014/06/boardview-02-2014-yrityskauppavalvonta-kilpailuviranomaisen-syyniin-myos-vahemmistoomistukset-niko-hukkinen-roschier.pdf

Results of the public consultation regarding the White Paper COM (2014) 449 Final

Burnside, Alec; MacGregor, Anne: Not the Best Solution: The European Commission’s July 2014 Proposals to Reform the EU Merger Regulation to Review Minority Shareholding Cases, Cadwalader, Competition Policy International 2014, Wickersham & Taft LLP (*Burnside – MacGregor 2014)* [Retrieved 7.1.2015] Available at: https://www.competitionpolicyinternational.com/assets/Uploads/EUNovember14.pdf

European Private Equity & Venture Capital Association (EVCA), Response to the White Paper, 3 October 2014 (*EVCA's response to the White Paper, 3 October 2014),* [Retrieved 7.1.2015] Available at: http://www.evca.eu/media/302311/20141003-EVCA-Response-to-Consultation-on-Merger-Regulation.pdf

ICC Comments on the EU White Paper on Merger Control, International Chamber of Commerce 225/779, 3 October 2014, *[Retrieved 7.1.2015]* Available at: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/ICC-Comments-on-EU-White-Paper-on-Merger-Control/

Ratliff, John; Louis, Frédéric; O'Daly, Cormac: Memorandum to European Commission White Paper and Staff Working Document, "Towards more effective EU merger control", WilmerHale LLP 3 October 2014, (*Ratliff – Louis – O'Daly 2014)*

E) TABLE OF CASES

European Commission

COMP/JV.55 Hutchinson/RCPM/ECT, Commission decision of 3 July, 2001

COMP/M.2283, Schneider Electric/Légrand, Commission decision of 10 October 2001

COMP/M.2416 Tetra Laval/Sidel, Commission decision of 30 January 2002

COMP/M2574 Pirelli/Edizione/Olivetti/Telecom Italia, Commission decision of 21 September 2001

COMP/M.2567 Nordbanken/Postgirot, Commission decision of 8 November, 2001

COMP/M.3653 - Siemens / VA Tech, Commission decision of 13 July 2005

COMP/M.4153 - Toshiba / Westinghouse, Commission decision of 19 September 2006

COMP/M.3330 - RTL/M6, Commission decision of 12 March, 2004

COMP/M.4439 - Ryanair / Aer Lingus, The Commission decision of 20 February 2007

Case COMP/M.5435 Ryanair / Aer Lingus II, The Commission decision of 23 January 2009

Case COMP/M.6663 Ryanair / Aer Lingus III, The Commission decision of 27 February 2013

COMP/M.2903 - DaimlerChrysler/Deutsche Telekom/JV, Commission decision of 30 April, 2003

IV/M330 – McCormick/CPC/Rabobank/Ostmann, Commission decision of 29 October, 1993

IV/M343 Société Générale de Belgique/Générale de Banque Comission decisioin of 3 August 1993

IV/M.397 Ford/Hertz, Commission decision of 7th of March 1994

IV/M613 Jefferson Smurfit Group plc / Munksjo AB, Commission decision of 31 of July 1995

IV/M.967 KLM/Air UK, Commission decision 22 of September1997

IV/M.1080 Thyssen/Krupp, Commission decision of 2 June 1998

Case 93/252 *Warner-Lambert/Gillette* L116, Commission decision of 12th of May 1993

COMP/IV/JV12 Ericsson/Nokia/Psion/Motorola, Commission decision of 20th November 1998

The General Court of the European Union

Case T-342/07, Ryanair Holdings plc v. Commission, 2010

T-411/07 Aer Lingus Plc v Commission, 2008, ECR II-411

Case T-282/02 Cementbouw Handel & Industrie BV v Commission, 23.3.2006

German Courts

Düsseldorf Higher Regional Court, decision of 6 June 2007, WuW/E DE-R 2094 et seq, E.ON/Stadtwerke Eschwege

Düsseldorf Higher Regional Court, decision of 23 November 2005, WuW/E DE-R 1639 et seq., Mainova/StW Aschaffenburg

UK Courts

British Sky Broadcasting Group Plc v The Competition Commission & Anor [2010] EWCA Civ 2 (21 January 2010

Competition Appeal Tribunal

Case 1219/4/8/13 Ryanair Holdings Plc v. Competition Commission v. Aer Lingus Plc,

[2014] CAT 3, 7.3.2014

United States Courts

The Supreme Court of United States

Copperweld Corp. v. independence Tube Corp., 467 U.S. 752 (1984)

ABBREVIATIONS

Abbreviation	Meaning
Horizontal Merger Guidelines	Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03
Jurisdictional Notice	Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008)
CJEU	Court of Justice of the European Union
EC	The European Community
ECJ	European Court of Justice
ECMR	The EC Merger Regulation (EC) No 139/2004
ECN	European Competition Network
ECR	European Court Reports
ECSC	Treaty establishing the European Coal and Steel Community
EU	The European Union
NCA	National Competition Authority
Non-horizontal Merger Guidelines	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2008/C 265/07, 18.10.2008, OJ C 265/6
OJ	The Official Journal of the European Union

Simplified Merger Procedure	2013/C 366/04: Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366/5 14.12.2013
TFEU	Treaty on the Functioning of the European Union, EUVL, N:o C 83, 30.3.2010
White Paper	COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014

1. Introduction

In my thesis I will dive into the world of Competition law and EC Merger Regulation and try to explore and locate the minority shareholdings possession in this context. We will see how acquisitions of minority stakes are effecting to the competition and what kind of competitive effect they have to the market. The aim of my thesis is to find out whether or not todays legislation is suitable for capturing problematic acquisitions of minority shareholdings, and if not, explore alternative and more suitable solutions than the White Paper is proposing to block the gap these acquisitions are creating in the EC Merger Control.

First in Chapter 2, I will present a short survey of the history of Merger Regulation, after which I will focus on important concepts such as control and concentration, which are essential terms when talking about Merger Regulation and acquisitions of minority shareholding. The basic idea of the EC Merger Regulation is formed around the acquisition of the control where acquirer has possibility to use decisive influence on a lasting basis.

I will then present an overview of how the acquisitions of minority shareholdings can already be overseen under the binding jurisdiction (ECMR and Article 101 and 102 of the TFEU), what possible anti-competitive concerns these existing solutions may raise, and whether they may have some efficiency-enhancing effects.

In Chapter 5, I will go through few cases concerning the acquisition of minority shareholding, The most important of them being the attempt by Ryanair to take over one of its competitors, Aer Lingus which in my opinion was the benchmark and impetus for the White Paper's proposals.

In Chapter 6, I will introduce the propositions of White Paper (Targeted Transparency System) and compare the promulgation process to the Commission's earlier Merger Simplification project, whose implementation did not go by the book.

After that, in Chapter 7, I will compare the proposed system to the jurisdiction of Germany, United Kingdom and the USA where the acquisitions of minority shareholding are already captured under the Merger Regulation.

Finally, in Chapters 8 and 9, I will focus on the weaknesses of the proposed system and propose alternative solutions to clarify the jurisdiction in lius of a massive and expensive legislation process. I will also present my suggestion to clarify the targeted transparency system in case the propositions of the White Paper should come to pass.

1.1. Minority Shareholding

The simplest, most basic example of minority shareholding or partial ownership is when a person or entity owns less than 50 % of the voting rights attached to the equity of another undertaking.[1] Minority shareholding in another undertaking can lead to anti-competitive effects which need to be taken into account while investigating the acquisitions. Anti-Competitive effects can be either coordinated or unilateral. Coordinated effects can be express or tacit. When talking about anti-competitive effects in mergers, we have to evaluate the ***concept of control***, which one undertaking gains after acquiring a minority shareholding in another undertaking. Control over another undertaking has to be decisive and on a lasting basis so that the Commission can investigate the concentration that occurs as a result of the merger. The next thing we have to pay attention to is the term ***concentration*** and how it is defined in the EC Merger Regulation. If the merger forms concentration in the meaning of EC Merger Control, we may then move to the concept of control which can appear in the legal or actual content and it can be sole or joint.

Both Sole and joint control can be categorized into their passive and active forms. After defining these terms, we can begin to ask if any of these criteria are in effect at the same time. Concentration occurs when control (legal or actual, joint or sole, passive or active) has been acquired on a lasting basis, and when the ability to use the decisive influence is real. According to the Article 8 section 4 of the EC Merger Regulation, these criteria determine whether the Commission may step in and forbid the merger.

The evaluation of the Commission regarding concentration – whether it should be notified or it should be forbidden – is always valuated case by case. If the concentration does not fall in to the scope of EC Merger Control, the acquisition of minority shareholding can also be measured under the Articles 101 and 102 TFEU. The problem with Article 101, which

[1] OECD Policy Roundtable concerning minority shareholdings (2008), page 20

forbids agreements restricting competition, hinges on the question of whether the acquisition of minority shareholding forms agreement. Article 102 forbids the abuse of the dominant position and the problem is that Article 102 only captures cases where dominant position is acquired, which is not the case in acquisitions of minority shareholding.

Overall, it has been shown in the OECD's roundtable discussions that acquisitions of minority shareholdings can have certain anticompetitive effects. First, minority shareholding in a competitor can lead to reduction of output and increase of prices to the detriment of consumers' welfare. They can also lead to a coordinated effects in the market, such as increasing transparency, that can affect the firms' incentives to compete. Anti-competitive effects are often shown in the oligopolistic markets with significant barriers to entry. Risks of the aforesaid effects arise from both passive and active minority shareholding among competitors. Some of the concerns associated with structural links between competitors can be addressed by merger control jurisdiction while others might require intervention under the competition rules on dominance (in the EU Article 102 of the TFEU) or competition rules on restrictive agreements between competitors (in the EU Article 101 of the TFEU).[2]

The Commission is right that there is a gap in the legislation and at the moment the Commission is not able to investigate acquisition of minority shareholding, but then again is it really a gap which should be blocked and does it really have that huge impact to the big picture. After all, the number of potentially harmful cases of acquisitions of minority shareholdings is limited and the process (targeted transparency system) is quite burdensome compared to what may be gained through the proposed system. Therefore I do not see a reason to start massive and expensive legislation process. Instead, the Commission could try to make the existing tools more effective by clarifying the Merger Guidelines and Jurisdictional Notice or even create totally new "*Guidelines on the Acquisition of Minority Shareholdings"*[3].

[2] OECD Policy Roundtable concerning minority shareholdings (2008), pages 19-20

[3] *Ratliff – Louis – O'Daly 2014,* page 2

1.2. Research Problem

The central question posed in my thesis is this: Do the acquisitions of minority shareholdings create such a gap that they give rise to anticompetitive concerns, and do they threaten the balance protected by the competition law, especially EC Merger Regulation?

Acquisitions of minority shareholdings have been in discussions for over a three decades now and in that time EU and the Commission have basically built the edifice of Merger Regulation that is in force today. In my thesis, I want to elaborate on acquisitions of minority shareholding and place them in the legal framework in force today. I will also question whether a new legislation is needed to block the possible gap created by existing EC Merger Regulation. I will analyze such gaps in recent history to see if this is really something that the Commission should allocate its resources to, as proposed in its White Paper[4]. I will also analyze the proposed targeted transparency system and propose some improvements which, if the system would be enforced, will make it more functional from the viewpoint of stakeholders.

1.3. Approach, Theoretical Framework and Method

Approach: I have taken the approach of a private stakeholder so I partly criticize the proposed system but still introduce a more objective view of the topic from the Commission viewpoint. In order to have the most effective and balanced system in place it is necessary to define the problem behind the acquisitions of minority shareholdings and find the solution which is satisfactory for all of the parties. Therefore I will define the concept of control in concentration that comes into play when minority shareholding is acquired. To define such concepts also requires an approach to the subject that takes into account economic theory. However due to the limited space I will take more of a legal approach to the subject and not dive too deeply into the economic theories behind the subject, which are still worth to mention on a general level.

[4] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014

Theoretical framework: My theoretical framework consists of European and Competition law. I have researched the Merger Regulation in Europe and United States as a background for my thesis. Most of the sources I have used in my thesis have both legal and economical approaches, from which I will concentrate more on the former. We have to remember that Merger Regulation is not just something that was invented to make multinational undertakings difficult, but in the end to protect consumer welfare and minimize the impact to all of parties involved. When a freedom of contract turns to a pure instrument of the stronger party to exercise power, it can be said that the spirit of contract law has turned against itself and at the same time against common interests[5]. My theoretical framework includes research, among the EU's Competition Law, from the United States Competition Law and national Competition laws of the member states of the EU to compare the systems in place all over the globe.

Method: The method that is used in my thesis is legal dogmatic, in other words jurisprudence, which aims to interpret the legal rules and systematization of provisions of law. These methods have both a practical and theoretical scope, with their own individual methods that nevertheless can be applied in close interaction with each other.[6] Theoretical jurisprudence aims to open and answer the abstract possibilities and questions that the practical jurisprudence faces in real context.[7] My thesis is a combination of theoretical and practical jurisprudence since it opens the theoretical framework behind the concept of control in concentrations and acquisitions of minority shareholdings, while trying to open these theoretical concepts through practice. This can be seen as an effort to explain how these concepts affect actual practice. In my thesis, I will first open the theoretical framework of the concepts, then go through the case law related to the acquisitions of minority shareholdings and attempt to explain the same through practical framework. This practical framework will consist of recent case history – Ryanair's attempted acquisition of its competitor Aer Lingus being the most important.

[5] *Pöyhönen 1997,* page 255
[6] *Aarnio 1997,* pages 36-37
[7] *Aarnio 1997,* page 53

1.4. European Commission's White Paper and its backgrounds

The Commission's objective is to create system that would allow them to examine and intervene against potentially anti-competitive acquisitions of non-controlling minority shareholdings. From the results of Public Consultation[8] in 2013, it can be read that Member States and other stakeholders would want a system which captures the potentially problematic cases while avoiding any unnecessary administrative burden on companies, which has been the goal of the Commission for the last 6 years.[9] Administrative burden on companies can also be seen as the biggest threat of the proposed legislation.

Three options for the new system were introduced based on the Public Consultation[10] in 2013, which are:

- **Notification system**: This system would extend the current system of ex-ante merger control to acquisitions of non-controlling minority shareholding under certain conditions.
- **Transparency system**: Would require parties to submit an information notice to inform the Commission of such acquisition. After that, the Commission could decide whether to further investigate the transaction, enable the Member States to consider a referral request, and enable potential complainants to come forward.
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- **Self-assessment system**: Would not require parties to notify such acquisitions in advance of completion. The Commission could still initiate an investigation of potentially problematic cases on the basis of its own market intelligence or complaints.

The best option, which was also in favor of most of the private stakeholders in the public consultation, is a combination of two last options: Self-assessment system with a possibility to voluntarily give notification to the Commission, without a stand-still obligation to create legal certainty. United Kingdom also preferred this kind of system, which would be similar with United Kingdom's own national system. Therefore the

[8] SWD (2013) 239 final: Commission Staff Working Document, Towards more effective EU merger control
[9] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, pages 22-23
[10] SWD (2013) 239 final: Commission Staff Working Document, Towards more effective EU merger control, pages 6-7

Commission introduced a new option called targeted transparency system in which I will focus in section 6.2.[11]

1.4.1 What is the Purpose of the new legislation and why we are about to adopt it?

In the background material of the White Paper, the Commission introduced five assessment criteria to measure the three different systems introduced above. First is a goal to prevent harm to competition and consumers; second is to create legal certainty; third is to lessen administrative burden on businesses; fourth is the amount of the public Enforcement costs; and fifth is consistency with the merger control systems at national and EU level and allocation to the more appropriate authority.[12]

The first goal sought to ensure effective competition in the internal market and prevent harms to customers by capturing the potentially problematic cases. The Commission has estimated that the benefits derived from the horizontal merger decisions are between 4000 and 6000 million euros per year between years 2009 - 2011[13]. In 2012 the Commission estimates to gain 2,200 – 5,600 million euros per year from horizontal merger decisions. These estimates don't apply directly to the proposed targeted transparency system since it would not be possible to assume a similar rate of intervention for minority shareholding cases than there are acquisitions of control. The Commission is expecting the rate to be higher. [14]

Legal certainty – in the other words, whether the proposed options are clear and precise – is the second criteria. In the public hearings legal certainty of the proposed system has raised a lot of concerns. It is clear that stakeholders, especially law firms, regard legal certainty as very important value so that they can be sure under which conditions and at what point transactions can be fully implemented.

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[11] SWD (2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 23

[12] SWD (2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, pages 28-31

[13] Due to a limited space, I will not focus on these estimations more precisely. Read more about the estimations from the Annual activity reports of DG COMP 2009-2011.

[14] SWD (2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 74. More detailed of the estimation, please see the Annual Activity report of DG COMP 2012.

The third criteria, and at the same time a big issue, is the administrative burden on businesses. this includes costs incurred by businesses to meet legal obligations to participate in procedures and to provide information. This can be seen problematic due to a limited number of problematic cases. The Commission focused only on the external costs of notification, but what about the internal costs? Transactions often involve a huge number of employees of the parties of the merger, not to mention the external legal and financial advisors, so it would have been good to also evaluate the internal costs of the parties while measuring the criteria.[15]

The fourth criteria assesses whether an option affects competition authorities and the Commission by increasing or decreasing workload. The fifth and last criteria assesses if the options fit with the existing procedures at the EU and Member State level.[16]

Based on the evaluation of the assessment criteria, the Commission concluded that the targeted transparency system would be most beneficial by meeting all of them. The Commission states that under this system, the potential harmful transactions will be caught, “innocent” transactions will be left out, the number of harmful cases will be limited, and harm to consumers prevented. Targeted transparency system also limits the administrative burden on businesses and enforcement costs for the public authorities involved, by limiting the amount of submitted information. Finally the Commission stated that the system would fit in with the existing systems on the national level.

The Commission also saw that the targeted transparency system would respect the principle of subsidiarity, since there have been few cases[17] that would have been more appropriately investigated by the Commission instead of by individual Member States, due to a dimension that did not go beyond the borders of a particular Member State.[18]

The Commission invited stakeholders to comment the White Paper by 3 of October 2014 and will decide, based on the public hearing, what actions it will take to block the possible gap of the acquisition of minority shareholdings. The Commission has not yet published a

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[15] SWD (2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, section 3.4.1.3

[16] SWD (2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, pages 30-31

[17] For example case Ryanair / Aer Lingus. See more about these cases in section 5.1

[18] SWD (2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, pages 35-36

summary of the results of the hearing. Some of the shareholders have already published their responses to which I will focus later in my thesis.

2. History of the merger regulation within EU

The goal of the EU merger regulation is to ensure effective competition in the internal market or parts of it. Its general obligation is to ensure effective competition in the markets. When one undertaking has to capitulate to agreements or other arrangements it has made with another undertaking that are heavily restrictive or disturb competition, the market does not receive the benefits of their content. It is a question of the maintenance of the effective markets based on restriction of the abuse of property law's rights which appears in the form of the restriction of the abuse of the dominant position. [19] Merger regulation is not a new invention and EC Commission has already in 1966 identified two categories: concentrations and co-operations (cartel type arrangements)[20]. Even back then the concentrations were said to result from structural chance in a manner indicating permanence[21]. EU has paid attention to the control of concentrations between undertakings since 1989 and has reviewed the system several times. EU has reformed the merger regulation in 1997 and 2004. Before the enactment of the EC Merger Regulation in 1989, the Commission applied the Philip Morris[22] standard for minority acquisition. According to ECJ the Article 81 (101 TFEU) applies to the acquisition of minority shareholdings in a competitor and serves as an instrument for influencing the commercial conduct of the parties so as to restrict or distort competition[23]. After the EC Merger Regulation came into force the role of the Philip Morris standard has been diminished.[24]

[19] Pöyhönen 2000, page 83
[20] Memorandum on the Problem of Concentration in the Common Market (1966), EEC Competition Series, Study No. 3,
[21] Verloop 1993, page 202
[22] Cases 142/84 and 156/84, British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v. E.C. Commission, before the Court of Justice of the European Communities [1987] ECR 4487; [1988] 4 CMLR 24, Phillip Morris tried to acquire 30,8 % share of Rothmans, its rival in the cigarette market. Ownership was reduced to 24,9 % and the ECJ stated that what may look like a passive investment may result in a takeover of a competitor.
[23] *Milanesi 2002,* page 15
[24] *Gilo – Ezrachi 2008,* page 339

2.1. Reform of the Merger Regulation on 2004

Reform of the Merger Regulation in 2004 was based on the Green Paper[25] and its investigations on 2001. The Green Paper Commission discussed, in reference to other subjects, the potentially complex acquisitions of minority shareholdings, so the topic has been in spotlights for over a decade now. It was noted back then that the number of the possible problematic transactions was limited and that articles 101 (81 EC) and 102 (82 EC) of the TFEU can be used to assess these cases and competition problems through case law. The Commission even stated in its 2001 Green Paper that it: "*appears that only a limited number of minority shareholdings would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 (nowadays 101 and 102 of the TFEU)… Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex-ante control of the Merger Regulation*". [26] As a conclusion Article 101 (81) remained the most appropriate instrument for the assessment for divestment of minority shareholdings.

2.2. Competence of the European Commission on the light of the fundamental rights

In its White Paper, the European Commission states that the scope of its jurisdiction relates directly to which procedure is appropriate and adequate.[27] This leads us straight to the question: on what basis does the European Commission have the right to widen its competence to investigate also acquisitions of minority shareholdings, which very rarely incur competition concerns? The Commission's right to investigate unproblematic transactions would create a heavy burden on businesses and make the Merger Regulation more uncertain and lessen its predictability.

[25] COM(2001) 745 final: Green Paper on the Review of Council Regulation (EEC) No 4064/89, 11 December 2001

[26] COM(2001) 745 final: Green Paper on the Review of Council Regulation (EEC) No 4064/89, 11 December 2001, pages 26-27. Articles 81 and 82 EC are the new Articles 101 and 102 of the TFEU

[27] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 43

According to the EC Merger Regulation paragraph 23[28], it has to be established if concentrations with a Community dimension are compatible with the common market, or if they are outside the terms of the need to maintain and develop effective competition in the common market. The Commission's appraisal needs to be placed within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 3 of the Treaty on European Union.

According to the Article 2 of the Treaty Establishing the European Community, its mission (among several others) is to:

> *"Promote throughout the Community a harmonious, balanced and sustainable development of economic activities, sustainable and non-inflationary growth a high degree of competitiveness and convergence of economic performance and economic and social cohesion and solidarity among Member States."*

When talking about acquisitions of minority shareholdings, I do not see that they would threaten the harmonious and balanced development of economy – neither the sustainable growth of competitiveness, nor the economic solidarity and cohesion among Member States. As one of the stakeholders stated in public consultation, the White Paper is only addressing "technicalities" instead of a complete overhaul of the merger control system. So in my opinion this is not a topic that is essential to EC Merger Regulation[29].

Article 3 section 3 of the Treaty on European Union the European (Maastricht Treaty) Community's task (among several others) is to establish an internal market which shall:

> *"Work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy"*

Some enterprises' minority shares in other firms certainly do not threaten the balanced economic growth or create unstable prices or prevent the creation of competitive social

[28] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1
[29] ICC Comments on the EU White Paper on Merger Control, 225/779, 3 October 2014, page 2

market economy. In EC Merger Regulation paragraph 36[30], the Commission recognizes that the Community respects the fundamental rights of the European Union and that the EC Merger Regulation should be interpreted and applied with respect to these fundamental rights. This opinion was little aggravated, and of course there are lot of concerns behind the proposals of the White Paper and some of them should be tangled in. Still, we need to ask if the Commission is using adequate tools to untangle these concerns or if there are more appropriate and adequate ways to deal with the acquisitions of minority shareholdings.

Joaquín Almunia, the competition commissioner of the European Commission, has exposed the rationale behind merger control in his speech in 2011 and stated that cases where competition concerns arise are a minority. As statistically 9 out of 10 mergers have been approved without conditions and during two decade there has been 274 notified mergers which the Commission has intervened 16 and only one has been prohibited. He also stated there are issues in the acquisitions of minority shareholdings and that the Commission is looking at an enforcement gap to solve the problem. Almunia stated that "*I have instructed my services to look into this issue and see whether it is significant enough for us to try and close this gap in EU merger control*".[31]

The next year, in Cernabbio, Almunia introduced new modifications to be made for the EU Merger Regulation. The first was the Simplified Merger Procedure, whose weaknesses I will focus on chapter 6.2. Almunia also raised the concern of the acquisition of non-controlling minority shareholdings which, on his opinion, may sometimes cause significant harm to competition and which the Commission is unable to handle within the current merger control system. Almunia also states that *"any reform would have to strike the right balance between effective enforcement and the need to keep the regulatory burden light"* and proposed a selective system that identifies the cases which raise competition problems.[32]

[30] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1
[31] J. Almunia, EU merger control has come of age, Brussels, 10 March 2011, SPEECH 2011/166
[32] J. Almunia, Merger review: past evolutions and future prospects, Cernobbio, 2 November 2012, SPEECH 2012/773

3. Control in concentrations

When talking about the concept of control in concentrations here, we are talking about the control contained in the EC Merger Regulation, since there are also other possible definitions of control – established by national authorities in accordance with the legislation applicable in each Member State[33]. According to the Commission *the concept of control under the Merger Regulation may be different from that applied in specific areas of legislation concerning, for example prudential rules, taxation, transport or the media*[34]. Therefore I will focus on the definition of control within the meaning of the EC Merger Regulation.

3.1. Concentrations

As defined in the EC Merger Regulation paragraph 20[35], a concentration concerns operations that bring about a lasting change in the control of the undertakings concerned, and therefore, in the structure of the market. Concentration also covers joint ventures performing on a lasting basis and series of transactions that are closely connected within a reasonably short period of time. Nowadays, the EC Merger Regulation only applies to concentrations that are defined as *acquisitions of control by one or more person(s) or undertaking(s) over one or more other undertakings or parts of undertakings.*[36] One example could be a firm acquiring a majority stake in another firm or joint venture created by two firms.

In order to discuss concentration as defined by the EC Merger Regulation, changes in control have to be on a lasting basis. Acquisition of control can happen on a legal basis (de jure) or on actual basis (de facto). We are talking about a Union Dimension on

[33] Navarro et al 2005, page 27
[34] Commission Notice on the concept of concentration 1998, paragraph 17
[35] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1
[36] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 19

concentration when the control has borne and certain turnover thresholds[37] are met. "*The Commission has exclusive jurisdiction to examine concentrations meeting certain turnover thresholds in order to assess whether they lead to a significant impediment of effective competition in the internal market or a substantive part of it*."[38] EC Merger Regulation only applies to a *Union Dimension*[39] concentrations. Before the treaty of Lisbon, equivalent term was *Community Dimension.*[40] Even though the transactions would not be large enough to reach the turnover threshold, mergers can still be subject to national merger regimes, as most of them utilize the EC Merger Regulations concentration test[41].

The idea of Union Dimension is based on the evaluation of the threshold of the parties. When it looks at thresholds, the Commission is not trying to evaluate the market situation of the parties of the concentration or its effects to competition, but trying to technically define its jurisdiction to investigate the concentration. This principle has been defined in the Cementbouw case, where it is said that: *"the Commission would become involved only where the proposed concentration — or the concentration already carried out — attains a certain economic size and geographic scope, that is to say, a 'Community dimension'.* [42]

EC Merger Regulation paragraph 11 requires that upon the exceeding of a given threshold, the undertakings should have substantial operation in the Community, a requirement that in fact has had no impact in practice. The requirement of Union dimension seems to be fulfilled in practice when the aggregate turnover of the undertakings exceeds given thresholds. With the Union Dimension, based on certain turnover thresholds, the Commission is trying to set up clear and unambiguous threshold to avoid the legal uncertainty. The determination of turnover thresholds is pretty easy and unambiguous in practice. The other side – and at the same time the weakness – is the mechanical application of the Union Dimension. This mechanical application, with no possible competition effects or only little effect, is being investigated within EC Merger Regulation.

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[37] *Article 1(2) of the EC Merger regulation: A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each at least two of the undertakings concerned is more than EUR 250 million*.

[38] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 19

[39] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1, paragraph 9

[40] Leivo et al 2012, pages 985-986

[41] *Reynolds – Anderson 200,* page 1

[42] Case T-282/02 Cementbouw Handel & Industrie BV v Commission, 23.3.2006, section 115

Nevertheless concentration with Union Dimension has to be notified to the Commission before execution of the merger.

Definition of the Union Dimension has three different turnover thresholds: worldwide, Union-wide and Member State - wide.[43]

Article 3(5) of the EC Merger Regulation[44] lists exceptions for operations that fall under the scope of Article 3(1) as concentrations but are deemed not to result in a concentration, such as:

(i) Acquisition of securities by financial institutions or insurance companies provided that the voting rights in respect of the securities are not exercised to determine the competitive behaviour of the undertaking and that the securities are sold within one year;

(ii) the acquisition of control by office-holder; and

(iii) the acquisition of securities by financial holding companies as defined by Article 5(3) of Fourth and Seventh Company Law Directives[45] provided that voting rights are used only to maintain the full value of the investment and not to determine the competitive conduct of the undertaking.

These are called operations which are not concentrations. Purely financial agreements such as sale and leaseback agreements with a buyback of the assets neither constitute a concentration since they do not change control over the management.[46]

3.2. Concept of Control

One of the defining characteristics of control is the capability of exercising decisive influence.[47] It is not necessary to prove that parties are actually using this decisive

[43] Leivo et al 2012, pages 1053-1054
[44] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1)
[45] Council Directive 78/660/EEC of July 25, 1978 on the annual accounts of certain types of companies, OJ L 222 of 1978, and Council Directive 84/569/EEC on consolidated accounts OJ L 314 of 1984
[46] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 19, see also *Giro – Ezrachi 2008,* page 335
[47] Leivo et al 2012, page 997

influence or that they are about to[48], but the ability to wield it must be proven.[49] When talking about minority shareholding, such shareholdings are considered to be under ECMR, if under circumstances defined above in this section, the Commission refers, in its notice, to the possibility of establishing control through *qualified minority*[50]. Article 3(1) of the EC Merger Regulation specifies that control may also be acquired by any other means. Concentration may arise by factual or legal basis. The control itself can be sole or joint, and its acquisition can concern one or several companies or parts of the companies. [51] The concept of control is specified in the Article 3(2) of the EC Merger Regulation:

Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regards to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."[52]

This set up the basic frames inside which the Commission is operating while reviewing the transactions.

3.3. Conclusive Control

EC Merger regulation does not define exactly the concept of the Conclusive Control which is determinant when estimating the concentrations[53]. In most of the cases the possibility to exercise the decisive influence is based on majority ownership of the shares or on the special rights gained through shareholders agreement concerning, for example the strategic

[48] Cook –Kerse, p. 31
[49] Case T-282/02 Cementbouw Handel & Industrie BV v Commission, 23.3.2006, section 58
[50] Commission Notice on the Notion of Concentration 1994, section 14. It is notable that the qualified majority was already noticed in the EEC Merger Regulation 1989
[51] Hukkinen – Troberg 2012, page 322
[52] Council Regulation (EC) No 139/2004, 2 January, 2004: On the control of concentrations between undertakings, Article 3 section 2
[53] Hukkinen – Troberg 2012, page 322

decision-making of the target company.[54] The control can be sole or joint control and both of them can appear on a legal or actual basis. Appraisal of the Commission is always made on a case-by-case basis.

3.3.1 *Sole Control (Legal or actual, negative or positive)*

Sole control occurs when only one undertaking is exercising its decisive influence on the target undertaking. When one undertaking is using its decisive influence in deciding on a strategic commercial decision of the target undertaking this is known as positive control. Usually it is based on the major ownership of shares of the target undertaking, which expresses itself through a majority of the voting shareholders convened at a general meeting. Negative sole control denotes a situation in which one undertaking has the power to prevent the strategic decision-making in the target company, but does not have the power on its own, to impose such a decision. In most of the cases this is based on veto rights gained through shareholders agreements.[55] The negative sole control situation is called deadlock[56]: Company is the sole owner of that position and it does not have to co-operate with other shareholders.[57]

A typical situation involving legal sole control is when an undertaking acquires a majority of the voting rights of another undertaking in a general meeting. Sole control may also occur on a legal basis when specific rights are attached to the minority shareholding[58]. If, according to the articles of association of the undertaking, A stipulated majority is needed for the strategic decision-making, the acquisition of simple majority does not give rights for strategic decision making (positive sole control) but instead allows the acquirer to block such decisions (negative sole legal control).[59]

Sole control can also be gained by acquiring minority shareholding, for example, in following cases:

[54] Leivo et al 2012, page 997
[55] Leivo et al 2012, pages 1002-1003
[56] More of the deadlock situation in clause 0
[57] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 54
[58] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 57
[59] Leivo et al 2012, page 1005

- **Different class of shares:** The undertaking has different kinds of share classes, where various shares are worth different amounts of votes at a general meeting. A minority shareholder can, by acquiring a sufficient number of shares with the majority of voting rights, assume the power to decide on the strategic decisions such as nomination over half of the board of directors.
- **Right to decide over operations in long course:** A minority shareholder can also use sole control when it has the right to lead the company operations and decide on them in long course.
- **Minor participation in the general meetings:** Minor participation of shareholders in general meetings can lead to a situation where it is very likely that undertaking will have majority of votes in the general meeting even though it does not have majority of the votes.
- **Convertible promissory note:** A convertible promissory note or other agreement through which the minority shareholder can, in a short time, change its position in the management or ownership of the undertaking so that it can overtake legal control over target[60].[61]

Minority shareholder can also gain the control through swap option, put option or call option. With these contractual stipulations, a minority shareholder can, rather quickly, acquire the majority of shares of the target undertaking. These stipulations are not, by themselves, enough to initiate sole control.[62] An example of the actual sole control is the case RTL/M6[63], in which RTL gained actual sole control when Suez, the other shareholder of M6, sold its shares to a large group of investors, leaving the RTL, the only user of actual sole control, no other choice than to notify the concentration to the Commission even though it did not take part to the acquisition.

De facto sole control occurs when a minority shareholder has control over another undertaking because it has significant shareholding in it and the remaining shares are dispersed. The minority shareholder establishes de facto controls the decision-making of

[60] In the case IV/M.397 Ford/Hertz, 7.3.1994 the Commission ruled that 49 % shareholding with possibility to nominate four out of nine board members and certain veto-rights lead to the possibility to use conclusive control.
[61] Leivo et al 2012, pages 1005-1006
[62] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 60
[63] More of the case COMP/M.3330 RTL/M6, 12.3.2004 in section 3.4

the target by controlling the majority of the votes at annual meetings. In this situation the minority shareholder exercises decisive influence over the target.[64] The control by de facto means can exist in the following situations:

- **Insignificant participation in the general shareholders meetings:** De facto control can be analyzed through the development of participating shareholders in the general meetings in last three (or more) years. The percentage of the vote needed to adopt the resolutions can be determined through analysis and the results can show whether minority shareholding is sufficient to confer control.[65] However the Commission cannot conclude that the control exists – if, for example, one shareholder has had majority in general meetings over the last three years – but it can be a decisive evidence of the existence of control.
- **Composition of shareholders:** When there are a lot of individual shareholders with small shareholding in the undertaking, the composition of shareholding needs to be viewed to determine whether one of the minority shareholders could, in theory, have significant influence in decision making in the target undertaking.[66]

3.3.2 *Joint Control*

According to the Jurisdictional Notice paragraph 62, *"Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking."* Decisive influence in joint control cases is described as "*the power to block actions which determine the strategic commercial behaviour of an undertaking.*" (Negative Joint Control).

Joint Control often leads to a possible deadlock situation[67] when two or more undertakings reject such proposed decisions.[68] These shareholders have to co-operate and reach common understanding in the decision-making of the target undertaking.

[64] Navarro et al 2005, page 22
[65] Minority shareholding has been considered sufficient to confer control in following cases: IV/M343 Société Générale de Belgique/Générale de Banque 1993 (**25,96 %**); IV/M613 Jefferson Smurfit Group plc / Munksjo AB 1995 (**29,04 %**); COMP/M2574 Pirelli/Edizione/Olivetti/Telecom Italia 2001 (**27 %**)
[66] Navarro et al 2005, pages 23-24
[67] More of the deadlock mechanism in clause 0
[68] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 62

Joint control can also be legal (de jure) or actual (de facto). Usually, the legal joint control is based on certain veto rights defined in shareholder agreements. Joint Control can very rarely be based on actual circumstances. One example could be when the minority shareholders have such significant common interest that they are actually prevented from acting against each other when using voting rights in the target undertaking. Recognition of actual joint control is very hard and the Commission has also stated in Jurisdictional Notice paragraph 76 that: "*The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.*"[69] The Commission has stated in its practice[70] that Actual Joint Control occurs when undertakings have exercised decisive influence on the target undertaking. [71]

Acquisition of joint control leads more often to a notification of the concentration than acquisition of sole control, because the turnover thresholds that count are based on the number of participants of the concentration. Turnover of the target undertaking can be rather small but very often the acquirers joint turnover meet the thresholds.[72] To be able to examine the turnover threshold, we first need to determine the concerned undertakings. Friend has provided an example of a joint venture situation that can cause problems when talking about undertakings is concerned: "*An example of a joint venture in which only some of the shareholders have joint control, while others are simply regarded as passive minority investors (albeit with minority protection rights). There may be perfectly sound business reasons why the transaction is structured in this way that have nothing to do with merger control "avoidance"; for example, reflecting the investment mandate of a pension fund which is prevented from playing an active role in management, or the fact that certain of the investors have particular sector expertise or are making a larger investment, and therefore want to have a more direct role in management.*"[73]

As we shall see below the Jurisdictional Notice draws a distinction between veto rights over vital strategic business decisions and those that are not regarded as conferring control. According to the Friend it is not clear which undertakings should be taken into account while counting the turnover thresholds and at least some of the non-controlling

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[69] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 76

[70] More of the Actual Joint Control, see cases COMP/JV.55 Hutschinson/RCPM/ECT, 3.7.2001 and IV/M.967 KLM/Air UK, 22.9.1997

[71] Leivo et al 2012, page 1009

[72] Leivo et al 2012, page 1014

[73] *Friend 2012,* page 304

shareholders would need to be taken into account while determining whether the Merger Regulation applies or not[74].

To be able to apply the EC Merger Control we have to distinguish between acquisition of joint control in concentration and establishment of joint venture. In order to review the established joint venture under EC Merger Control it has to be a full function joint venture. In acquisition of joint control in concentration, it is sufficient that the target is a business in which certain threshold gain from the market can be directed. [75]

One or more undertaking with minority shareholding in the same entity can also enjoy specific rights, e.g. virtue of article of association or an agreement between parent undertakings, which compensates the shareholders by providing an avenue to exercise joint control with each other. Usually these take the form of veto rights that allow the minority parent undertaking to block the decision-making of the joint venture.[76] Even if one undertaking holds a sufficient amount of shares to exercise sole control, joint control may arise as the results of the veto rights of the minority shareholder. Normally these veto rights are exercised at the shareholders meeting and in the administrative or supervisory bodies where a minimum quorum is needed in order to pass vital decisions.[77] Such vital decisions[78] are:

- **Business plan:** Veto rights over the business plan may confer joint control and contrary lack of a veto right on this point can itself determine the absence of joint control.
- **Approval of budget:** Budget determines the future of commercial strategy of the undertaking, so veto rights over the approval of budget may confer joint control.
- **Appointment of senior management:** Appointment of senior management (chairman, managing director, general directors) of the joint venture is important element although it is not decisive in its own[79]. Nevertheless important point over here is the power of the parent undertakings to block appointments to these posts.

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[74] *Friend 2012,* page 305
[75] *Leivo et al 2012*, pages 1025-1026
[76] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), clause 3.2
[77] Navarro et al 2005, page 16
[78] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), clause 3.2
[79] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), clause 3.2

- **Other veto rights:** Regarding e.g. investments, changes in the scope of the activity of the joint venture, restructurings of joint ventures, and other specific rights over which undertakings can exercise power through veto rights, although not decisive.
- **Casting vote and deadlock mechanisms:** Generally the joint control, when one of the parent undertakings is having a casting vote, may exist very rarely. It could exist when the casting vote could only be used after all the stages in arbitrations or attempts at reconciliation have been exhausted or if it were used in a very limited field.[80] These are certainly an exception.

Over all the most important veto rights, which refers to the existence of joint control, are approval of business plan and budget and the appointment of senior management. Overall the joint control between minority shareholders does not result from the veto rights but from an agreement between two or more minority shareholders to pool their voting rights.[81] Minority shareholders of the joint venture can exercise their voting rights through a holding company to which the minority shareholders transfer their rights[82].

The existence of joint control by two minority shareholders can, in some exceptional cases, be taken into account even when they are not bound by any agreement that obliges them to act jointly. This kind of joint control occurs as a result of concerted actions of minority shareholders who are obliged for economic reasons to take concerted actions even though they do not mutually prejudice their interests. This kind of joint control, which is purely factual, requires exhaustive investigative efforts and is very exceptional.[83] The Commission has declared following indicators of common interest that lead to a joint control of joint venture on de facto basis:[84]

- Previous existence of connections between minority shareholders or the acquisition of shares through concerted actions;
- Concerted actions in newly created joint venture (It is likely that the parent companies intentionally operate a joint policy); and
- Existence of a small number of parent companies.

[80] Commission Notice on the concept of concentration 1998, paragraph 37
[81] Navarro et al 2005, pages 17-21
[82] IV/M330, McCormick/CPC/Rabobank/Ostmann, 1993, paragraph 48
[83] Navarro et al 2005, pages 24
[84] COMP/IV/JV12 Ericsson/Nokia/Psion/Motorola, Commission decision of 20th November 1998

The Commission usually uses de facto joint control as supporting evidence of the existence of such control. [85]

3.3.2.1 Shifting alliances and Dead lock mechanism

Shifting Alliances. If in the target undertaking, which is owned by more than two shareholders, none of the shareholders has a right to make (positive control) or block (negative control) strategic commercial decisions, the assumption is that none of the shareholders is using control. These situations are called *Shifting Alliances* or *Changing Majorities.*[86] For example, in an undertaking in which there are three shareholders and each owns a third of the share capital, each shareholder may nominate a different board member to the same seat, since there is no clear majority amongst them, the shareholders do not have joint control.[87] Since it is not possible to determine ex ante which of these shareholders has the power to pass such decisions, they do not form a concentration within the meaning of the ECMR[88]. Joint Control could, in this situation, only occur when two of the shareholders would have significant common interest to vote in the same way (e.g. family relations).[89]

Dead Lock mechanism. In Dead Lock situations, actions determining the strategic commercial behaviour of an undertaking are blocked by a minority shareholder.[90] There cannot be a joint control if one of the shareholders, by himself, is able to make the strategic commercial decisions of the target undertaking. If this power has been significantly limited, e.g. with a shareholders agreement, in a way that minority shareholders would have the power to dispute the decision in arbitration, which in practice would delay the implementation of the decisions. This kind of a dead lock-mechanism can lead to a joint control. [91]

[85] Navaro et al 2005, page 25
[86] The Commission also uses terms *Variable Majorities* and *Chancing Coalitions* in the Case T-282/02 Cementbouw Handel & Industrie BV v Commission, 23.2.2006, sections 27 and 60
[87] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 80
[88] *Friend 2012,* page 305
[89] Leivo et al 2012, pages 1012-1013
[90] Commission Notice on the Notion of Concentration 1994, section 16. See also *Gilo – Ezrachi 2008*, page 335
[91] Leivo et al 2012, page 1013

3.4. Acquisition of control

As explained in section 3.1 *a concentration shall be deemed to arise where a change of control on a lasting basis*[92]and possibility to exercise decisive influence is real.[93] Control can be acquired by following means:

- Acquisition of sole or joint control in the target undertaking in which has not have users of control before;
- Transformation from sole to joint control;
- Transformation from joint to sole control and
- Increasing number of the shareholders using the joint control.[94]

Control can also be gained without active actions due to legal acts of the other shareholders, as in the case RTL/ M6 where in the beginning, RTL held 48,4 % and Suez 37,6 %, the two holding joint control over M6. Suez sold 29,2 % of its shareholding in M6 to a large number of investors through a public placement, leaving the RTL as the major holder of sole control. Despite the fact that RTL has not acquired any additional shares in M6, the divestment of Suez's shares led to the passive acquisition of sole control by RTL and the company had to notify the concentration to the Commission in 2004.[95]

Acquirer of the control is defined in Article 3 (3) of the EC Merger Regulation[96]:

"Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or
(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom."

Target of the acquisition has to be whole or parts of one or more undertaking. This is often very simple when commercial assets (including production, immaterial property and

[92] Council Regulation (EC) No 139/2004, 2 January, 2004: On the control of concentrations between undertakings, Article 3 (1)
[93] Case T-282/02 Cementbouw Handel & INdustrive BV v Commission, 23.2.2006
[94] Leivo et al 2012, page 1014
[95] COMP/M.3330 RTL/M6, Commission decision 12 March 2014.
[96] Council Regulation (EC) No 139/2004, 2 January, 2004: On the control of concentrations between undertakings, Article 3 (3)

employees) are been divided from the seller and transferred to the buyer. If the target is only a part of the seller's property, it can be questioned whether OR NOT SUCH ASSETS ARE a concentration in the meaning of the Article 3(1) of the Merger Regulation. According to the Jurisdictional Notice: "*The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed.*"[97] Transfer of immaterial rights or licensing of such rights, transfer of the customers and outsourcing of business are at least acquisitions of part of the business.[98]

3.5. Change of control on lasting basis

As defined earlier and in Article 3(1) of the EC Merger Regulation, changes of control have to be on a lasting basis in the structure of markets also, as defined in paragraph 20 of the EC Merger Regulation[99], which normally is the situation when acquiring a business. The concept of lasting basis has gained expansive interpretation in practice. Fixed-term transactions are not excluded by the fact that the agreements are entered into for a definite period of time, provided they are renewable and the period envisaged is sufficiently long.[100]

Parties of the concentration can also cancel the merger, and if certain criteria are met the acquirer of control can avoid the consequences.[101]

3.6. Passive control

When a controlling shareholder of the undertaking invests in to its competitor, the potential unilateral and coordinated anticompetitive effects are pretty similar to those involving

[97] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 24
[98] Leivo et al 2012, pages 1021-1022
[99] Council Regulation (EC) No 139/2004, 2 January, 2004: On the control of concentrations between undertakings
[100] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2014 on the control of concentrations between undertakings (OJ 2008/C 95/1), paragraph 28
[101] More of the abandonment of concentration see DG Competition information note on Art. 6 (1) c 2nd sentence of Regulation 139/2004 (abandonment of concentrations)

passive investment among the rivals themselves. The controlling shareholder partly identify with the profits and losses of the rival undertaking and the controller tends to make his own undertaking compete less vigorously[102]. Anticompetitive effects are much stronger the lower the controller's stake in his own firm[103]. This is because the lower the controller's stake in his own undertaking is, the more weight the controller places on his minority stake in the rival undertaking, and the less vigorously the controller tends to manage his own undertaking. [104]

Passive investments by controlling shareholders are often ignored when measuring anticompetitive effects. This was the case in Nordbanken/Postgirot[105], where Nordbanken, a large Swedish bank, held a significant shareholding in Bankgirot, the only competing undertaking of Postgirot from which the Nordbanken was planning to acquire a minority. The Commission ruled that such an arrangement could seriously reduce competition between the only undertakings in the giro industry in Sweden, so Nordbanken had to reduce its shareholding to no more than 10 % in Bankgirot.

Nevertheless, the Commission states in the White Paper that anti-competitive effects may materialize whether the minority shareholding is passive or active.[106]

As a result, the White Paper states that an undertaking with a minority stake in a competitor will have less incentive to compete vigorously, so it will tend to reduce its competitive pressure, which leads to increasing prices and reduction of output in markets. This may occur whether or not the minority shareholder has influence on the target's decision (passive control) or the minority shareholder has some influence on the target's decision making (active control).[107]

In proposed targeted transparency system, the acquisitions of minority shareholdings should be reported to Commission if the purchasing company acquires influence in the decision-making of the target company. This would mean that this kind of passive minority shareholding would still not fall into the scope of the proposed system, so it would not work in the way the Commission intends it to. This seems to beg the question, therefore:

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[102] *Gilo – Moshe – Spiegel 2006,* pages 81-99
[103] *Gilo – Moshe – Spiegel 2006,* pages 81-99
[104] *Ezrachi – Gilo 2006,* page 333
[105] COMP/M.2567 Nordbanken/Postgirot
[106] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 29
[107] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, chapter 23

what use is the targeted transparency system if it still cannot capture the possible passive transactions, which seems to be the most problematic from the Commission's point of view?

According to the Commission, the potential anti-competitive effects of minority shareholding is made active when the acquirer has a power to approve certain strategies in the shareholders' meeting in relation to significant investments, product lines, geographical scope, capital-raising, and engaging in mergers and acquisitions. Practice proves that competitive concerns are more serious when a minority shareholding is granted some degree of influence over its target's decisions. I will focus more on the cases of acquisition of active minority shareholding in chapters 5.1 - 5.4.[108]

4. How are the acquisitions of shareholdings and minority shareholdings legislated today in EU

Acquisitions of shareholdings and minority shareholdings are all subject to the ECMR and Articles 101 and 102 of the TFEU. Minority shareholdings that give rise to control or decisive influence are the ones which need regulatory review because they might materially affect competition so they are reviewed under the ECMR. In case the acquisition of minority shareholding does not give rise to control or decisive influence so that the merger could be reviewed under ECMR, the merger is subject to ex-post review under Articles 101 and 102 of the TFEU.[109]

The Commission has stated in the White Paper that the Articles 101 and 102 TFEU may not be suitable for dealing with anti-competitive minority shareholdings[110]. In this chapter, I will focus on the anti-competitive effects of acquisitions and see if Articles 101 and 102 can be used and if they have been used to solve the possible concerns of anti-competitive effects on the acquisitions of minority shareholdings.

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[108] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, chapter 24
[109] *Reynolds – Anderson 2005,* page 1
[110] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, section 3.1.2

Three of the Member States of the EU (Austria, Germany and the United Kingdom) are already empowered to investigate the acquisitions of minority shareholdings within their national legislation and in their territories[111]. I will focus more on the procedure these countries have chosen in the chapter 7.

4.1. Anti-Competitive Effects

One way to systematize mergers is to pay attention to the competitive concerns which they raise. We are talking about unilateral or non-coordinated anticompetitive effects which are born when undertakings have sole control to restrict the competition without contribution of the other undertakings as well as coordinated anticompetitive effects that are created when two or more undertakings have the kind of interdependence that restrains them from competing. [112]

In practice, anticompetitive effects depend on a number of factors that significantly influence the undertakings incentive to compete. These factors can be structural ("*e.g. the degree of market concentration, entry conditions, the homogenous or differentiated nature of the products concerned, the substitutability of the products concerned, their respective diversion ratios and the number of companies in the market which are linked to each other")* or they can be transaction specific ("*e.g., the companies' respective costs and margins, their market shares, the size of the minority interest and the reciprocal nature of the structural links").* Additional factors that need to be taken into account are the data relating to the target that can affect the acquirer's decision-making, conflicting incentives for management, the acquirer's ability to capture benefits from its minority shareholding and the degree of control over the target's decisions. [113]

Acquisition of minority shareholding in the competitor can cause anticompetitive effects when the acquirer gains ability to effect the targets competition behaviour. Control can be acquired through the usage of voting rights e.g. right to name executive board members of the target undertaking. This kind of control can cause the restriction of competition

[111] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 1
[112] Leivo et al 2012, page 1136
[113] OECD Policy Roundtable concerning minority shareholdings (2008), page 9

because the acquirer can, through its control, make the target undertaking compete less aggressively or raise collusion between competitors.[114]

Passive investment can cause anticompetitive effects especially in concentrated, oligopolistic markets[115] , if the parties involved are strategic players in the market and the magnitude of passive investment is large enough.[116] As in oligopolistic markets where there are only few significant players, consumer price is usually above the marginal cost of supplying products or services.[117]

Passive investments can lead either a collusive outcome in the market (co-ordinated effects) or a lessening of competition between the competitors (unilateral effects). [118] Such investments may enable undertakings unilaterally to raise prices even absent explicit collusion or tacitly (unilateral effects), or they may facilitate explicit or tacit collusion between competitors (coordinated effects) [119]

When one undertaking owns a share of its competitor, the losses of the target affects the value of the investment of the minority shareholder and can cause losses to the minority shareholder as well. In these circumstances the minority shareholder may have to compete less intensively with its target undertaking. The acquirers may lessen the intensity of their competition with the target undertaking, even though the acquirer does not have the power to influence the target undertakings competitive behaviour. [120]

Acquisition of minority shareholding in the competitor can also work as a barrier to entry into the markets. The Commission has determined that minority shareholding could be abused in a way that would debar smaller competitor from acquiring target undertaking, which would thereby enhance the competitive pressure on the market. Minority shareholding in the competitor can also debar third parties entry to the capital of the target undertaking through acquisition. [121]

It has been shown in economic studies that minority ownership between actual competitors can lead to anti-competitive effects which can be harmful for the fair competition. Minority

[114] U.S. Horizontal Merger Guidelines, section 13.1
[115] *Wik - Alkio 2009,* page 60
[116] *Ezrachi – Gilo 2006,* page 328
[117] *Ezrachi – Gilo 2006,* page 329
[118] Staahl – Hjelmeng – Sorgard 2011, page 839
[119] *Ezrachi – Gilo 2006,* page 329
[120] U.S. Horizontal Merger Guidelines, section 13.2 and *O'Brien – Salop 2000,* page 67 and *Staahl – Hjelmeng – Sorgard* 2011, page 839
[121] *Hukkinen – Troberg 2012*

shareholdings in a competitor can also have efficiency-enhancing effects. As with so many other things in the field of competition law, this is not so black and white. So instead of just concentrating on the possible anti-competitive effects, competition authorities should be aware of these effects and review them in light of the enhanced efficiencies that may be generated by minority shareholding.[122]

4.1.1 Non-coordinated or Unilateral anti-competitive effects

According to Reynolds and Snapp[123], the unilateral effects of minority shareholdings with high-entry barriers and structural interdependence between undertakings might lead to unilateral reductions of output and could increase prices to the detriment of consumer welfare. This structural effect is the consequence of the acquirer´s ability to gain profit from rivals it owns a minority share of as a result of unilateral output restrictions. The losses incurred can be recovered through a minority shareholding of the target undertaking, so the acquirer can actually turn the losses to profits.[124]

Even though minority shareholding between competitors can have unilateral anti-competitive effects, this does not necessarily mean that these effects will be present or substantive.[125] Two methodologies have been suggested to measure the anticompetitive effects of horizontal mergers – the MHHI[126] and PPI[127] indexes. These deal with unilateral competitive effects due to a merger, when concentration creates the ability to profitably raise prices even though the other undertakings would not follow their example. Passive investments have no unilateral effects when the market is perfectly competitive. The only effect of such investment would then be the facilitation of collusion.[128]

[122] OECD Policy Roundtable concerning minority shareholdings (2008), page 24
[123] *Reynolds – Snapp 1986*
[124] OECD Policy Roundtable concerning minority shareholdings (2008), page 24
[125] In literature some of the writers are sceptic about the possibility to quantify the magnitude of the unilateral anticompetitive effects. See more of the skepticism *Areeda – Turner 1980*
[126] Modified Herfindahl-Hirschman Index (MHHI) builds on the HHI (Herfindahl-Hirschman Index) concentration index which is calculated by squaring the market shares of the participants. See more of the MHHI-index in *O'Brien – Salop 2000*, page 563
[127] Price Pressure Index (PPI) measures the direct incentive effects in response to a change in ownership structure. See more of the PPI-index in *O'Brien – Salop 2000*, page 598
[128] *Ezrachi – Gilo 2006,* page 331

In horizontal mergers, unilateral anticompetitive effects exist when one undertaking gains dominant position or strengthen its already dominant position. Unilateral anticompetitive effects also arise in gap-cases in oligopolistic markets. This means situations where withdrawal of the competitive pressure due to a merger can lead to a situation where concentration can unilaterally raise prices even though it is not the biggest actor in the market and the merger does not arise or strengthen the dominant position. [129]

In vertical mergers, unilateral anticompetitive effects exist mainly in two ways. If the concentration has dominant position in the upstream market, it can debar competitors in the downstream market by refusing to supply essential inputs or by raising their prices. If the concentration has dominant position in the downstream market (ie., it is big purchaser of the inputs or significant distributor) it can debar competitors in the upstream markets by refusing to purchase from them or lessen purchasing.[130]

Unilateral effects may, in minority shareholdings, change the payoffs for the undertakings involved, or lessen their incentive to deviate from a collusive agreement or engage in a pricing war to punish deviations from a collusive agreement. Investments in a competitor may also signal to the rest of the market that the undertaking has intention to compete less vigorously. This may induce all of the undertakings in the industry to reduce competition and favor a collusive balance to the detriment of consumers. [131]

4.1.2 Coordinated anti-competitive effects

Coordinated anti-competitive effects in acquisitions of minority shareholdings may also arise when market participants will gain ability and incentive to explicitly or tacitly coordinate competition in order to achieve supra-competitive profits.[132] Explicitly coordinated effects are less likely because of the fear of intervention by competition

[129] Leivo et al 2012, page 1136
[130] Leivo et al 2012, pages 1136-1137
[131] OECD Policy Roundtable concerning minority shareholdings (2008), page 9
[132] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control", Brussels, 9.7.2014, paragraph 35

authority but tacit collusion is a threat in industry fields where there is a limited number of significant undertakings[133].

Tacit collusion refers to a situation where cartel-like prices are sustainable without communication between the undertakings. Each undertaking may refrain from cutting a collusive price out of the fear that this would cause a price war. Such war could involve long-term losses which may reduce the short-term profits of the price-cutting undertaking. Unlike cases of explicit collusion, it is very difficult for competition authorities to detect or prove tacit collusion. [134]

Because of its nature, collusion is difficult to sustain. It is enough that for at least one undertaking the short-term profit during a price cut outweighs the long-term losses from a price war that would cause tacit collusion to cease. When other undertakings become aware that one firm is eager to cut prices, collusion may not be sustainable. Even the undertakings that prefer collusion to price-cutting would prefer not to be undercut by a rival. This takes us to conclusion that passive investment may facilitate tacit collusion, since when investing in a rival in an oligopolistic market, the investor may become less eager to price cut on a collusive price. This is because it would absorb a portion of the rivals' losses from this price-cut. [135]

It is important to notice that passive investment among rivals in oligopolistic market will not always facilitate collusion. Unilateral passive investment facilitates collusion only when the investment IS made by the undertaking most eager to price-cut. Such an undertaking is called an *Industry Maverick.* When non-maverick undertakings are the only ones in the market investing in rivals, their passive investment has no effect on the stability of collusion because it gives its competitors no incentive to price-cut.[136] Some undertakings have more influence on the competition than their market shares shows. A merger involving a maverick may change the dynamics of competition in a significant anti-competitive way, especially in oligopolistic markets. The undertaking may, for example, be a recent entrant in the markets that is expected to exert significant competitive pressure on the other undertakings in the market in the future.[137] The analysis reveals that passive

[133] *Ezrachi – Gilo 2006,* page 331
[134] *Tirole 1988,* chapter 6
[135] *Ezrachi – Gilo 2006,* page 331
[136] *Ezrachi – Gilo 2006,* page 332
[137] Commission Horizontal Merger Guidelines 2004, paragraph 37

investment by industry mavericks raise competitive concerns due to the coordinated anticompetitive effects.[138]

Some markets can be structured in a way that undertakings would consider it possible, economically reasonable and preferable to adopt on a sustainable basis a course of action at selling at increased prices on the aimed market. A merger in an oligopolistic market may significantly impede effective competition by creating or strengthening dominant position, because it would increase the likelihood that undertakings are able to coordinate their market behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 (101 of the TFEU). A merger may also make coordination more stable, easier or effective for undertakings already in dominant position, either by making the coordination more powerful or by permitting undertakings to coordinate on even higher prices.[139]

All different kind of mergers (horizontal, vertical and conglomerate) can cause coordinated anticompetitive effects.[140]Acquisition of minority shareholding can lessen the competition in three ways:

1. It can lessen the competition by giving the acquirer the ability to influence the competitive conduct of the target undertaking;
2. It can reduce the incentive of the acquirer to compete; and
3. It can give the acquirer access to the non-public competitively sensitive information of the target undertaking.[141]

Prevailing balance in the market can falter because the undertakings are co-operating through the knowledge gained from minority shareholdings[142]. This can create uncertainty over the upcoming market behaviour of competitors. This is how undertakings can foresee each other's behaviour in the market and adjust their strategies to their competitor´s, which prevent the effective and real competition in the markets[143]. Minority shareholdings can prevent such undertakings incentive to differ from the agreed co-operation or from start a price war to punish those who have not followed the agreed-upon arrangements. Investments in the competitors can send a message to the relevant markets that their

[138] *Ezrachi – Gilo 2006,* page 332
[139] Commission Horizontal Merger Guidelines 2004, paragraph 39
[140] Leivo et al 2012, pages 1138
[141] U.S. Horizontal Merger Guidelines, section 13.3
[142] Commission Horizontal Merger Guidelines 2004, paragraph 41
[143] *Ezrachi – Gilo 2006,* page 332

incentive is not to compete so aggressively, which can reduce the incentive to compete and support the achievement of collusive balance within competitors and cause harm to consumers. Coordinated anti-competitive effects can also arise when one undertaking acquires passive minority shareholding from its competitor if the target is rival in the markets and the arrival is expected to cause significant market pressure in the future (the so-called maverick).[144]

4.2. Minority Shareholdings

As stated in the section 1.1, minority shareholding refers to a situation in which a shareholder owns less than 50 percent of the voting rights of another undertaking. However it does not necessarily indicate whether the holder of such minority stake is entitled to exercise control over the target undertaking or otherwise influence its business conduct.[145] The Commission is concerned with "structural links" between competitors that could lead to competitive harm in following manners:

- *“by reducing competitive pressure between competitors ("horizontal unilateral effects");*
- *by substantially facilitating coordination among competitors ("horizontal coordinated effects");*
- *in case of vertical structural links by allowing companies to hamper competitors' access to inputs or customers ("vertical effects").”*[146]

In some minority shareholding acquisition cases, the withholding of input may be more likely after control is acquired, since the acquirer only internalizes a part of the target’s profits when it receives the full benefit of such a withholding. According to the Commission, competition concerns are limited when the acquirer has no influence on the target company’s decisions (passive minority shareholding). On the other hand, when the minority shareholding is active and the acquirer has some influence on the target company’s decisions, the risk of foreclosure can be higher than with a fully-integrated

[144] Commission Horizontal Merger Guidelines 2004, paragraph 37
[145] *O’Brien – Salop 2000,page 567*
[146] SWD(2013) 239 final, European Commission Staff Working Document: "Towards more effective EU merger control", Brussels, 25.6.2013, page 2

firm.[147] The Commission concentrated on the input foreclosure in IPIC / MAN Ferrostaal case[148], which I will go through in section 5.4.

OECD's Competition Committee has paid attention to the minority shareholdings and their possible anti-competitive effects in roundtable discussions in 2008. The conclusion of the discussion was that minority shareholding can have negative effects on competition, either by facilitating collusion (*coordinated effects)* or by reducing the minority shareholder's incentive to compete (*unilateral effects)* [149]. In some cases, the minority shareholding can result in less production and higher prices. This can be seen when the financial losses incurred by the acquired competitor affects the value of the investment of undertaking that owns a part in a competitor. It is clear that such an undertaking has less incentive to compete against the company it has investigated in and the undertaking has incentive to unilaterally reduce output and raise prices if it is in a position to recoup part of the lost sales through its investment in the competitor.[150]

> ***OECD: "****The Organisation for European Economic Cooperation (OEEC) was established in 1948 to run the US-financed Marshall Plan for reconstruction of a continent ravaged by war. OECD brings around its table 40 countries that account for 80% of world trade and investment, giving it a pivotal role in addressing the challenges facing the world economy. OECD's work is based on continued monitoring of events in member countries as well as outside OECD area, and includes regular projections of short and medium-term economic developments. The OECD Secretariat collects and analyses data, after which committees discuss policy regarding this information, the Council makes decisions, and then governments implement recommendations."*[151]

At the moment, the Commission only has the power to investigate acquisitions of control and already existing minority shareholdings related to the notifications of acquisition of full control. The Commission states that if the minority stakes is acquired after the examination of the acquisition of full control, it does not have the competence to

[147] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, chapter 31
[148] COMP/M.5406 IPIC / MAN Ferrostaal, Commission decision of 3 of March 2009
[149] OECD Policy Roundtable concerning minority shareholdings (2008), page 9
[150] OECD Policy Roundtable concerning minority shareholdings (2008), page 9
[151] Find more of the OECD from their webpage: http://www.oecd.org/about/

investigate this kind of cases. [152] An example of the already existing minority shareholding is the Thyssen/Krupp[153] merger, in which Krupp held a 10 % minority stake and certain contractual rights (structural links[154]) in its competitor, Kone. Since the parties were competing in an oligopolistic market, the Commission cleared the merger only after Krupp undertook to waive the exercise of its rights in Kone.[155]

In one noteworthy case, a conflict within the ECMR law was discovered when the Commission viewed an already finalized merger of dominant position and demanding remedies. The merger between Tetra AND Sidel[156] had already been finalized when the Commission found that the merger created a dominant position in the market and ordered Tetra to divest its ownership in Sidel, according to the Article 8(4) of the ECMR. Under this provision, the Commission was empowered to require the undertakings to dissolve the already implemented concentration. Tetra argued that it should be allowed to retain minority interest in Sidel, and that in this particular case the retention of the minority stake did not require notification under the ECMR so the Commission would not have jurisdiction under Article 8(4) of the ECMR to order divestiture of such interest. The Commission disagreed and ruled that the purpose of the Article 8(4) was to restore conditions of effective competition. In the end, Tetra was not able to retain minority shareholding in Sidel.[157]

When minority shareholdings are found to have anticompetitive effects, competition authorities can use structural remedies to eliminate competitive concerns. Generally, these remedies seek to reduce or eliminate certain shareholder rights or interests, as can be seen in the practice in section 5. Competition authorities have very rarely accepted behavioural remedies such as firewalls, which are not so common due to a high monitoring cost and doubts of effectiveness.[158]

According to the OECD roundtable discussions, there are four categories of remedies that competition authorities may consider to eliminate anticompetitive effects of minority shareholding:

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[152] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, chapter 33
[153] IV/M.1080 Thyssen/*Krupp*, Commission decision of 2 June 1998
[154] *Reynolds – Anderson 2005,* page 4
[155] *Milanesi 2002,* pages 16-17
[156] COMP/M.2416 Tetra Laval/Sidel, Commission decision of 13 January 2003
[157] *Reynolds – Anderson 2005,* page 6
[158] OECD Policy Roundtable concerning minority shareholdings (2008), pages 11

1. *"The divestiture of the acquired shares or part of the shares and the severance of the structural link between the competing firms;*
2. *The waiver of the rights linked to the minority shareholding, such as representation rights on the board, veto rights and information rights;*
3. *The creation of a so-called "firewall" between the firms in order to prevent the flow of sensitive information between them; and*
4. *The elimination of interlocking directorates, when the shareholder has the right to appoint board members of the target company and, as a result, one or more board members become members of the boards of both companies."*[159]

In roundtable discussions, competition authorities have expressed a preference for structural remedies over behavioural remedies. In their opinion, behavioural remedies should only be allowed when they satisfactorily eliminate the anticompetitive effects, if there is no structural remedy and NO or only minimal monitoring is required.[160]

Interlocking directorates occure when one or more persons have responsibilities in two or more competitors. These can raise competition concerns because directors in common can become conduits for information exchange between competing undertakings and facilitate coordination. They can also lead to foreclosure of rivals. Some countries prohibit certain interlocking directorates in their merger regulation.[161]

4.3. Article 101 of TFEU

Article 101 of TFEU forbids the restriction of competition, the so called cartel prohibition. Application of Article 101 on restrictive agreements to the acquisitions of minority shareholding does not depend on the acquisition of control or material influence over the target, which is the case with ECMR. There are several reasons why the Article 101 has not been applied to minority shareholdings. According to the OECD's roundtable discussions[162], it is difficult to establish anticompetitive agreement. One example which

[159] OECD Policy Roundtable concerning minority shareholdings (2008), page 11
[160] OECD Policy Roundtable concerning minority shareholdings (2008), page 11
[161] OECD Policy Roundtable concerning minority shareholdings (2008), page 11
[162] OECD Policy Roundtable concerning minority shareholdings (2008), pages 10-11

the Commission named in the White Paper[163] is the acquisitions of shares via the stock exchange. It may be difficult to argue that the different purchase agreements meet the criteria of Article 101 TFEU. It may also be difficult to show the actual or highly likely anticompetitive effects. After all, it is not clear whether acquiring a minority shareholding would constitute an "agreement" affecting the object or restricting competition in all cases[164].[165]

We still have to keep in mind that Article 101 of the TFEU has been used to block the acquisitions of minority shareholdings even before the merger control came into force in 1989, as it did in the Philip Morris Cases[166] which I introduced in section 2. Why did the Commission not cite this case in its White Paper, especially if the Philipp Morris standard seems to be satisfactory to these situations? This would need a further debate rather than the Commission just denying the application of the Article 101 of the TFEU[167].

There have also been cases in which an acquisition of minority shareholding was aborted following an intervention by the Commission under Article 81 (nowadays 101 of the TFEU). In 1994, Dresser Industries, Ingersoll-Rand, General Electric and Nuovo Pignone gave notification of the proposed acquisition by Dresser and Ingersoll-Rand of a minority shareholding in Nuovo Pignone of a stake of 12 % each from General Electric. Dresser and Ingersoll were direct competitors of Nuovo Pignone through their joint venture companies. Both of them withdrew their planned acquisition following an intervention by the Commission under Article 81 (Nowadays 101 of the TFEU).[168]

[163] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 40
[164] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 40
[165] OECD Policy Roundtable concerning minority shareholdings (2008), pages 10-11
[166] Cases 142/84 and 156/84, British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v. E.C. Commission, before the Court of Justice of the European Communities [1987] ECR 4487; [1988] 4 CMLR 24
[167] *Burnside – MacGregor 2014,* page 6, see also ICC Comments on the EU White Paper on Merger Control, 225/779, 3 October 2014, paragraph 47
[168] 25th Report on Competition Policy 1995, page 116

4.4. Article 102 of TFEU

Article 102 of the TFEU forbids the abuse of dominant position. Generally it is said that dominant undertakings are less likely to invest in competitors. They still may invest in competitors to discipline them and ensures that incentives to compete are reduced.[169] The Commission's White Paper says, "*In order for the Commission to intervene using Article 102 TFEU, the acquirer of the minority shareholding would need to hold a dominant position, and the acquisition would need to constitute an abuse.*" [170] That is why Commission sees that it possibility to investigate acquisition of minority shareholdings via Article 102 of the TFEU is quite narrow.

Nevertheless, in Warner-Lambert/Gillette-case[171], the Commission found Article 102 (82) applicable to the acquisition by a dominant firm of minority shareholdings which did not confer decisive control over the target. The Commission held that Gillette's acquisition of 22 % of Warner-Lambert, its competitor in the wet-shaving market in Europe, was in violation to Article 102 (82) of TFEU – notwithstanding the fact that the 22 % stake gave Gillette no voting rights or board representation.[172]

When dealing with acquisitions of minority shareholdings under Article 102 of the TFEU, the question of whether a dominant position has been established is a primary concern.[173] If such transactions are not covered under Articles 101 and 102 of the TFEU, they will require oversight under the EC Merger Regulation.

4.5. The EC Merger Regulation No 139 / 2004

According to the ECMR paragraph 21, "*Articles 81(101) and 82(102), while applicable to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty*." Therefore the EC Merger Regulation is most frequently used to examine the competitive

[169] OECD Policy Roundtable concerning minority shareholdings (2008), pages 11
[170] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 40
[171] Case 93/252 *Warner-Lambert/Gillette* L116, 12.5.1993, page 21
[172] OECD Policy Roundtable concerning minority shareholdings (2008), pages 188
[173] *Rusu 2014,* page 9

effects of mergers in general and also the acquisitions of minority shareholdings in some cases. As discussed earlier in clause 3.2 the ECMR uses the concept of Control to determine whether a transaction is to be reviewed; it can only be reviewed if it results in a change of control. This may create the risk of an enforcement gap in cases when the acquisition of minority shareholding do not affect control but may have anti-competitive effects.

When reviewing acquisitions of minority shareholdings we have to distinguish between two different kinds of acquisitions. Pre-existing non-controlling minority shareholdings related to a notification of a different concentration is already covered by the Commission[174]. This leaves us with a second option – pure acquisition of minority shareholding not related to any other transaction.

The Commission only has jurisdiction to review the acquisition of minority shareholding in cases in which the acquirer exercises control over the target (active minority shareholding). ECMR does not give the Commission jurisdiction to review if minority shareholding does not result in changes in control (passive minority shareholding). As already noted in section 3.2, the concentration may occur on a legal basis or de facto basis, and it may take the form of sole or joint control[175].

ECMR regulations may apply if changes in the quality of control (from joint to sole and vice versa) creates new shareholders – whether they replace the existing controlling shareholders or not – and also if such changes reduce of the number of controlling shareholders[176]. The Commission has clarified the EC Merger Regulation in 2008 with a Jurisdictional Notice[177] that works as an excellent guidebook to interpreting the ECMR. The purpose of this Jurisdictional Notice is to provide guidance on issues related to the EC Merger Regulation. According to the Jurisdictional Notice paragraph 1: "*formal guidance should enable firms to establish more quickly in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations"*. Jurisdictional Notice deals with the concept of concentration and explains joint ventures, undertakings concerned and the calculation methods of turnover thresholds in details.

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[174] *Rusu 2014,* page 9
[175] *Rusu 2014,* page 3
[176] *Jones – Sufrin 2011,* page 871
[177] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008/C 95/1)

There is no prescribed minimum level of shareholding over which the acquisitions of minority shareholdings would necessitate oversight by the ECMR[178]. Therefore it can be said that there is a certain enforcement gap which the Commission is trying to block with the propositions of the White Paper.[179]

That the Commission can affect acquisitions of minority shareholding has been demonstrated by recent history. For example, in Schneider/Légrand case[180] the Commission prevented Schneider from keeping its 98,1 % stake in Légrand, one of its competitors in a highly concentrated market. The Commission analyzed that an increase in the HHI (Herfindahl-Hirschman Index) of less than 100 points would allow Schneider to maintain a stake of less than 5 % of the Légrand´s shares. This suggested that acquisition of minority shareholding would not result in an HHI increase of less than 100 points (which in this case was less than 5 % stake) and thus would not be a cause of concern to the Commission. This is a good example of how the Commission's jurisdiction has overseen acquisitions of minority shareholdings.[181]

4.5.1 Pre-notification and full notification

Form CO and Short Form CO are forms of the notification which are used to notify the concentration that it is subject to oversight by the Commission under EC Merger Regulation.[182] Concentrations which are unlikely to pose competition concerns can be notified with Short Form CO, which requires less information about the relevant markets. Parties of the concentration can also make a pre-notification which is based on voluntarily when the Commission can take actions of the formal merger review procedure. According to the Commission, pre-notification can be advantageous to the notifying parties, since it can result in a significant reduction of the information required. By acting pre-emptively, the acquirer may submit less information to the Commission than is required under full notification. The process of pre-notification is an essential concept in my thesis, since it is unclear what the circumstances are that cause acquirers of minority shareholding to receive

[178] Miller – Raven – Went 2012, page 3
[179] OECD Policy Roundtable concerning minority shareholdings (2008), page 10
[180] COMP/M.2283, Schneider Electric/Légrand, Commission decision of 10 October 2001
[181] *Reynolds – Anderson 2005,* page 7
[182] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1, Annexes I and II

notification. Currently, parties are caught in the position of having to make a pre-notification, just in case if the White Paper reforms should come to pass.[183]

4.6. SIEC-test

Once the Commission receives notification from an enterprise, it begins to investigate whether that concentration is compatible with the common markets or not. According to the EC Merger Regulation the concentration is compatible if the concentration does not: *"Significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position"*[184].

This SIEC (*Significant Impediment to Effective Competition)* test is the defining threshold through which the Commission assesses the concentration's effects on competition. Within this framework, the Commission can assess whether the concentration is compatible with the common market in light of Article 101 of the Treaty. The Commission moved from Dominance test to SIEC test in 2004. The SIEC test broadened the Commission's jurisdiction to intervene in mergers that significantly impede the effective competition in common markets but do not create or strengthen dominant position.[185]

The introduction of the SIEC test in 2004 also enabled the Commission to review non-coordinated effects of transactions in cases when the merged entity would not acquire a dominant position. [186] The Commission has, under the EC Merger Regulation, exclusive jurisdiction to examine concentrations that meet certain turnover thresholds, to assess whether they could lead to a significant impediment of effective competition in the internal market or a substantial part of it.[187]

The SIEC test and other methods used by the Commission to analyze mergers are inherent in the more economic approach in that they try to directly assess the extent to which

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[183] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1, Annex I, page 2
[184] Council Regulation (EC) No 139/2004of January 2004 on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1, Article 2
[185] *Leivo et al 2012,* pages 1125 - 1126
[186] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 78
[187] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 18

competition would be lost as a result of a merger. This kind of approach does not have to work with a market definition. Therefore, the SIEC test represents a much truer reflection of economic reality than the simple black-and-white definitions of relevant products and geographic markets. Nevertheless relevant products and geographic markets are still important indicators, especially in homogenous products, because market shares can still tell a lot about the restriction of competition in the light of Article 101 of TFEU, and markets still need to be defined for the assessment of dominance under the Article 102 of the TFEU.[188]

4.7. Theories of Harm

There are several types of competition concerns that arise when a minority shareholding is acquired. These are based on theories of harm similar to those relevant to acquisitions of control, and in general require that the transaction significantly increase market power.[189]

Acquiring a minority shareholding in a competitor may lead to non-coordinated anti-competitive effects because such a shareholding may increase the acquirer's incentive and ability to unilaterally raise prices or restrict output.[190]

The Commission's Staff Working Document states that competitive harm on acquisitions of minority shareholdings may arise from access to a competitor's confidential business information, or from the influence acquired over strategic decisions of a competitor[191]. The Commission justifies this proposition by arguing that the targeted transparency system would not have any impact on small and medium sized enterprises because the jurisdiction of the Commission would only be triggered if the turnover thresholds[192] are met.[193]

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[188] *Weitbrecht 2011,* page 131

[189]Commission Horizontal Merger Guidelines 2004, paragraph 8 and Non-horizontal Merger Guidelines, paragraph 10.

[190] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 29

[191] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 1

[192] *Article 1(2) of the EC Merger regulation: A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each at least two of the undertakings concerned is more than EUR 250 million*.

[193] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 47

4.8. Efficiency-enhancing effects

Minority shareholdings can also gain efficiency effects that can be truly beneficial for the undertakings involved, the market and, most importantly, for the consumers. Sometimes mergers do increase competiveness in the relevant industry markets, can improve the conditions of growth and are in the line with the requirements of dynamic competition. The efficiencies brought by such mergers counteract the anticompetitive effects and the potential harm to consumers that they might otherwise have. The Commission makes a competitive appraisal of the merger to assess whether it would significantly impede effective competition by strengthening a dominant position. In doing so, the Commission takes into account the factors mentioned in Article 2(1) of the ECMR, including economic progress provided that it is to the *consumers' advantage and does not form an obstacle to competition*.[194]

When sufficient evidence can be found that the merger is likely to enhance the ability and incentive of the concentration to act competitively for the benefit of consumers, the Commission may, because of such efficiencies, declare that there are no grounds on the basis of the Article 2(3) of the ECMR to declare the merger incompatible with the common market.[195]

According to the Horizontal Merger Guidelines, there are three factors that need to be fulfilled in order that the Commission may approve such a merger. The efficiencies need to:

- **Benefit consumers**: Consumers should not be in worse situation because of the merger;
- **Be merger-specific**: Efficiencies are direct consequence of the merger and they cannot be achieved by less anticompetitive alternatives; and
- **Be verifiable**: Efficiencies are likely to materialize and counteract a merger's potential harm to consumers.[196]

[194] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03, paragraph 76
[195] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03, paragraph 77
[196] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03, paragraph 78-86

These criteria also relate to the acquisitions of minority shareholdings. When all these factors are fulfilled at the same time, the Commission might approve an anti-competitive merger that it otherwise would have prohibited.

Usually the competition authorities get curious when one undertaking acquires one of its main competitors in the same industry sector, since such a merger would significantly reduce competition in the affected markets. But what if the target undertaking is near a bankruptcy? Could the parties then argue that since the target would exit the market anyway, the acquisition would not reduce competition, since the target would not have remained as competition to the acquirer? This defense is called "failing firm" which has been considered acceptable in the UK and France.[197]

According to the Commission Horizontal Merger Guidelines, it may decide that a problematic merger is compatible in the market if one of the merging parties is a *failing firm* but the situation cannot be a consequence of the said merger[198]. The Commission specifies three conditions that all must be satisfied so that the failing firm defense can be accepted:

- Failing firm, if not acquired by another undertaking, would be forced out of the market in the near future because of financial difficulties;
- There is no alternative purchase that would be less anti-competitive than the said merger; and
- Failing firms assets would inevitably exit the market.[199]

Under these circumstances, the Commission might accept an acquisition that otherwise would raise such anti-competitive concerns that it could not be accepted. What would be the value of the failing firm defense in the situation of acquisition of minority shareholdings to proposed targeted transparency system if it would pass?

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[197] *Grenfell 2013,* page 3

[198] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03, paragraph 89

[199] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between undertakings 2004, OJ C 31/03, paragraph 90

5. Cases concerning mergers and attempted mergers of minority shareholding

Cross investments are very common in the automobile, air travel, banking, car rental and energy industries[200]. Based on cases on which it has ruled dealing with acquisitions on minority shareholdings, The Commission has focused on three factors the acquirer might possess: a minority power to block, a seat on the board of directors, and access to commercially sensitive information belonging to the target. Any of these can lead to anti-competitive effects in acquisitions of minority shareholding. I will focus on how the Commission has dealt with these possible harmful effects in cases where it reviewed acquisition of minority shareholding.

Here are some cases in which the Commission has taken account of the divestment of minority shareholdings or the abandonment of interlocking directorship in first-phase decisions, rendering unnecessary an analysis of the potentially complex issues arising from the assessment[201]:

5.1. Ryanair / Aer Lingus

This series of attempted acquisitions is one of the most influential cases behind the proposals of White Paper. Activity between Ryanair and Aer Lingus and the perceived need to have the targeted transparency system in place has been the Commission's biggest concern. The story begins in 2006, when Ryanair acquired 19 % shareholding of its competitor, Aer Lingus, the former Irish national flag carrier. This required no notification under the ECMR, since the stake was not big enough to confer a control[202]. In November 2006, Ryan Air raised its interest to 25 % and after receiving notification of the acquisition, the Commission prohibited the acquisition in June 2007 due to a competition

[200] *Ezrachi – Gilo 2006,* page 327
[201] COM(2001) 745 final: Green Paper on the Review of Council Regulation (EEC) No 4064/89, 11 December 2001, clause 106
[202] *Rusu 2014,* page 12

concerns[203]. Ryanair appealed this decision but the General Court sustained the prohibition[204]. Overall, this decision is not that important within the present thesis, but it should be mentioned that the Court fully endorsed the Commission's assessment and its conclusion was that the decision entailed solid prohibition[205]. Meanwhile, after the decision, the UK's national competition authority, the Office of Fair Trading (OFT), commenced an independent investigation while Ryanair's appeal on the Commission decision was still ongoing . The ECMR provides a "one-stop shop" for merger control at EU level which can be read from Article 1(1) of the ECMR: "*Regulation shall apply to all concentrations with a Community dimension".* According to the Article 21(3) of the ECMR: "*No Member State shall apply its national legislation on competition to any concentration that has a Community dimension"* This means that when there is a conflict between EU and national law, EU law, in this case ECMR, shall prevail. By these means the OFT was required to desist from making any reference to the UK's Competition Commission when the Appeal to the First Court was still ongoing, so the OFT has to stop its investigations.[206]

Aer Lingus appealed to the General Court, arguing that the Commission, in ordering Ryanair to divest its controlling shareholding based on Article 8(4) of the ECMR and Ryanair, should have ordered a complete divestiture of all shareholdings, even the remaining 29,4 %. The General Court dismissed Aer Lingus' motion on the basis that the acquisition of non-controlling minority shareholding did not constitute a merger within the meaning of the ECMR.[207]

So Ryanair retained its 29,4 % shareholding in Aer Lingus and a second attempt to take control over Aer Lingus occurred in July 2012, which the Commission likewise blocked in February 2013.[208] The UK's Competition Commission informed Ryanair and Aer Lingus that it would continue its investigation and rejected Ryanair's contention that the investigation should be halted because it infringed the ECMR's exclusive jurisdiction for merger control. Ryanair appealed the decision and the Competition Appeals Tribunal and

[203] COMP/M.4439 – Ryanair / Aer Lingus I, decision of 27 June 2007
[204] Case T-342/07, Ryanair Holdings plc v. Commission, 2010
[205] *Rusu 2012,* page 12
[206] *Enso 2012,* page3-4
[207] *Weitbrecht 2011*, page 130
[208] COMP/M.6663 – Ryanair / Aer Lingus III, decision of 27 February 2013

Court of Appeal dismissed their application, saying this Ryanair's second attempt to acquire Aer Lingus after its first attempt had been blocked by the Commission.[209]

Nevertheless, Ryanair refused to divest its shareholdings in Aer Lingus and the case went to the General Court. The General Court confirmed that Ryanair did not have to divest [210] After this decision Ryanair increased its possession to 29,8 %.

Since the Commission did not have the power to force Ryanair to reduce its holdings, the UK's Competition Commission began examining the case on the basis of the UK merger control rules. Such jurisdictions are triggered by different merger control tests.[211] The UK merger control rules allow for a review of minority interest in acquisitions based on material influence, we shall examine in section 7.2. (ECMR is based on decisive influence.)

In August 2013 the UK Competition Commission forced Ryanair to reduce its shareholding from 29,8 % to 5 %, arguing that these holdings gave Ryanair the ability to influence Aer Lingus' commercial policy and strategy. This was significant, because at the time, Aer Lingus was Ryanair's main competitor on flights between the UK and Ireland. The matter was appealed and the Competition Appeal Tribunal sustained the decision[212].

This case is one of the main reasons the Commission has pushed for a targeted transparency system. UK authorities were able to review only the routes to and out of the UK – however, there would were still many other routes between EU Member States that would have fallen under the scope of the proposed system, but UK authorities were not able to look at them.[213]

[209] *Enso 2012,* page 4
[210] T-411/07 Aer Lingus Plc v Commission, 2008, ECR II-411
[211] *Sousa 2012,* page 2
[212] Case Number: 1219/4/8/13 Ryanair Holdings Plc v. Competition Commission v. Aer Lingus Plc, 7.3.2014
[213] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 36

5.2. Toshiba / Westinghouse

In the Toshiba/Westinghouse case[214] the Commission's concern focused on Toshiba's joint venture with one of Westinghouse's most important competitors, GNF. Toshiba had numerous board and management members in common with GNF and its subsidiaries, which gave them both veto rights and the opportunity to obtain sensitive confidential information. The Commission ruled that Toshiba had to relinquish all of its board and management representation in GNF, its veto rights and all rights to obtain any confidential information before it could acquire Westinghouse.[215]

5.3. Siemens / VA tech

The Commission's decision[216] concerning the acquisition of Austrian VA Tech by Siemens raised the issues of harm and influence and voting rights gained. A horizontal overlap existed between Siemens and SMS Demag, with Siemens holding a non-controlling 28 % minority shareholding in SMS, one of VA Tech's subsidiaries. *"Certain information, consultation and voting rights were granted to Siemens by SMS Demag's shareholders' agreement."* According to the Commission, the merger would reduce competition in the metal plant-building market because of a combination of information rights and financial incentives stemming from Siemens' shareholding in SMS Demag.[217]

Due to Siemens' access to commercially-sensitive information of VA tech through the ownership in SMS Demag – a subsidiaries of VA Tech – the Commission held that the acquisition produced non-coordinated competition effects. Eventually, Siemens had to reduce its positions in SMS Demag in order for the Commission to accept its acquisition of VA Tech.

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[214] COMP/M.4153 – Toshiba / Westinghouse, Commission decision of 19 September 2006
[215] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, chapter 28
[216] COMP/M.3653 - Siemens / VA Tech, Commission decision of 13 July 2005
[217] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page chapter 25

5.4. IPIC / MAN Ferrostaal

As stated in section 4.2, the IPIC/MAN Ferrostaal[218] transaction gave rise to a foreclosure risk. Acquisition was approved by the Commission subject to certain conditions. International Petroleum Investment Company (IPIC) attempted to acquire MAN Ferrostaal, a subsidiary of MAN and owners of the only non-proprietary technology for melamine production in the world.

IPIC's subsidiary, AMI, was the major producer of melamine and together with DSM and MAN Ferrostaal had a 30 % minority shareholding in Eurotecnica, a supplier of the input technology in the industry. A minority stake of 30 % gave MAN Ferrostaal significant influence on the decision-making procedures of Eurotecnica's engineering and melamine licensing business. Because several decisions had to be made by super-majority according to the shareholders agreement, the merger gave all shareholders broad information rights. According to the Commission, this arrangement was likely to substantially deter the licensing practice for customers of Eurotecnica, since the information exchanged between a prospective client and Eurotecnica (due to a shareholders agreement) might end up in the hands of the client's competitor – in this case, AMI. Thus, a foreclosure strategy towards new entrants and DSM for the production of melamine could be expected.

The Commission also noticed that due to a high concentration of market participants (two producers with the same market shares – DSM and AMI) and the transparent nature of the markets (well-known costs and published agreement prices), there was an increased risk of co-ordination between market leaders DSM and AMI. Therefore, the Commission placed remedies and MAN Ferrostaal had to commit to divest its entire shareholding in Eurotecnica.[219]

Overall, it can be said that the Commission can view acquisitions of minority shareholdings to a significant extent. The question then is, is this enough to satisfy the Commission's mandate or should its jurisdiction to capture acquisitions of minority shareholdings been extended even further?

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[218] COMP/M.5406 IPIC / MAN Ferrostaal, Commission decision of 3 of March 2009

[219] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 32

6. Propositions of White Paper

In order to prevent harm to consumers resulting from acquisitions of minority shareholding, the Commission is attempting to expand the scope of its Merger Regulation[220]. It has identified three[221] requirements the new system should take into account to be truly effective in its monitoring of acquisitions of minority shareholdings:

1. *"It should capture the potentially anti-competitive acquisitions of non-controlling minority shareholdings;*
2. *It should avoid any unnecessary and disproportionate administrative burden on companies, the Commission and NCAs; and*
3. *It should fit with the merger control regimes currently in place at both the EU and national level."*

The Commission also proposed that the same turnover thresholds which currently apply to the acquisitions of control also apply to the acquisition of non-controlling minority shareholdings. The question then is: do these turnover thresholds already apply to the acquisitions of non-controlling minority shareholdings? Since these situations are not specially mentioned in the Merger Control regulation, they are to be treated as any other acquisitions; these situations, therefore, already fall into the scope of Merger regulation.

The Commission calls this new system, which would cover the acquisitions of minority shareholding, a "targeted" transparency system[222], which would cover all three principal requirements. *"It would allow potentially problematic transactions to be targeted from the outset, namely through the identification of transactions which create a "competitively significant link".* [223] Competitively significant links would arise when there is a competitive relationship in the horizontal markets or closely related vertical markets.

[220] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 1

[221] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 42

[222] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 44

[223] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 44

6.1. Competitively Significant Link

To avoid legal uncertainty the Commission states that the competitively significant link would only arise when following criteria's are fulfilled:"

- *Acquisitions of a minority shareholding in a competitor or vertically related company (i.e. there needs to be a competitive relationship between acquirer and target); and*
- *the competitive link would be considered significant if the acquired shareholding is (1) around 20 % or (2) between 5 % and around 20 %, but accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking minority, a seat on the board of directors or access to commercially sensitive information of the target.*

The parties would be required to self-assess whether a transaction creates a "competitively significant link" and, if so, submit an information notice."[224]

This means that if these criteria's are met, parties have to submit an information notice in advance of closing the transaction. The White Paper also proposes a waiting period of 15 days after the pre-notification (information notice), during which the parties of the transaction cannot close the transaction and Member States should decide whether to request a referral. If the parties of the transaction do not make pre-notification as proposed by the White Paper proposes[225], "*the Commission would also be free to investigate a transaction, whether or not it has already been implemented, within a limited period of time following the information notice. Such a period could be 4 to 6 months, and would allow the business community to come forward with complaints."* I will focus more on the waiting period and to the legal uncertainty which it could create on section 8.4.

According to the White Paper, the Commission lacks adequate tools for dealing with anti-competitive acquisitions of minority shareholdings and therefore the proposed targeted transparency system should be adopted[226]. The Commission does not, however, expose the

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[224] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 47 and 48

[225] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 51

[226] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 55

problems behind the acquisitions of minority shareholdings and their anti-competitive effects effectively enough. Instead of dissecting the pros and cons, the Commission exists only to determine whether acquisitions of minority shareholding create anti-competitive effects and IF a new system should be adopted to be able to investigate them. I will focus more on the problematic behind the propositions of White paper in section 8.

6.2. Targeted transparency system

The proposition of the targeted transparency system is that the parties would only be required to submit an information notice for the anti-competitive transactions instead of a full notification. In order to avoid the legal uncertainty the Commission proposes that the system would be combined with a possibility to voluntarily submit a full notification.[227]

6.3. What went wrong with the adoption of the Simplified Merger Procedure

The purpose of the Simplified Merger Procedure[228] was to streamline and make Merger Regulation more effective. The aim was to raise the applicable market share thresholds for the identification of horizontal markets from 15 % to 20 % and of vertical markets from 25 % to 30 %. The idea was to adopt the Short Form CO, which requires less information from the parties of the concentration, on the basis that they generally do not raise competition concerns. Therefore, the Commission launched a similar consultation project with the White Paper in 2013, and according to the Commission, "*the proposed changes could allow up to 70% of all notified mergers to qualify for review under the Commission's simplified procedure, i.e. about 10% more than today.*"[229]

The Commission got a lot of replies from the stakeholders and many of them were concerned with the new procedure and stated that rather than simplifying the procedure,

[227] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 25
[228] 2013/C 366/04: Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366/5 14.12.2013
[229] European Commission Press Release, Mergers: Commission consults on proposal for simplifying procedures under EU Merger Regulation, Brussels, 27 March 2013

the new wording of the section 5.4 of the ECMR would dramatically increase the scope of the Commission and require even more information of the relevant markets in which the parties of the concentration are acting in.[230] Of particular concern was one word included in the market definitions: the word "plausible". This means that the parties would have to report what impact their concentration would have to the *plausible* markets, while notifying the concentration. It was not clear what was meant by this term, and many of the stakeholders asked the Commission to clarify this term in particular. Despite criticism from 30 stakeholders in the public consultation, the Commission abided only to mention this concern in its Summary of Responses. [231] In December 2013 the proposed changes were made without alteration, a move that certainly did not create legal certainty within the markets.

In general, the propositions, of the Simplified Merger Procedure were acceptable but the way the changes were implemented was not. We have to hope that the Commission learned something from this episode and will not repeat the same mistakes in its adoption of the White Paper.

The White Paper states that if we want to go further than the achievements of the Simplified Merger Procedure, the Merger Regulation itself should be amended[232]. The Commission talks about achievements instead of the problems behind the steps towards more effective Merger Regulation. The way that I see it, the Commission is once again heading to a one direction with eyes shut instead of investigating the big picture and considering the tools that are already in place to ensure Merger Regulation is effective.

As an alternative to full notification, the White Paper proposes voluntary information notices as a way of ensuring that information about potentially problematic transactions is aired. Based on the information given in the information notice, the Commission would then choose whether to investigate the transaction further or not.[233]

Background material included in the White Paper also contains proposals to simplify the Merger Procedure even further by extending the transparency system to certain types of

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[230] Bushell, Gavin 2013: The one-handed Euroean Merger Simplification Project, Baker & Mackenzie 11.6.2013

[231] Simplification of merger procedures: Brief Summary of Responses by Subject Matter, available at: http://ec.europa.eu/competition/consultations/2013_merger_regulation/summary_of_responses_en.pdf

[232] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 77

[233] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 8

simplified merger cases. Merger procedures could be exempted from the prior notification of cases currently falling under the simplified procedure, its scope could be defined in the Implementing Regulation, and the procedure of information notice in the acquisition of minority shareholdings could be used in a simplified merger procedure.[234]

Due to the small number of the potentially problematic transactions, the Commission sees the costs of the targeted transparency system to be rather limited. They consist of preparation of the information notice, full notification (which has been introduced in chapter 0) and limited public enforcement costs. [235] As already mentioned in the chapter 1.4.1, the Commission has focused only on the external costs of notification, instead of the internal costs, which can be significant. Such notifications can involve a huge number of employees of the parties of the merger and external legal and financial advisors, the costs of which should also be taken into account.[236]

7. Comparative review on the treatment of the acquisitions of minority shareholdings in different countries

There exist other jurisdictions than the EU's whose wider jurisdictional nets may review acquisitions of minority shareholdings, e.g. under a material influence, or may review all acquisitions of an interest in another undertaking.[237] Acquisitions of minority shareholdings are covered under merger controls in the USA, Canada and Japan. Within EU, the UK, Austria and Germany are able to investigate acquisitions of minority shareholdings because of a wider legislation than ECMR. Since the space is limited and USA is an important area in which several minority shareholding acquisition are handled, I will focus on the USA and on Germany, one of the largest economies in the EU.

[234] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, Annex 2, page 52

[235] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 8

[236] EVCA's response to the White Paper, 3 October 2014, page 14

[237] OECD Policy Roundtable concerning minority shareholdings (2008), page 10

Some other EU member states, such as the Czech Republic, the Netherlands, Italy, Portugal, Romania and Spain, which currently do not have power to review acquisitions of minority shareholdings, have reviewed and intervened against minority shareholdings where these have existed prior to the time of the EU merger. Competition authorities of these Member States have overseen cases concerning banking, telecom and energy sectors and required several commitments from the boards of the target companies –, for example, divestments of the minority shareholding or removal of directors – before accepting these mergers.[238]

Most of the EU Member States are supportive of the Commission's proposal to extend the scope of the Merger Regulation, while private stakeholders have certain concerns on the high administrative burden the system would create. They also believe that a potentially problematic transaction may be covered under Articles 101 and 102 TFEU and question whether the limited number of problematic transactions justifies the expansion of the Commission's scope. Nevertheless, Though EU Member States are generally welcoming the proposals, their views of how the system should work differs a lot. Since the United Kingdom, Germany and Austria already have their own systems in force, these countries are taking exception to the proposal in favor of one that fits into their existing national procedural systems. The United Kingdom has a self-assessment system with a voluntary notification aspect, while Austria and Germany have an ex-ante control notification system. Each of these countries are favoring their own system and expecting a similar system to become binding within the EU Merger Control.[239]

Envisioning a scenario in which EU jurisdiction lacks the tools to regulate anti-competitive acquisitions and local jurisdictions have them, some observers worry that such a division could undermine the objective of harmonized rulemaking and create the possibility of protracted scrutiny of particular shareholdings[240].

[238] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 39
[239] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, Annex 6, pages 67-68
[240] *Riis-Madsen – Stephanou – Kehoe 2012.* page 3

7.1. United States

Merger Control in the United States was established for the first time in 1914 with the enactment into law of the Clayton Act. In the United States, minority shareholding are implicated under the following areas of antitrust law:

- *Section 1 of the Sherman Act, which covers agreements between companies*
- *Section 7 of the Clayton Act, which governs mergers and acquisitions (along with Hart-Scott-Rodino Pre-merger Notification Act, which provides the antitrust enforcement agencies time and tools to investigate mergers before they are consummated.*[241]

In exploring indirect shareholding connections, we first need to answer the question whether the firms are, within the context of the Sherman Act, two separate entities or a single business entity. In Copperweld case[242], the Supreme Court held that activity between a parent company and its fully-owned subsidiary is viewed as single enterprise. When common control is less clear, the availability of Copperweld defense is less certain. When the undertakings are found to be separate entities, the agencies must view whether the connections between undertakings will have anticompetitive effects that should be reviewed.[243]

The Hart-Scott-Rodino-Act (HSR) requires that acquisition of voting rights that meets the size of certain threshold (and person threshold) must be reported to the antitrust enforcement agencies prior to consummation. There are several exemptions to the HSR, the most important of which is perhaps section (c) (9), which exempts acquisitions of less than 10 percent solely for the investment purposes.[244]

In the United States, Merger Control is based on an SLC cap (Substantial Lessening of Competition).[245] The system has very extensive reach so it can cover all acquisitions of minority shareholdings. Because the jurisdiction of acquisitions is not premised on change in the control of an undertaking, the agencies are able to focus directly on the

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[241] OECD Policy Roundtable concerning minority shareholdings (2008), pages 175-176
[242] Copperweld Corp. v. independence Tube Corp., 467 U.S. 752 (1984)
[243] OECD Policy Roundtable concerning minority shareholdings (2008), page 175
[244] OECD Policy Roundtable concerning minority shareholdings (2008), page 179
[245] Leivo et al 2012, page 977

important substantive question of whether the acquisition of minority shareholding might substantially lessen competition.[246]

As with the White Paper, the U.S. Department of Justice and the Federal Trade Commission pays attention to the same anti-competitive effects of minority shareholdings, in their Horizontal Merger Guidelines. According to the U.S. Merger Guidelines[247], there are three principal effects which lessen competition due to a partial acquisition of a competitor:

1. Giving the acquiring firm the ability to influence the competitive conduct of the target firm;
2. Reducing the incentive of the acquirer to compete and;
3. Giving the acquirer access to non-public competitively sensitive information from the target firm.

These three principal effects are quite the same as those faced by the EC Merger Regulation, and the Commission would do well to pay attention to the American example before moving forward with its proposal of the targeted transparency system.

7.2. United Kingdom

Acquisitions of minority shareholdings have been subject to UK merger control since 1973. THE United Kingdom's power to investigate acquisitions of minority shareholding was further established under the Enterprise Act of 2002, which established a voluntary notification regime. UK merger jurisdiction has three level of ownership interest, which are:

1. Controlling interest: De jure control in another means over 50 % share of voting rights
2. Ability to control policy: De facto control in another means shareholding less than 50 % and the ability to control the target undertaking.

[246] OECD Policy Roundtable concerning minority shareholdings (2008), page 10
[247] U.S. Horizontal Merger Guidelines 2010, section 13

3. Ability to materially influence the policy of the target undertaking – the most interesting option, which we will focus on below.[248]

As seen in option three, the United Kingdom's Office of Fair Trading has jurisdiction over acquisitions in which one undertaking acquires the ability to "*materially influence"* another, and if certain thresholds[249] are met. Full Control is not equivalent with *material influence*, so acquisitions falling out of the scope of control may still fall under the jurisdiction of the Office of Fair Trading.[250]

The material influence captures cases falling outside the EC Merger Regulation and its decisive influence. The jurisdictional meaning of material influence over the policy of an undertaking is articulated in the OFT's EA02 Merger guidance[251] in the following way: Shareholding of 25 % or more generally enables the acquirer to block special resolutions and is likely to be seen as presumptively conferring the ability materially to influence policy. The OFT can also examine cases where shareholding is 15 % or more to see whether the acquirer might be able materially influence the target undertakings policy. Shareholding of less than 15 % may still attract scrutiny when other factors indicate an ability to exercise material influence over policy.[252]

One example of de facto blocking minority shareholding is the BSkyB/ITV[253] in which BskyB, the leading UK pay-TV provider, acquired 17,9 % of the ITV. The UK Competition Commission found that with this share BskyB would, in practice, have the ability to block resolutions in ITV; this was expected to result in a substantial lessening of competition. The Court confirmed the Competition Commission's decision that BSkyB must reduce its shareholding to less than 7,5 %.[254]

Another high profile case was the Ryanair/Aer Lingus-case, which we examined earlier in section 5.1. After the European General Court ruled that the European Commission did not

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[248] OECD Policy Roundtable concerning minority shareholdings (2008), page 165
[249] Relevant merger situation (RMS) is created if two or more enterprises have ceased to be distinct enterprises, and the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £ 70 million; or a result of the transaction, in relation to the supply of goods or services of any description a 25 per cent share of supply in the UK (or a substantial part thereof) is created or enhanced.
[250] OECD Policy Roundtable concerning minority shareholdings (2008), page 10
[251] OFT Mergers – Substantive Assessment Guidance (2003)
[252] OECD Policy Roundtable concerning minority shareholdings (2008), page 166
[253] British Sky Broadcasting Group Plc v The Competition Commission & Anor [2010] EWCA Civ 2 (21 January 2010)
[254] British Sky Broadcasting Group Plc v The Competition Commission & Anor [2010] EWCA Civ 2 (21 January 2010) Statement on handing down of judgment on the appeals, section 9

have the power to require divestment of Ryanair's minority shareholdings, that did not confer decisive influence for the purposes of the EC Merger Regulation. OFT started to investigate the merger and forced Ryanair to reduce its position in Aer Lingus to less than 5 %.

According to an accompanying document to the White Paper, 5 % of all mergers within the area of United Kingdom are reported as acquisitions of non-controlling minority shareholdings.[255]

7.3. Germany

The local competition authority of the Germany Bundeskartellamt has recognized minority shareholding to have anti-competitive foreclosing of markets to competitors. To address these effects, German merger control law beginning in 1973 put into effect provisions to regulate acquisition of minority shareholdings. Acquisition of minority shareholding was now subject to merger control if certain provisions like thresholds were met and no exception applied.[256] Transactions are subject to the Act Against Restraints of Competition (ACR) if, according to § 37, at least 25 % of the shares of another undertaking are acquired or a transaction enables one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking.[257]

The 25 % shareholding threshold is quite straightforward. A more complicated process, though, is determining whether a link between competitors gives one undertaking significant influence over another in a way that allows the acquirer to influence competitive behaviour of the target, reduce competition and cause the parties to no longer act independently in the market. Under German law, as within the EC Merger Control, the power to exercise influence can be decisive. 40 § of the ARC also allows structural

[255] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 38
[256] Act against Restraints of Competition (ARC) 35 §, as within the EC Merger Regulation ARC 37 § also contains the so called "banking clause" of the exclusion of acquisition of minority shareholding if the acquirer is credit or financial institution or an insurance company and resell the shares within a year.
[257] OECD Policy Roundtable concerning minority shareholdings (2008), pages 111-112

remedies (such as divestiture of participations) but does not allow behavioural remedies, due to a consideration problems of the competition authority.[258]

An example of the acquisition of at least 25 % of the share is the case of E.ON/Eschwege[259], in which the Düsseldorf Higher Regional Court confirmed a Bundeskartellamt decision to prohibit EAM Energie AG, Kassel, a firm belonging to the E.ON group, from acquiring 30 % share in the municipal utility Stadtwerke Eschwege GmbH. The Bundeskartellamt stated that the acquisition would have strengthened the dominant position held by E.ON group in the electricity and gas sales market.

Another example of competitive significant interest in a competitor is the case of Mainova /Aschaffenburger Versorgungs AG[260], where the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision to prohibit the electricity and gas provider Mainova AG from acquiring a 17,5 % stake in Aschaffenburger Versorgungs GmbH (AVG), the subsidiary of the Aschaffenburg municipal utilities. Because of information rights granted to Mainova AG, the likely result would have been a strengthening of the dominant positions of Mainova AG and AVG.[261]

Minority shareholding may also be prohibited through § 1 of the ACR, which prohibits anticompetitive agreements if they affect trade between EU Member States. The Bundeskartellamt may prohibit such agreements via Article 101 of the TFEU.[262]

In Germany, 10-12 % of all acquisitions are non-controlling minority shareholdings.[263] The Commission states that 40-45 % of the cases investigated by the Bundeskartellamt in the 21th century will have an EU dimension and that the Commission is the more appropriate authority to investigate these minority shareholding cases.[264]

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[258] OECD Policy Roundtable concerning minority shareholdings (2008), page 112
[259] Düsseldorf Higher Regional Court, decision of 6 June 2007, WuW/E DE-R 2094 et seq, E.ON/Stadtwerke Eschwege
[260] Düsseldorf Higher Regional Court, decision of 23 November 2005, WuW/E DE-R 1639 et seq., Mainova/StW Aschaffenburg
[261] OECD Policy Roundtable concerning minority shareholdings (2008), pages 112-114
[262] OECD Policy Roundtable concerning minority shareholdings (2008), pages 115
[263] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 38
[264] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, chapter 101

8. Why the White Paper should not be adopted

At the moment, there are three instruments that can be used to monitor acquisitions of minority shareholdings. These are the European Merger Regulation and Articles 101 and 102 of the TFEU. As mentioned in section 6.2, the Commission proposes that in order to ensure that transactions be approved the parties involved could voluntarily make a full notification. This system would fight against the goals of Merger Regulation and Fundamental Rights by creating legal uncertainty. Passage of this proposition could give rise to situations in which the parties of unproblematic transactions would have to make pre-notification (or full notification, if they wished) just in case. These transactions are often very sensitive and proceed with a tight time schedule in order to achieve the best competitive advantage. Pre-emptive pre-notification would create a heavy burden on businesses and could even derail a planned transaction by bogging it down in paperwork and interfering with a an undertaking's ability to act quickly and decisively, which is so important in rapidly changing dynamics of the markets.. Such legal uncertainty could be avoided entirely if notification was required in all mergers. This might cause massive overload for the Commission, but at least the legal uncertainty could be avoided.

So the question is: Should the heavy task of amending the ECMR be undertaken? Is there a need for reform? If yes, then the Commission should pay attention to legal certainty, effectiveness and completeness of the targeted transparency system. If the system is adopted in its current form, it runs the risk of deterring undertakings from doing business in the Internal Market of the EU due to a fear of overregulation. In this economic climate, can the EU afford to scare away important tax contributors while attempting to achieve the desideratum of enhancing competitiveness in global markets?[265] How significant is competitive harm caused by the acquisitions of minority shareholdings, and is it worth the extra amount of work that would overburden the Commission?[266]

[265] COM (2012) 573 final: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Single Market Act II, Together for new growth, page 4
[266] *Rusu 2014,* page 2

8.1. Efficiencies vs. potential harm: Valuation case by case

Acquisition of minority shareholding can create efficiencies in business or they can cause some serious harm. According to the EU Merger Regulation paragraph 29[267], the Commission should publish guidelines on the conditions under which it may take efficiencies into account while assessing the concentration, because in some cases the efficiencies brought by the concentration might counteract the harmful effects to competition. That is the reason why these concentrations should be evaluated case by case, because the efficiencies created by mergers may counteract the harm done to competition. Concentration may not significantly impede effective competition in the common market or part of it.

If the targeted transparency system is applied, the parties of a concentration would need to self-assess if their merger forms a competitively significant link. The Commission is already empowered to review the competitive effects of minority shareholdings within the already notified concentrations, so the situation would not change so much, as the participants are already self-assessing whether to notify the concentration or not.

8.2. Limited number of potentially problematic cases

According to the Commission, approximately 12 acquisitions of minority shareholdings with competitively significant influence or material influence will be brought to the Commission's attention, according to criteria used in the German and the UK systems. The Commission has conducted an analysis from the Zepryh database that lists the number, value and participation percentages of ownership transactions in listed companies registered in the EU Member States. According to their analysis, 43 acquisitions of minority shareholdings over a period of six years will fall into the scope of Merger Regulation if the targeted transparency system is put into place.[268] According to the analysis, 12 of these cases will have to be notified in Germany, or around 28 % of all the acquisitions.

[267] Council Regulation (EC) No 139/2004 of 20 January 2004, on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1

[268] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, page 20-21

According to the EU Merger Control statistics[269], more than 90 % of the investigated mergers are being cleared in the first appraisal phase. So is the enforcement gap so significant that there is actual need for a targeted transparency system? The opinion of the stakeholders, according to public consultation, is that many more information notices will be filed than are necessary, since the involved parties will wish to avoid any possible negative consequences[270].

8.3. Acquisitions of minority shareholdings covered by 101 and 102 TFEU

The function of the EC Merger Regulation is to oversee mergers in which one enterprise acquires the power to control another enterprise, and in which the combined enterprises form a functional concentration. Mergers that do not fulfill the EC Merger Regulation criteria but still raise competitive concerns are subject to the Article 101 and 102 TFEU.[271]

The White Paper also states that within the proposed targeted transparency system the acquisitions of minority shareholdings remain subject to assessment under Articles 101 and 102 TFEU, excluding ancillary restraints i.e. "*restrictions directly related and necessary to the implementation of the concentration* "[272] which shall not fall into the scope of 101 and 102 TFEU[273].

However, as the number of cases creating problematic structural links seems to be rather limited, the question arises if there is a reason to waste man-years of the Commission on adopting a new system that is already covered with legislation in force? In public hearings of the Commission towards more effective EU merger control business associations, law firms and law associations asked whether the limited number of problematic transactions justified the extension of the scope of the Merger regulation. These groups made the same

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[269] See EU Merger Control statistics until November 30th, 2014, retrieved on 29th of December 2014 at: http://ec.europa.eu/competition/mergers/statistics.pdf

[270] *Burnside – MacGregor 2014,* page 4

[271] Leivo et al 2012, page 855

[272] Article 6(1)(b) subparagraph 2 of the EC Merger Regulation

[273] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 53

assertion I have made, that Articles 101 and 102 of TFEU should be used since they already deal with problematic transactions generally.[274]

On June, 2013, the European Commission convened a public hearing on the acquisition of minority shareholding. The Commission's goal was to make EU merger control more effective. At this hearing, many stakeholders experessed concern that the new system would create a burden on business compared to the limited number of cases and create a problematic structural link[275]. In accompanying documents, the Commission estimates the transactions that would fall into the scope of targeted transparency system would only be 20-30 per year. Is it really reasonable to change the Merger Regulation if the effect is so small and truly problematic cases can already be solved by the Merger Regulation in force?

It is already clear that it is not dominant position in itself that is harmful, but abuse of that position – which is already forbidden according to the Article 102 TFEU and Article 101 TFEU, which forbid restriction of competition. From my point of view, the Commission should not have power over all acquisitions made within the area of EU but only those that represent competition concerns. Abuse of dominant position and restriction of competition can be and in most of the cases is truly harmful, but what about the acquisition of minority shareholding? If you are about to compete in a free market economy, you should be able to stand a certain amount of disruptive factors coming from outside of the company and if you are not able to compete in the markets, you will most probably lose the battle to your competitors. This is the whole idea on which the free market economy is based on.

8.4. Waiting period and ex ante control: Legal Uncertainty on the light of the goals of the EU's Merger Regulation and its predictability

The Commission also proposes a waiting period of 15 days after pre-notification, during which competent Member States would be able to request a referral and the Commission, if so wishes, can decide to initiate an investigation and request for a full notification. This stand-still obligation means that no implementation could be made before a clearance

[274] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 35
[275] SWD(2013) 239 final, European Commission Staff Working Document: "Towards more effective EU merger control", Brussels, 25.6.2013, page 6

decision, excluding acquisitions of shares via stock exchanges[276]or acquisitions of control by financial institutions[277]. Within this framework, the Commission proposes that it could also take up the case in a period of 4-6 months after the waiting period. After 6 months a transaction would most probably already have been implemented; still, the Commission could decide on interim measures to ensure that there is no exercise of special rights, and the acquirer would not be able to vote its shares until approval. [278] What are the benefits for the acquirers if they are not able to use the power which they have gained through merger for a half a year? This would in many cases mean that mergers would stop in the first phase, because of the heavy burdens of the process and legal uncertainty of the future. It is also hard for undertakings to self-assess whether the concentration should be notified or not, so the targeted transparency system would force them to notify the concentration just in case, which would add to the work load of an already overloaded Commission.

8.5. Preventive or subsequent jurisdiction?

All of the effects cannot be taken into account in advance and therefore there are ex ante methods (such as Article 101 and 102 of the TFEU) to oversee arrangements that have the potential to lessen or infringe the effective competition. How would the world be if everything would be taken into account in advance with regulation? The duty of the Commission is certainly not to try to capture all acquisitions made within the area of the EU. Heavy notification procedures would be like shooting a fly with heavy cannon, which

[276] According to EC Merger Regulation Article 7(2) Waiting period shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers.
[277] According to the EC Merger Regulation Article 3(5)(a) a concentration shall not be deemed to arise where credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition.
[278] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, pages 25-26

certainly is not the right way to resolve problems within the Competition law. Better to try to find a mutual understanding between the concerned parties[279].

9. Closing remarks

Why should one shareholder have to suffer when the other shareholder is passive? Rather than punish shareholders who are active and take care of their investment, we should somehow try to motivate the passive shareholders to attend to their interests, in order to avoid the intervention of the authorities.

The purpose of Competition law is, in the end, to protect consumers. But consumer protection cannot be a ”curtain” behind which the Commission can hide. The Commission is already using this as a weapon to strengthen its own position. The basic idea of the free market economy has been the ”law of supply and demand,” which determines the prices in the relevant markets. When one institution, in this case the Commission, takes all the authority, we cannot really talk about free market economy anymore but more likely a planned or command economy, in which a single institution decides how the markets should work and regulates the market to the hilt.

The market may also be changing as we may see from the latest Google case, in which the European Parliament voted to split Google into search engine and commercial parts in order to stop its abuse of its dominant position [280](or at least this is what the European Parliament has claimed). Thus far it is not the dominant position itself that has been restricted but the abuse of such position, as established in Article 102 of the TFEU. It should be questioned, then: has there been such an abuse of dominant position, and if so, why hasn’t the Commission followed its mandate and started to investigate it?

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[279] Hukkinen, Niko: Kilpailuviranomaisen syyniin myös vähemmistöomistukset, Board View- lehti 2/2014, page 25

[280] European Parliament Press Release: MEPs zero in on internet search companies and clouds, Brussels 27.11.2014 available at: http://www.europarl.europa.eu/news/en/news-room/content/20141125IPR80501/html/MEPs-zero-in-on-internet-search-companies-and-clouds

While reflecting on the roots of competition law, we might go as far as Hippocrates' first oath: *First do no harm*. Philip Marsden also states: "*Competition authorities and courts are trying to remove harm, without doing any harm"*.[281]

What will happen in the future if the propositions of the White Paper are adopted? The competitiveness of the EU would more likely nosedive and became a negative model for the world, while enterprises in the markets would move elsewhere, where they can still compete in a fair way and the legislation is predictable[282].

The political ambitions of the Commission can be heard too loudly in the background. The Commission cannot see the forest for the trees and accept the fact that the acquisition of minority shareholding became an issue of political authority once Ryanair was able to escape from its sanctions. Because of this, the Commission has begun a massive project to capture the acquisition of minority shareholdings in its jurisdiction, which will have fateful consequences in the other industry fields. The Commission wants to show its power in the form of new regulation which, as shown in the clause 2.2, is not the purpose of the Merger Regulation and Competition Law. Proposed legislation might be effective in the air traffic markets but how it can be implemented in the other industry fields of different products and services?

The Commission will decide based on the feedback of the White Paper whether to take further steps towards legislative proposals to amend the Merger Regulation. [283]Let us hope that the Commission is wise enough to take into account the concerns of the stakeholders and does not repeat the same mistakes as with the implementation of the simplified merger procedure. Law is not just something given but something that is written down based on the practice and common understanding, which in this case could be understood as the common understanding of the stakeholders of the justice and equity. As the Olaus Petri stated in 16th century "*What is not justice and equity, cannot be considered law either"* which from my opinion suits pretty well for the problematic behind my thesis.

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[281] *Ioannis – Ioannis 2010* – page 412
[282] ICC Comments on the EU White Paper on Merger Control, 225/779, 3 October 2014, page 5
[283] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, pages 49-50

9.1. Required Changes to the proposals of the White Paper

After all, it has to be mentioned that not all the proposed changes are inappropriate. There are some good ideas in the White Paper. In case the proposed targeted transparency system should pass, the Commission could make few improvements to make the proposed system more efficient, streamlined and easier to accept for the stakeholders. The Commission should impose a self-assessment system based on voluntary disclosure[284] combined with clarified Horizontal and Non-Horizontal Merger Guidelines and Jurisdictional Notices.

There should be clear rules and criteria of the competitively significant link[285]. There should also be a safe harbor of shareholding, below which no information notice is required. The limits set by the Commission should be extended e.g. from 20 % to 25 %[286] and from 5 % with additional factors to 10 -15 %[287]. Otherwise, the proposed system would regulate too large a scale of mergers and target those that do not raise competition concerns at all and only create more duty to the parties of the merger and to the Commission.

The additional factors (*rights which give the acquirer a "de-facto" blocking minority, a seat on the board of directors or access to commercially sensitive information of the target*[288]) should be defined more precisely, so they are clear and understandable to stakeholders. The term "commercially sensitive information" should also be clarified to avoid uncertainty. It should be noticed that the Commission is already investigate sharing of such information between the parties under Article 101 of the TFEU even without the acquisition of minority shareholding[289]. Therefore, one could be easily question the purpose of such additional factors as access to the commercial sensitive information. If the Commission wants to put a new system into place, it should first check its already existing toolkit to avoid unnecessary expansions of jurisdiction.

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[284] *Burnside – MacGregor 2014, page 8*

[285] See *Burnside – MacGregor 2014,* page 3, There has also been other alternative proposition for wording such as *"Potential Competitive Link"* see *Ratliff – Louis – O'Daly 2014,* page 3

[286] *EVCA's response to the White Paper, 3 October 2014,* page 12

[287] *Ratliff – Louis – O'Daly 2014,* page 2 see also ICC Comments on the EU White Paper on Merger Control, 225/779, 3 October 2014, paragraph 51

[288] COM (2014) 449 final, European Commission's White Paper: "Towards more effective EU merger control, Brussels, 9.7.2014, paragraph 47 and 48

[289] See *Ratliff – Louis – O'Daly 2014,* subparagraph 9 and EVCA's response to the White Paper, 3 October 2014, page 12

There should be no possibility of ex ante control (proposed period of 4 to 6 months), when the Commission would be free to investigate a transaction, provided that the acquirer has informed the transaction to the Commission[290]. If the Commission had such jurisdiction to ex ante control, it would be burdensome to businesses and create unnecessary legal uncertainty over the markets.

9.2. Clarification to the Guidelines and Jurisdictional Notice needed from the Commission

Rather than change the articles of the EC Merger Regulation, the Commission should clarify the guidelines on the Assessment of Horizontal and Non-Horizontal Mergers and Jurisdictional Notice[291] in a way that define more clearly how the anti-competitive acquisitions of minority shareholdings fall into the scope of the EC merger regulation. As encoded in sections 4.5 and Articles 101 and 102 of the TFEU and explained in section 4.3 and 4.4, these powers exist already and cry out for clarification.

The Commission could derive such clarification through the practice[292] which is already there in the field of acquisitions of minority shareholding such as have been made with the efficiency effects and failing firm defense, both introduced in section 4.8, which are also exceptions to the principal rules. The Commission could even adopt "*Guidelines on the Acquisition of Minority Shareholdings"* which could explain the theories of harm and clarify when to submit an information notice[293]. The Commission has mentioned that legal certainty can also be ensured through soft-law instruments such as guidance in measuring the three different options through assessment criteria[294].It also mentioned in the EC Merger Regulations paragraph 28 that "*in order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible*

[290] *Ratliff – Louis – O'Daly 2014,* page 2
[291] ICC is also proposing for a substantive guidelines, see ICC Comments on the EU White Paper on Merger Control, 225/779, 3 October 2014, paragraph 113
[292] See section 5 for relevant cases concerning acquisitions of minority shareholdings
[293] *Ratliff – Louis – O'Daly 2014,* page 2
[294] SWD(2014) 217 final: European Commission Staff Working Document, Impact Assessment, Accompanying the document White Paper, paragraph 76

with the common market."[295] The basic idea of the EC Merger Regulation is not to try to capture all the acquisitions that are been made within the area of EU but those that violate fair competition within the area of EU.

[295] Council Regulation (EC) No 139/2004of January 2004 on the Control of Concentration Between Undertakings (the EC Merger Regulation) OJ (2004) L 24/1